COURT OF APPEALS DECISION DATED AND FILED

August 21, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2540-CR

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARLA J. TILLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Darla J. Tilley appeals from the judgment convicting her of possession of a controlled substance (500 grams or less of marijuana) with intent to deliver, contrary to WIS. STAT. §§ 961.14 (4)(t) and

961.41(1m)(h)1.[1] Tilley first challenges the trial court's decision denying her motion to suppress the marijuana and drug paraphernalia found in her purse and tote bag. She claims that the warrantless search conducted after she was taken into protective custody pursuant to WIS. STAT. § 51.15 did not fall within any of the Fourth Amendment exceptions permitting a search. She also submits that the trial court erred in failing to suppress her incriminating statements made after the officer's discovery of the drugs and drug paraphernalia because the statements were tainted by the earlier illegal search and her intoxicated mental state made her statements involuntary. Finally, Tilley challenges the trial court's maximum sentence, which was then stayed. She claims that despite the fact that she was placed on probation, the sentence was excessively harsh and disproportionate because she was a first offender. We affirm.

I. BACKGROUND.

¶2 On September 27, 1999, Chris Blunt, a Cudahy police officer, was dispatched to a local tavern regarding a complaint concerning an "intoxicated and despondent female." Upon arriving, the officer spoke to Tilley and a friend of Tilley's, Therese Schumacher. Schumacher told the officer that she was concerned about Tilley's welfare because Tilley was intoxicated and she suspected Tilley had also taken some drugs. According to Schumacher, Tilley was also making comments about "slitting her wrists." The officer observed that Tilley appeared highly intoxicated and "exhibit[ed] mood swings." Blunt conducted a preliminary breath test on Tilley that registered .29, indicating that she was highly

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

intoxicated. Blunt then called an ambulance to transport Tilley to a hospital. Tilley was neither searched nor handcuffed before being transported in the ambulance to the hospital.

¶3 Once at the hospital, Tilley told the officer that she "hates life and thinks of killing herself every day," and that she tried to commit suicide in the past. She also related that she drank and smoked marijuana every day to cope with her problems. As a result of Tilley's comments, coupled with her earlier conduct, the officer decided to take Tilley into protective custody pursuant to WIS. STAT. § 51.15(1)(a)1. Section 51.15(1)(a)1[2] allows an officer to take someone into protective custody when the individual exhibits "[a] substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm." Blunt advised Tilley of his decision to take her into "protective custody," and asked her to hand over the bag

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[2] Pertinent parts of WIS. STAT. § 51.15 provide:

> **(1)** BASIS FOR DETENTION. (a) A law enforcement officer or other person authorized to take a child into custody under ch. 48 or to take a juvenile into custody under ch. 938 may take an individual into custody if the officer or person has cause to believe that such individual is mentally ill or, except as provided in subd. 5., is drug dependent or developmentally disabled, and that the individual evidences any of the following:
>
> 1. A substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm.
>
> ….
>
> (b) The officer's or other person's belief shall be based on any of the following:
>
> 1. A specific recent overt act or attempt or threat to act or omission by the individual which is observed by the officer or person.

and purse in anticipation of conveying her to the Milwaukee Mental Health Complex. Officer Blunt then searched her bag and purse and observed seven individually wrapped bags containing marijuana, along with rolling papers and a glass pipe. He also found $385 in cash in the two bags and a notebook with several names written in it. Without speaking further with Tilley, Blunt then left the hospital at Tilley's request to check on Tilley's underage son. Upon returning to the hospital approximately an hour later, Blunt advised Tilley of her ***Miranda*** rights,[3] and Tilley admitted that the marijuana was hers and that she was selling marijuana to a few people, but she did not consider herself to be a dealer.

¶4 Tilley was conveyed by ambulance to the Milwaukee County Mental Health Complex and later charged with one count of possession of a controlled substance with intent to deliver. She filed a motion to suppress the items taken in the search of her bags, as well as a motion seeking suppression of her statements to the officer. The trial court denied her motions and, pursuant to a plea negotiation, Tilley then pled guilty to the charge. She was sentenced to a maximum three-year sentence, which was stayed, and she was placed on probation for three years with several conditions, including alcohol and drug treatment, and a six-month term in the House of Correction. Tilley brought a postconviction motion challenging the search, her statement and the sentence. The motion was denied.

II. ANALYSIS.

¶5 Tilley claims that the trial court erred in denying her motion to suppress the search of her purse and a tote bag that yielded marijuana and the

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

evidence of drug dealing because the search did not meet any Fourth Amendment exception permitting a warrantless search. Further, Tilley contends that the trial court erred in failing to grant her motion seeking to suppress her statements, both because the statements were the result of the police officer's exploiting the illegal search of her belongings and because the officer "took advantage of [her] unstable mental condition" in obtaining her confession. Finally, Tilley posits that her sentence was excessively harsh and disproportionate.

A. *The search occurred when the officer was acting in a community caretaker role.*

¶6 Tilley first challenges the trial court's ruling denying her motion to suppress the marijuana and paraphernalia found in her belongings. The trial court found that the officer's search was proper because he was acting in a community caretaker capacity when he searched Tilley purse and handbag. We agree.

