COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1858-CR **Cir. Ct. No. 2010CF2894**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL CERVANTES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Reversed.*

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

¶1 CURLEY, P.J. Daniel Cervantes appeals the judgment convicting him of possession of marijuana, second or subsequent offense, contrary to WIS.

STAT. § 961.41(3g)e. (2009-10).[1] Cervantes argues that the marijuana should have been suppressed because: (1) the police entered his apartment, seized and arrested him without probable cause or exigent circumstances; (2) the police entered his home and conducted a protective sweep without lawful authority; and (3) the later consent given by Cervantes to search for guns was not sufficiently attenuated from the taint of the illegal entries, seizure and arrest. We agree that the police lacked probable cause or exigent circumstances to arrest him when he opened the door of his apartment; the protective sweep following Cervantes' arrest was unlawful; and his consent to search the apartment was not sufficiently attenuated from the illegal entries, seizure and arrest. Consequently, we grant the motion to suppress the evidence and reverse the conviction.

BACKGROUND

¶2 According to the record and the transcripts of the proceedings held in the case, a Milwaukee police officer was contacted on June 9, 2010 by a security guard who works for a company that contracts with an apartment complex located at 2803 West Kilbourn Avenue in Milwaukee. The security guard, who the officer knew from previous encounters, told him that he had received information from the building manager that for the prior several days tenants had complained that Cervantes was walking through the apartment complex with a shotgun, cursing and yelling at other residents. The security guard did not personally witness the complained-of conduct. Although the information given to the police was that Cervantes was making threats while carrying the shotgun, they

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

had no information that Cervantes had actually pointed the gun at anyone. As a result, the police officer obtained a photograph of Cervantes from the Milwaukee Police Department and showed it to the security guard who confirmed that the photo was that of Cervantes.

¶3 Following the identification of Cervantes by the security guard, the police officer and his partner, both of whom were in plain clothes, proceeded to the apartment building after making arrangements for five uniformed officers to meet them there. Once at the apartment building, the officers did not attempt to make contact with the building manager or any of the complaining tenants. Instead, the two plain clothes officers went to Cervantes' apartment and knocked on the door several times. After about a minute, Cervantes answered the door. The officers only identified themselves as police officers when Cervantes opened the door. Once the door was opened, one of the officers asked if anyone else was in the apartment. Cervantes failed to immediately respond, and, according to the testimony of one of the officers, took a step backward into the apartment. At this time the officer grabbed Cervantes, pulled him into the hallway, and handcuffed him. The officer then asked the uniformed officers who were in the hall to go inside and see if anyone else was in the apartment. The police found no one else in the apartment. When asked why Cervantes was handcuffed, the officer said it was done "for his safety and our safety." Cervantes testified that he believed he was arrested when he opened the apartment door and was handcuffed. He remarked that he "had never been arrested like that before."

¶4 Following the search of the apartment for other people, the officer brought the handcuffed Cervantes into the kitchen and told him they were investigating complaints concerning his walking in the building with a shotgun. The officer then asked Cervantes if he had a shotgun or any handguns in the

apartment. Cervantes responded he had neither a shotgun nor any handguns. The officer then asked him twice if they could search the apartment and he gave consent. At the time he gave consent there were five officers in the kitchen with him.

¶5 No shotgun or handgun was found, but one of the uniformed officers claimed to have smelled marijuana coming from a book bag that was lying on the living room floor. When the officer opened the bag, he found two large baggies of marijuana.

¶6 Cervantes was charged with possession of a controlled substance, second or subsequent offense. He filed a motion to suppress the evidence. The two plain-clothed police officers testified to the account given above. Cervantes also testified at the hearing on his motion to suppress. Although the trial court ultimately found his version of the events not as credible as the police officers, Cervantes stated he had been asleep when he heard knocking on the door and when he got up and looked through the peep hole he could not see anyone. He then went back to bed, but when he heard more knocking he got up and asked who was there and never received an answer. He then opened the door and a police officer told him to step out, which he did, and was handcuffed. He denied ever stepping back into the apartment and he claimed that when he was asked if anyone else was inside the apartment, he said "no." He also testified that the search occurred without anyone asking his consent. He also stated that he did not own the book bag.

