COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2083-CR **Cir. Ct. No. 00-CM-1231**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. GARCIA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed.*

¶1 PETERSON, J.[1] David Garcia appeals his judgment of conviction for possession of THC, contrary to WIS. STAT. § 961.41(3g)(e). He argues that the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f).

circuit court erred by denying his motion to suppress evidence based upon an illegal search and seizure. We disagree.

BACKGROUND

¶2 At approximately 1:10 a.m. on July 3, 2000, Green Bay police officers responded to a noise complaint at a residence. Upon arrival, the officers heard a stereo and loud talking. The officers knocked on the door and obtained consent to enter the residence. The officers entered and noticed several people in the living room and a black fanny pack lying in the middle of the floor. The occupants were identified. The officers discovered that two of the occupants had outstanding warrants. They were arrested.

¶3 During the arrest, officer Jeffrey Engelbrecht seized the fanny pack and asked who it belonged to. He was told that the owner of the fanny pack had left the residence. Engelbrecht then searched the fanny pack and discovered marijuana along with Garcia's identification. Garcia was later found in the bathroom of the residence and was arrested for possession of THC.

¶4 Garcia moved to suppress evidence based on an illegal search and seizure. Garcia argued that the fanny pack was not abandoned and that it could not be searched incident to a lawful arrest. The circuit court denied the motion and held that Engelbrecht had the right to perform a "caretaker's search to ascertain who owned the property" and to search the bag for safety purposes. Garcia entered a plea of no contest and was found guilty.

STANDARD OF REVIEW

¶5 When reviewing a circuit court's ruling on a motion to suppress evidence on Fourth Amendment grounds, we will uphold the circuit court's factual

findings unless clearly erroneous. ***State v. Knight***, 2000 WI App 16, ¶10, 232 Wis. 2d 305, 606 N.W.2d 291. However, whether a search is reasonable under the Fourth Amendment is a question of law that we review independently. ***Id.***

DISCUSSION

¶6 Garcia argues that the circuit court erred by denying his motion to suppress the contents of the fanny pack because: (1) the fanny pack was not subject to a caretaker's search because it was not abandoned property; and (2) the search of the fanny pack cannot be justified as a search incident to an arrest. Because the search was squarely incident to an arrest, we affirm on that basis and do not address the caretaker argument. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

¶7 It is well established that the Fourth Amendment does not prohibit all searches and seizures but only those that are unreasonable. ***State v. Murdock***, 155 Wis. 2d 217, 226-27, 455 N.W.2d 618 (1990). The purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. ***Michigan v. Tyler***, 436 U.S. 499, 504 (1978). In interpreting the Fourth Amendment, a balance must be struck between the intrusion on the individual's Fourth Amendment interests and the government's promotion of its legitimate interests. ***Bies v. State***, 76 Wis. 2d 457, 466, 251 N.W.2d 461 (1977). The United States Supreme Court has consistently held that warrantless searches are per se unreasonable under the Fourth Amendment, subject to a few carefully delineated exceptions. ***Texas v. Brown***, 460 U.S. 730, 735-36 (1983).

¶8 In ***Chimel v. California***, 395 U.S. 752 (1969), the United States Supreme Court held that a lawful arrest creates a situation that justifies the

contemporaneous search without a warrant of the person arrested and the immediate surrounding area. ***Id.*** Several governmental interests are promoted through and justify the search incident to an arrest exception. One is the need to detect and remove any weapons the arrestee might try to use to resist arrest. Another is to prevent destruction of evidence. ***Id.*** at 763.

¶9 In ***Murdock***, our supreme court concluded that the ***Chimel*** standard "authorizes a contemporaneous, limited search of the area immediately surrounding the arrestee measured at the time of the arrest without consideration to actual accessibility to the area searched." ***Murdock***, 155 Wis. 2d at 236.

¶10 In ***Murdock***, detectives entered Murdock's home with their weapons drawn and ordered Murdock and the two other men in the room to "hit the floor." ***Id.*** at 222. All three men were handcuffed with their hands behind their backs and remained restrained while lying on the floor face down. They searched the room, which was about twelve-by-fourteen feet, and a connected pantry-type closet. In the pantry, the detectives seized a bullet they saw sitting on a shelf. The detectives then searched the closed drawers of the pantry and found a short-barreled rifle. ***Id.*** at 223. The supreme court determined that under the ***Chimel*** standard, the pantry was within Murdock's immediate control and the search of the pantry incident to his arrest was therefore reasonable. ***Murdock***, 155 Wis. 2d at 236.

¶11 Garcia argues that ***Murdock*** does not define what "immediately surrounding" the arrestee is. He contends that, taking into account the totality of the circumstances, the fanny pack was beyond the arrested occupants' immediate surroundings. We disagree.

¶12 Engelbrecht testified that upon entry of the residence, he noticed the fanny pack on the floor, in the middle of everyone. While at the scene, Engelbrecht discovered that two of the occupants had outstanding warrants. While the two occupants were being arrested, Engelbrecht became concerned for his safety. He noticed that the fanny pack was within four to eight feet from the first arrestee and testified that had the arrestee fallen over, he would have been within reach of the fanny pack.

¶13 We conclude that the fanny pack was in the area immediately surrounding the arrested occupants. It is irrelevant that Engelbrecht was told that the fanny pack belonged to someone else because it was within reach of at least one of the arrested occupants. Therefore, under the standard set forth in ***Chimel*** and ***Murdock***, Engelbrecht was justified in searching the fanny pack.

¶14 Garcia argues that, given the degree of control the officers had at the scene and the benign nature of the matter being investigated, it was unreasonable for Engelbrecht to conclude that the fanny pack may contain a weapon or evidence. Garcia further argues that only a limited search of the persons arrested was permissible because the fanny pack did not belong to the occupants being arrested.

¶15 Garcia misreads ***Murdock***. The officers were not required to have individualized suspicion that there were weapons present or that the fanny pack contained evidence. *See* ***Murdock***, 155 Wis. 2d at 237. "When a custodial arrest is made, there is always some danger that the person may seek to use a weapon, or that evidence may be concealed or destroyed." ***Id.*** at 231. Arrests are dangerous undertakings. "Every arrest must be presumed to present a risk of danger to the arresting officer." ***Id.*** (citation omitted).

¶16 While the initial purpose of the police visit may have been non-threatening, the nature of the interaction changed once police discovered the two outstanding warrants. For the purpose of safety and prevention of the destruction of evidence, Engelbrecht was justified in seizing and searching the fanny pack.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.