¶7 When reviewing an order denying a suppression motion, this court will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, the application of constitutional principles to the facts as found is a question of law which we decide without deference to the circuit court's decision. ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

¶8 The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Wisconsin Constitution is essentially the same. *See* WIS. CONST. art. I, § 11. Warrantless searches "are per se unreasonable under the fourth amendment, subject to a few carefully delineated exceptions" that are "jealously and carefully drawn." ***State v. Boggess***, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983) (citation omitted).

¶9 One such exception is a search conducted while an officer is acting in a community caretaker capacity. ***State v. Horngren***, 2000 WI App 177, 238 Wis. 2d 347, 617 N.W.2d 508, involving a community caretaker search, is particularly instructive.

> In evaluating whether police action was justified as "community caretaker" activity, we must first determine whether the conduct involved was truly "bona fide community caretaker activity." Community caretaker activity is defined as: "being totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." The second part of our inquiry requires a review which weighs the "public good" involved against the level of intrusion on an individual's privacy. We must determine whether the Fourth Amendment's standard of "reasonableness" has been satisfied under the facts and circumstances of the individual case.

Id. at ¶9 (citations omitted).

¶10 When Officer Blunt determined that Tilley should be taken into protective custody after answering a call involving an intoxicated and despondent woman, he was not engaged in the "detection, investigation, or acquisition of evidence relating to the violation of a criminal act." Rather, he was attempting to care for what appeared to be a disturbed, intoxicated person who told him she thinks of killing herself daily and has attempted suicide in the past. None of Blunt's earlier actions, or his treatment of Tilley, suggested he was conducting a

criminal investigation. Blunt did not engage in any acts that would ordinarily be associated with an arrest. He did not handcuff Tilley. He did not pat her down or ask for backup to conduct a pat-down of her person. Prior to taking her into protective custody, he did not search any of her clothing or her bag or purse. In fact, he did not even accompany Tilley in the ambulance. It was only after arriving at the hospital and hearing Tilley's remarks about suicide that the officer determined that there was a "substantial probability that Tilley would harm herself or commit suicide that the focus of the encounter changed."

¶11 After the officer decided to transport Tilley to the Milwaukee County Mental Health Complex, he testified that he felt obligated to search Tilley as he wanted to make sure she possessed nothing with which she could harm herself or others while being transported. Although Tilley argues the officer's search at this later time was unnecessary and she suggests his real motive for the search followed her comment about "marijuana," the trial court's findings do not support her contentions. The trial court found that the officer's decision to search Tilley was not motivated by the "detection, investigation, or acquisition of evidence relating to the violation of a criminal statute," and was reasonable under the circumstances. These findings are not clearly erroneous and we accept them.

¶12 The second part of the ***Horngren*** analysis requires us to review whether the "public good" outweighed the level of intrusion into Tilley's privacy. ***Id.*** Here, we are satisfied that the public good outweighed Tilley's privacy.

¶13 As noted, Officer Blunt was acting in his community caretaker role when he initially decided to transport Tilley to the hospital for medical assistance. At that time, Tilley was highly intoxicated and displayed wide mood swings, suggesting she was under the effects of drugs. Her friend expressed concern over

her well-being. Tilley herself later commented about "hating life," and told the officer she often thought about killing herself. These circumstances strongly suggested that Tilley would harm herself, and her statements led to her being taken into protective custody. Thus, Blunt's search of Tilley's belongings at this time was done for both Tilley's and the public's good. Had the officer not searched Tilley's bags, there was no way of knowing whether she had access to anything that she could have used to kill herself or used to harm others. The safety of Tilley and others clearly outweighed Tilley's right of privacy. Consequently, we conclude that the officer, in his community caretaker role, in deciding to search Tilley, did so for reasons that outweighed Tilley's privacy rights. Thus, we are satisfied that Blunt's search was reasonable.

B. *Tilley's statements were voluntary.*

¶14 Next, Tilley argues that the trial court should have suppressed her statements. She submits that her statements were inadmissible, both because Blunt exploited the illegal search of her purse and tote bag, and because the statements were involuntary due to her depressed and intoxicated condition. We reject Tilley's first argument because we have previously found that the search was proper under the community caretaker exception to the Fourth Amendment. We also are not persuaded by Tilley's second argument that her statement was involuntary due to her mental condition or intoxication.

¶15 In finding Tilley's statements voluntary, the trial court remarked that Tilley was still intoxicated and upset, although less upset than she appeared to be at the tavern. The trial court also found that after being advised of her ***Miranda*** rights, Tilley affirmatively stated that she understood her rights. The trial court further noted that Tilley never requested a lawyer and gave answers to the

officer's questions that were appropriate to the questions asked. In concluding, the trial court stated:

> I'm finding that the statements and questions were the product of the defendant's free and unconstrained will reflecting deliberateness of choice. That's based upon all the factors before this court, and I'm so satisfied by the preponderance of the evidence. I clearly understand that Ms. Tilley was—highly intoxicated at the time that the officer went to the tavern … [but] it was approximately two and one half-hours afterwards that the officer talked to her at the hospital.