¶7 As noted, the trial court determined that the police officers' account of the events was more credible than Cervantes'. With respect to the initial contact with Cervantes, the trial court also accepted the police version of the

events that after Cervantes was asked if anyone else was in the apartment, he failed to answer and Cervantes then took a step back into the apartment, at which time one of the officers grabbed his arm and escorted him into the hallway.[2] Specifically, the trial court found that "because he failed to answer as to whether anyone else was in the apartment [the police officer] placed the handcuffs on Cervantes and told the other officers to go in and clear the apartment." In justifying the grab of Cervantes, the trial court explained that Cervantes "could have stepped back into the apartment, slammed the door" and officer safety would have been compromised. The trial court also believed that the officers asked for and obtained Cervantes' voluntary consent on two separate occasions to search the apartment for guns. As a result, the trial court denied the motion to suppress.

¶8 Cervantes filed a motion for reconsideration, which the trial court denied. Cervantes then pled guilty. Cervantes received a withheld sentence and fifteen months of probation. This appeal follows.

ANALYSIS

¶9 The issue on appeal is whether the trial court properly denied Cervantes' motion to suppress the evidence found after the police searched his apartment purportedly with Cervantes' consent. "Ordinarily, a guilty plea waives all non-jurisdictional defects and defenses." ***State v. Hampton***, 2010 WI App 169, ¶23, 330 Wis. 2d 531, 793 N.W.2d 901, *rev. denied*, 2011 WI 29, 332 Wis. 2d

[2] The parties all agree that the act of grabbing Cervantes' arm and taking him into the hallway was an entry into Cervantes' apartment. While not the most egregious of entries, we note, as did the Supreme Court over a century ago in ***Boyd v. United States***, 116 U.S. 616 (1886), that "[i]t may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *See* ***id.*** at 635.

279, 797 N.W.2d 524. However, "[a] narrowly crafted exception to this rule exists … which permits appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea." *See* ***id.***; *see also* WIS. STAT. § 971.31(10). We review the denial of Cervantes' motion to suppress under a two-part standard of review: we uphold the trial court's findings of fact unless they are clearly erroneous, but review *de novo* whether those facts warrant suppression. *See* ***Hampton***, 330 Wis. 2d 531, ¶23.

A. The police had no probable cause to arrest Cervantes and no exigent circumstances existed to allow entry into the apartment without a warrant.

¶10 We first address whether Cervantes' arrest was valid. Cervantes argues that the police had no probable cause to arrest him and no exigent circumstances existed to permit the entry into his apartment. The State submits that the police did have probable cause to arrest Cervantes and there were exigent circumstances.[3] In addition, the State suggests that the police were acting in their role as community caretakers when they went to Cervantes' apartment and subsequent events that occurred permitted the police to arrest him. A detention can escalate into an arrest even if the officer does not tell the individual he or she is under arrest.

> "[T]he test for whether a person has been arrested 'is whether a reasonable person in the defendant's position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances.'"

State v. Marten-Hoye, 2008 WI App 19, ¶14, 307 Wis. 2d 671, 746 N.W.2d 498 (citation and one set of quotation marks omitted). We accept Cervantes' belief that he was under arrest when he was grabbed by the officer, taken into the

[3] The State concedes that the handcuffing of Cervantes was an arrest.

hallway and handcuffed. We do so because a reasonable person in Cervantes' position would have considered himself under arrest. *See* ***id.***

¶11 A police officer's warrantless entry into a private residence is presumptively prohibited by the Fourth Amendment to the United States Constitution, and article I, section 11, of the Wisconsin Constitution. However, this court and the United States Supreme Court have recognized exceptions to the warrant requirement where the government can show both probable cause and exigent circumstances that overcome the individual's right to be free from government interference. ***Payton v. New York***, 445 U.S. 573, 583-88 (1980); ***State v. Smith***, 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986) (abrogated on other grounds by ***State v. Felix***, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775).

¶12 The Fourth Amendment requires probable cause to support every search or seizure in order to "safeguard the privacy and security of individuals against arbitrary invasions by government officials." ***State v. DeSmidt***, 155 Wis. 2d 119, 130, 454 N.W.2d 780 (1990). Probable cause in the arrest context protects an individual's interest in his or her personal liberty.

