COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3116-CR **Cir. Ct. No. 2008CF353**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEON BERNARD HOWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 CURLEY, P.J. Deon Bernard Howell appeals from an amended judgment of conviction entered after he pled guilty to possession of cocaine (more than one gram but less than five grams) with intent to deliver, contrary to WIS.

STAT. § 961.41(1m)(cm)1r. (2007-08).[1] Howell pled guilty after the trial court denied his suppression motion.[2]

¶2 In challenging the trial court's denial of his suppression motion, Howell argues that the court erred when it found that probable cause existed to support his arrest. We disagree and conclude that, based on the totality of the circumstances faced by the arresting police officer, probable cause existed to arrest Howell and the search that ensued was lawful as incident to the arrest. Accordingly, we approve the trial court's decision to deny Howell's suppression motion and affirm the amended judgment of conviction.

I. BACKGROUND.

¶3 The State filed a criminal complaint charging Howell with one count of possession of cocaine (more than one gram but less than five grams) with intent to deliver. Howell subsequently moved to suppress the fruits of what he contended was an illegal seizure and arrest.

¶4 Police Officer Daniel Robinson testified at the suppression motion hearing that on January 22, 2008, he participated in the execution of a search warrant for a residence located in the City of Milwaukee. The warrant was issued after police learned, through a controlled buy, that heroin was being sold out of the residence. Officer Robinson reviewed the warrant and supporting affidavit prior to executing it. The warrant authorized a search of the residence and the

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] A defendant may appeal from an order denying a motion to suppress evidence even though the judgment of conviction rests on a guilty plea. WIS. STAT. § 971.31(10).

individuals occupying the premises for heroin, drug-related paraphernalia, weapons, and documents or items evidencing who was in control of the premises. The warrant and supporting affidavit described the person who sold the heroin out of the residence.

¶5 Pursuant to the search warrant's execution, police discovered heroin, currency, and drug-related paraphernalia, along with photographs and other identifiers of individuals suspected of selling the drugs. A photograph of Howell displaying a gang-related hand gesture was found in close proximity to heroin and currency discovered inside of the residence. No one fitting the description of the heroin dealer was present in the residence when the warrant was executed.

¶6 Approximately two hours after the police began executing the warrant, Howell arrived outside of the residence. At the time, Officer Robinson was standing outside talking to other police officers. Officer Robinson testified that Howell seemed agitated and that Howell was on a cell phone yelling about his mother being arrested and talking about picking up children who were in the residence. Officer Robinson immediately recognized Howell as he approached and made a decision to place Howell in custody because Howell's photograph was found near the heroin in the residence and because Howell matched the description of the drug dealer identified in the search warrant and supporting affidavit.[3]

[3] Howell asserts: "Officer Robinson never described Mr. Howell, either in his testimony or in the police report, as matching the black male described in the search warrant." Our review of the suppression hearing transcript reveals that this statement is in error. It is true that Officer Robinson did not say that Howell matched the target of the search warrant in his report. However, during cross-examination by Howell's attorney, Officer Robinson testified to this effect:

(continued)

¶7 Howell initiated a conversation with Officer Robinson in the middle of the street outside of the residence. At the time, Howell had one hand in his pocket, which Officer Robinson asked him to remove. Howell did not initially comply and Officer Robinson repeated his request, at which point Howell took a bag out of his pocket and put it down the back of his jacket. Believing that Howell was involved in the selling of heroin from the residence that had been searched and that Howell had placed a controlled substance down the back of his jacket, Office Robinson placed Howell in handcuffs. Howell was searched and a bag containing multiple corner cuts of an off-white chunky substance believed (and later confirmed) to be cocaine base was recovered from the bottom of Howell's jacket.

¶8 In denying Howell's suppression motion, the trial court found that the police had probable cause to arrest Howell "based on the circumstances of the warrant and the connection of the picture." Following the denial of his suppression motion, Howell pled guilty to possession of cocaine (more than one gram but less than five grams) with intent to deliver. Howell now appeals.

> Q. And when you recognized [Howell], did you make a decision at that point that you were going to place him into custody?
>
> A. Yes.
>
> Q. Because he was in photographs [found in the residence]?
>
> A. Because his photograph was sitting next to the heroin. *He matched the description of the target of the search warrant as well.*

(Emphasis added.)

II. ANALYSIS.

¶9 Howell asks this court to determine whether the trial court erred in denying his suppression motion. He argues that the search of his person was not authorized because he was not inside the residence that was subject to the search warrant. Howell further asserts that there was no probable cause to arrest and search him outside of the residence. As to Howell's argument that the search warrant did not authorize police to search him because he was not on the premises covered by the warrant, we note that the State does not rely on the terms of the search warrant to support the police conduct at issue; consequently, our analysis focuses on Howell's assertion that there was no probable cause to arrest and search him outside of the residence.