¶16 Here, our standard of review is two-fold: "the appellate court first reviews the trial court's findings of facts to determine if they are clearly erroneous. Then the appellate court, viewing the totality of the circumstances, makes its own determination of the constitutional issue of the validity of the waivers." ***State v. Smith***, 125 Wis. 2d 111, 117, 370 N.W.2d 827 (Ct. App. 1985), *reversed on other grounds*, ***State v. Smith***, 131 Wis. 2d 220, 388 N.W.2d 601 (1986). In determining voluntariness, the question is whether the rights were waived and/or the statements were obtained under such circumstances that the defendant's actions represent her uncoerced free will, or whether the circumstances deprived her of the ability to make a rational choice. ***State v. Wedgeworth***, 100 Wis. 2d 514, 524, 302 N.W.2d 810 (1981). The mental condition of the accused is a relevant factor in this determination. ***Norwood v. State***, 74 Wis. 2d 343, 365, 246 N.W.2d 801 (1976). We are satisfied that the trial court's findings are not clearly erroneous. Like the trial court, we also conclude that Tilley's statement was voluntary. Several cases support our conclusion.

¶17 In ***State v. Mitchell***, 167 Wis. 2d 672, 698, 482 N.W.2d 364 (1992), the court reiterated that proof of intoxication should not affect admissibility of a confession where there is no proof that the defendant was irrational, unable to

understand the questions or responses, otherwise incapable of giving a voluntary response, or reluctant to answer the questions. In ***Smith***, 125 Wis. 2d at 120, this court observed that while the mental state of a person is a factor to be taken into consideration in determining whether a statement is voluntary, the existence of a mental illness does not render a statement involuntary. A mental illness does not render a statement involuntary unless the "ability to act and respond freely was affected by his mental condition, 'but not to the degree that would nullify all ability to understand and act.'" ***Id.*** Later, in ***State v. Clappes***, 136 Wis. 2d 222, 241-42, 401 N.W.2d 759 (1987), the supreme court noted that proof of physical pain and/or intoxication does not affect admissibility of evidence where there is no proof that the confessor was irrational, unable to understand questions or responses, otherwise incapable of giving voluntary response, or reluctant to answer questions posed by authorities.

¶18 Here, Tilley acknowledged that she understood all her rights. She answered the questions posed to her rationally and appropriately. No showing was made that her mental state inhibited her "ability to act and respond freely." With regard to her intoxication, no proof was presented that Tilley was irrational or unable to understand the questions. Moreover, Tilley was questioned two-and-one-half hours after she was first observed at the tavern. Consequently, Tilley's motion challenging the statements admissibility was properly denied because her statements were voluntarily given.

C. *Tilley's sentence was neither harsh nor disproportionate to her criminal conduct.*

¶19 Finally, Tilley claims that the trial court erroneously exercised its discretion in sentencing her. She argues that because she was a first offender, the trial court's decision to sentence her to the maximum and then place her on

probation, thereby exposing her to three years in prison if her probation is revoked, was excessively harsh and "so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." We disagree.

¶20 The Wisconsin Supreme Court has set forth the following standards for reviewing sentences:

> This court has held that it will review sentences to determine whether there has been an [erroneous exercise] of discretion; "[h]owever, such questions will be treated in light of a strong policy against interference with the discretion of the trial court in passing sentence." In reviewing a sentence to determine whether or not discretion has been [erroneously exercised], the court will start with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of.

Elias v. State, 93 Wis. 2d 278, 281-82, 286 N.W.2d 559 (1980) (citations omitted).

¶21 The three primary factors the trial court must consider at sentencing are: (1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public. ***State v. Thompson***,172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). A sentence will be deemed harsh and excessive only when the sentence is so excessive, unusual, and disproportionate to the offense committed so as to shock public sentiment. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶22 Here, the trial court explained its reasoning:

> The court found the offense to be particularly serious based on the defendant's actions. Aggravating was the fact that she was selling drugs to three or four regular customers

> over the course of two years, and the fact that she was smoking marijuana and selling marijuana during this entire period while caring for her son and granddaughter in her home – "Very poor role model." …. The court indicated that the community needed to be free from this type of activity. Due to the seriousness and aggravating nature of the offense, the court imposed a substantial prison term. However, because this was the defendant's first offense, the court stayed the sentence and placed her on probation, giving her an opportunity for rehabilitation. By doing so, it permitted her to remain in the community, to care for her son and granddaughter, and seek treatment to terminate her drug dependency.

¶23 Tilley's sentence is not shocking. As the trial court noted, while Tilley was a first offender, she was not a first-time seller of marijuana, as she admitted that she had been selling marijuana for several years. She was also not a good role model for her son and granddaughter, both of whom were in her care. Tilley had serious drug, alcohol and mental health problems, which needed to be treated. The trial court apparently believed that hanging a "Sword of Damocles" over Tilley's head would provide her with the incentive she needed to consistently follow through with treatment. The trial court considered the proper factors and fashioned a sentence accordingly. Thus, we are satisfied, under the circumstances presented here, that the sentence was neither harsh nor disproportionate to the criminal conduct in which Tilley engaged. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.