¶13 "Probable cause is a flexible, commonsense standard" requiring "only that the facts available to the officer would warrant a person of reasonable caution to believe that an offense likely was committed." ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125. Probable cause requires "more than a possibility or suspicion that [the] defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). "The government bears the burden of showing that the warrantless entry was both supported by probable cause and justified by

exigent circumstances." ***State v. Robinson***, 2010 WI 80, ¶24, 327 Wis. 2d 302, 786 N.W.2d 463.

¶14 There are four exigent circumstances that may justify a warrantless entry: "(1) [a]n arrest made in 'hot pursuit,' (2) a threat to safety of a suspect or others, (3) a risk that evidence will be destroyed, and (4) a likelihood that the suspect would flee." ***Smith***, 131 Wis. 2d at 229.

¶15 We now apply these rules of law to the facts as found by the trial court. First, we observe that the complaints lodged against Cervantes to which the police were responding had happened at least twenty-four to seventy-two hours before the police arrived at the apartment. This fact is important to our analysis because none of the tenant witnesses, the building manager or the police treated this complaint with any sense of urgency. The building manager called the security guard only after Cervantes allegedly walked through the building with a shotgun on three prior separate days. The record is devoid of any evidence that anyone who witnessed the incident ever called the police. The police responding to the complaint did not treat it as an urgent matter, either. After receiving the call at about 12:30 p.m., the police went to the police station to obtain Cervantes' picture and then met with the security guard. The police then went to the apartment building, arriving at approximately 2:00 p.m. The police, despite being at the apartment building, never interviewed the building manager nor any of the tenants who may have actually witnessed Cervantes with the gun. Further proof that no urgency existed in the minds of the police was the fact that one of the police officers testified that it was his intent in going to Cervantes' apartment to

obtain Cervantes' consent to search his apartment and close out the complaint.[4] At no time did either of the officers testify that they had planned to obtain a search warrant or an arrest warrant for Cervantes.

¶16 Our review of the facts fails to reveal that the police had probable cause to arrest Cervantes when they went to his apartment, although clearly they did have suspicions about his earlier conduct, especially because Cervantes was a felon. No police officer interviewed any witnesses, nor were any reports generated concerning Cervantes' conduct until after his arrest. Further, no exigent circumstances existed at the time the police grabbed Cervantes from inside his apartment, took him into the hallway, and handcuffed him. None of the four exigent circumstances allowing for a warrantless entry were present. *See* ***id.*** The police were not in hot pursuit; there was no reasonable belief that Cervantes was then threatening the safety of anyone given the delayed response to the tenant complaints; there was little risk that evidence would be destroyed, as it is difficult to quickly dispose of a shotgun or a handgun in an apartment; and it was highly improbable that Cervantes would flee out the window of his apartment. *See* ***id.***

¶17 Once at the apartment building, the police knocked on the door of Cervantes' unit without identifying themselves. According to one of the officers, "I waited about a minute or so until finally Mr. Cervantes answered the door." The officer testified that after Cervantes came to the door, and after the officer identified himself as a police officer and asked if there was anyone else in the apartment, Cervantes failed to respond. The officer testified that Cervantes "just

[4] This practice is commonly called a "knock and talk," where police attempt to talk to a person of concern into consenting to a search or to simply gather more information.

looked at me and then he took a step back into the apartment, and I went to grab him." Cervantes was then escorted into the hallway where he was handcuffed. Although the officer testified that his actions were driven by safety concerns that someone else in the apartment posed a risk, there is nothing particularly remarkable about not opening a door for one minute after hearing knocking or stepping back from the doorway when met by seven police officers. Besides, according to Cervantes, he had just awakened and was surprised at the sight of numerous officers at his door. Moreover, the police had no reasonable belief that there was another individual in the apartment. They heard no talking nor saw anything suspicious when the door was opened. According to the security guard's report, Cervantes acted alone when he allegedly brandished the shotgun. Further, there was no mention made of a roommate and it was highly unlikely there would be one since Cervantes lived in a studio apartment, a fact known by the officers. Other than the complaints about actions that occurred days before, the police had no cause for alarm. Up until this point Cervantes had done nothing to trigger the immediate and forceful response of the police. Indeed, if his actions, under these circumstances, entitled police officers to seize a person and enter to "clear" the apartment, then almost every suspect who answers a door would be subject to seizure or arrest.