¶10 Both the Wisconsin Constitution and the United States Constitution guarantee the right of persons to be secure from unreasonable searches and seizures.[4] "A warrantless search is per se unreasonable unless one of the 'few specifically established and well-delineated exceptions' justifies the search."

[4] Article I, section 11 of the Wisconsin Constitution states:

> 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 warrant 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 Fourth Amendment to the United States Constitution states:

> 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.

State v. Pallone, 2000 WI 77, ¶29, 236 Wis. 2d 162, 613 N.W.2d 568. One exception to the warrant requirement authorizes a warrantless search incident to a lawful arrest. ***Id.***; *see also* WIS. STAT. § 968.10(1). There are two justifications for allowing a search under such circumstances: "(1) the need to ensure officer safety, and (2) the need to discover and preserve evidence." ***Pallone***, 236 Wis. 2d 162, ¶32.

¶11 In order to be lawful, an arrest must be based on probable cause. ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). It is a common-sense test, not a technical determination, *see* ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990), and does not require "'proof beyond a reasonable doubt or even that guilt is more likely than not,'" ***State v. Babbitt***, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994) (citation omitted).

¶12 In reviewing an order denying a motion to suppress evidence, we uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Kutz***, 2003 WI App 205, ¶13, 267 Wis. 2d 531, 671 N.W.2d 660. However, we independently determine whether the evidence satisfies the standard of probable cause. ***Id.***

¶13 Howell argues: "Officer Robinson did not testify that he made the arrest based on the affidavit's description of the heroin dealer." According to Howell, "Officer Robinson recognized Mr. Howell from the photograph inside the house and only then decided for the purpose of [the] suppression hearing, that

[Howell] matched the affidavit's vague description of the dealer." Howell bases his argument on the fact that there is no mention of Howell matching the description of the heroin dealer in the police report Officer Robinson prepared.

¶14 As an initial matter—and as previously noted—Howell's contention that Officer Robinson did not testify to making the arrest based on the description of the heroin dealer targeted in the search warrant is in error. *See supra* ¶6 n.3. Furthermore, we are not persuaded by Howell's claim that Officer Robinson added the idea that Howell matched the description of the heroin dealer as an afterthought to bolster the State's position at the suppression hearing. Although the trial court did not make a specific finding regarding Officer Robinson's testimony that Howell matched the description of the heroin dealer in the warrant, the court did conclude that there was "probable cause to arrest based on the circumstances of the warrant." From this statement, we may assume that the trial court accepted Officer Robinson's testimony that he made the decision to place Howell in custody because Howell matched the description of the heroin dealer targeted in the search warrant. *See* ***State v. Angiolo***, 186 Wis. 2d 488, 495-96, 520 N.W.2d 923 (Ct. App. 1994) ("[I]f a trial court fails to make a finding of fact that appears from the record to exist, an appellate court may assume the fact was determined in support of the decision."); *see also* ***State v. Baudhuin***, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987) ("The credibility of witnesses and [the] weight to be given their testimony are matters for the trial court to decide.").

¶15 Finally, we are not convinced that the description of the heroin dealer in the affidavit supporting the search warrant—"John DOE, b[lack]/m[ale], 19 y[ears]o[f] a[ge], 5'11", [sic] 140 lbs., medium complexion, close-cut short black hair, brown eyes"—was too vague to justify Howell's arrest. (Some uppercasing omitted.) The circumstances known to Officer Robinson at the time

of Howell's arrest were not limited to the description of the heroin dealer in the affidavit. Officer Robinson recognized Howell from the photograph found near the heroin inside the residence. In addition, Howell approached Officer Robinson while on a cell phone yelling about Howell's mother being arrested and talking about picking up children who were in the residence, evidencing a connection between Howell and the residence that was searched. Based on these circumstances, Officer Robinson possessed sufficient knowledge to reasonably believe that Howell was involved in the selling of heroin from the residence that had been searched.[5]

¶16 In light of the foregoing, we conclude that probable cause existed to support Howell's arrest. Because Howell's arrest was lawful, it follows that the search of Howell, which produced the drug evidence, was incident to his arrest and was also lawful. *See* WIS. STAT. §§ 968.10(1), 968.11. Therefore, we affirm the amended judgment of conviction.[6]

[5] We have determined that these circumstances (which do not include the drug evidence Howell placed down the back of his jacket) gave Officer Robinson probable cause to arrest Howell. Consequently, we need not address Howell's argument that this case runs afoul of ***State v. Mata***, 230 Wis. 2d 567, 602 N.W.2d 158 (Ct. App. 1999), because the fruits of the search of his person (i.e., the drug evidence) were needed to support probable cause. *See* ***id.*** at 574 ("'A search may immediately precede a formal arrest so long as the fruits of the search are not necessary to support the arrest.'") (citation omitted).

[6] In light of this resolution, we do not discuss the alternative basis set forth by the State in support of the trial court's denial of Howell's motion to suppress. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (If this court affirms a trial court order based on one ground, it need not address others.).

By the Court.—Judgment affirmed.

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