B. The police were not engaged in a community caretaker function.

¶18 The State has also argued that the police were acting in their community caretaker function when they seized Cervantes. The State writes that the officer "was acting to protect the safety of the officers and other persons in the vicinity when [the police officer] seized Cervantes."

¶19 As noted, the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution both protect against unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. "Subject to a few well-delineated exceptions, warrantless searches are deemed per se unreasonable" under the United States and Wisconsin Constitutions. *See* ***State v. Faust***, 2004 WI 99, ¶11, 274 Wis. 2d 183, 682 N.W.2d 371. One of those exceptions arises when an officer is serving as a community caretaker to protect persons or property. ***State v. Pinkard***, 2010 WI 81, ¶14, 327 Wis. 2d 346, 785 N.W.2d 592. When acting as a community caretaker, an officer may conduct a seizure without probable cause or reasonable suspicion, as long as the seizure satisfies the reasonableness requirement of the Fourth Amendment. ***State v. Kelsey C.R.***, 2001 WI 54, ¶34, 243 Wis. 2d 422, 626 N.W.2d 777.

¶20 We apply a three-part test to determine whether a seizure unsupported by probable cause or reasonable suspicion is justified under the community caretaker exception. ***State v. Kramer***, 2009 WI 14, ¶21, 315 Wis. 2d 414, 759 N.W.2d 598. First, a seizure within the meaning of the Fourth Amendment must have occurred. ***Id.*** Second, the police conduct must be a bona fide community caretaker activity. ***Id.*** Third, "'the public need and interest [must] outweigh the intrusion upon the privacy of the individual.'" ***Id.*** (citation and footnote omitted). It is the State's burden to prove that an officer's conduct falls within the community caretaker function. ***Id.***, ¶17.

¶21 It is undisputed that one of the officers seized Cervantes immediately by grabbing his arm, pulling him into the hallway and handcuffing him. Therefore, we move on to discuss the second part of the test. With respect to the second test, a bona fide community caretaker activity must be "'totally divorced from the detection, investigation, or acquisition of evidence relating to

the violation of a criminal statute.'" ***Id.***, ¶23 (citation omitted). Here, it is obvious that the police were not engaged in a bona fide community caretaker activity. Rather, the police were responding to complaints that Cervantes had engaged in criminal behavior. In other words, the police were conducting a criminal investigation when they went to Cervantes' apartment. As this court has explained concerning the community caretaker function: "The question is whether there is an 'objectively reasonable basis' to believe there is a 'member of the public who is in need of assistance.'" ***State v. Ultsch***, 2011 WI App 17, ¶15, 331 Wis. 2d 242, 793 N.W. 2d 505 (citation omitted). Clearly, here there was no person in need of assistance, nor could the police have reasonably believed that such a person existed when they went to Cervantes' apartment. As this factor, too, weighs heavily against the officers acting as community caretakers, we need not explore whether the third part of the test is met.

C. The protective sweep was illegal.

¶22 "'A protective sweep is a brief search of the premises, ordinarily occurring during an arrest, to ensure the safety of those on the scene.'" ***State v. Horngren***, 2000 WI App 177, ¶20, 238 Wis. 2d 347, 617 N.W.2d 508 (citation and emphasis omitted). A protective sweep is justified "when the [law enforcement officer] possesses 'a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others.'" ***State v. Sanders***, 2008 WI 85, ¶32, 311 Wis. 2d 257, 752 N.W.2d 713 (citation omitted). *See also* ***Maryland v. Buie***, 494 U.S. 325, 327 (1990).

¶23 As noted, the arrest of Cervantes was accomplished without the benefit of either probable cause or exigent circumstances. In addition, no "'specific and articulable facts'" were known to the police that would have led a reasonable officer to believe that Cervantes' apartment contained an individual who posed a danger to the officers. *See* ***Sanders***, 311 Wis. 2d 257, ¶32 (citation omitted). Further, if Cervantes had possessed the shotgun that brought the police to Cervantes' door, once he was handcuffed the gun would not have been a danger to the police. Consequently, we determine that the protective sweep was not warranted.

D. The evidence obtained during the consensual search must be suppressed because the consent was not sufficiently attenuated from the taint of the unlawful arrest.

¶24 As noted, consent is a valid exception to the warrant requirement. ***State v. Johnson***, 177 Wis. 2d 224, 233, 501 N.W.2d 876 (Ct. App. 1993). However, Cervantes contends that the consent he gave to search his apartment for guns was not sufficiently attenuated from the taint of his illegal arrest, seizure and entries.

¶25 Voluntary consent provides one such exception to the Fourth Amendment's prohibition against warrantless searches. *See* ***State v. Phillips***, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998). When the defendant's consent allegedly provides the justification for a warrantless entry and search, the State bears the burden of proving by clear and convincing evidence that the defendant voluntarily consented. ***Id.*** at 197; *see also* ***Gautreaux v. State***, 52 Wis. 2d 489, 492, 190 N.W.2d 542 (1971) (The State bears "the burden of proving by clear and positive evidence [that] the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied.").

"Whether consent was given and the scope of the consent are questions of fact that we will not overturn unless clearly erroneous." ***State v. Garcia***, 195 Wis. 2d 68, 75, 535 N.W.2d 124 (Ct. App. 1995). The legality of a search, including whether the defendant's consent for a warrantless search is voluntary, however, are matters that we review *de novo*. *See* ***Phillips***, 218 Wis. 2d at 195.

¶26 Where "consent to search is obtained after a Fourth Amendment violation, evidence seized as a result of that search must be suppressed as 'fruit of the poisonous tree' unless the State can show a sufficient break in the causal chain between the illegality and the seizure of evidence." ***Id.*** at 204 (citing ***Wong Sun v. United States***, 371 U.S. 471, 487-88 (1963), and ***Brown v. Illinois***, 422 U.S. 590, 602 (1975)).

¶27 We have concluded that the police did not have probable cause or exigent circumstances to arrest Cervantes. We also have concluded that the protective sweep by the police was unlawful. Thus, we must determine if the consent given by Cervantes is sufficiently attenuated from the taint of the earlier police actions to have purged the taint. In ***State v. Richter***, 2000 WI 58, ¶45, 235 Wis. 2d 524, 612 N.W.2d 29, our supreme court set forth the following three factors in deciding the issue: "the temporal proximity of the official misconduct and seizure of the evidence"; "the presence of intervening circumstances"; and "the purpose and flagrancy of the official misconduct." *See also* ***Brown***, 422 U.S. at 603-04. After applying these three factors, we are satisfied that sufficient attenuation did not occur.

¶28 First, in addressing the temporal proximity of the illegal activity and the consent, we note that Cervantes' consent to search was given almost immediately following the illegal seizure, arrest and protective sweep. Proof of

this is the testimony of one of the officers that only five minutes elapsed from the time of the knock on Cervantes' door to the time of Cervantes giving his consent to search. Thus, this factor favors no attenuation. *See* ***Richter***, 235 Wis. 2d 524, ¶45.

¶29 As to the presence of intervening circumstances, the record supports the fact that after the completion of the protective search, nothing occurred except Cervantes' being brought into the kitchen, still handcuffed, and, in the presence of five officers, being asked for consent to search. No explanation was given to Cervantes about his options; he was only told that police were investigating a complaint that he was walking around the building with a shotgun. He was asked if he had any firearms, and when he stated he did not, the police asked him for his consent to search. Because there were no significant intervening circumstances, and thus no break between the illegalities and the seizure of evidence, this factor also favors a finding of no attenuation. *See* ***id.***

¶30 Finally, the last factor to be determined is the purpose and flagrancy of the misconduct. *See* ***id.*** While there is no doubt that the officers believed their actions were appropriate, as we have seen, the seizure and arrest of Cervantes upon his opening his door, failing to immediately answer a question and taking a step backward, was not reasonable. This situation was further aggravated when the police swept his apartment after he was arrested. Consequently, the police violated Cervantes' constitutional rights more than once. He was illegally seized and arrested, and the police unlawfully entered his apartment twice. Thus, because of the number of illegalities, this factor does not support attenuation either. *See* ***id.***

¶31 In sum, the exclusionary rule must be applied, and the evidence found during the search must be suppressed as the "fruit of the poisonous tree," as explained in the landmark case of ***Wong Sun***, 371 U.S. at 477-78. Accordingly, the judgment is reversed.

By the Court.—Judgment reversed.

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