COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP681-CR **Cir. Ct. No. 2010CF616**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHAN G. HUBER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Nathan G. Huber appeals from a judgment convicting him of manufacturing/delivering THC in an amount less than 200 grams. He contends that the circuit court erred when it determined that the arresting officer's actions did not constitute an unreasonable search. He further

contends that the court erred when it determined that the search warrant obtained by the State was not unconstitutionally overbroad. We reject Huber's claims and affirm the judgment of conviction.

¶2 On October 25, 2010, Deputy Misty Welnicke of the Sheboygan County Sheriff's Department received an anonymous report that a marijuana plant was visible in a window at the residence of 225 Wisconsin Street in the Town of Adell. At approximately 5:16 pm, she was dispatched to the residence.

¶3 When Welnicke arrived, she observed a two-family residence with upper and lower units. The door to the lower unit was at the front of the building with a walkway leading directly to it and an address placard for "223" directly over the door. There was an address placard for the upstairs unit "225" on the far left corner of the building, but there was no door leading to it on the front side. The only entrance to the upper unit was at the rear of the building. The only access to the entrance to the upper unit was via the driveway to the right of the building that led to a garage used by the residents of both units.

¶4 Welnicke walked up the open driveway towards the entrance to the upper unit. When she got about halfway up the driveway, she observed a marijuana plant growing in a window of the upper unit.

¶5 Welnicke contacted her supervisor and informed him of her discovery. The supervisor, in turn, contacted the district attorney to obtain a search warrant. Welnicke swore out a telephonic affidavit in support of the warrant, which was issued by a court commissioner later that evening. The warrant authorized officers to search the upper unit and the detached garage for controlled substances and evidence of drug use or manufacture, as well as "any persons found therein or thereon" for the evidence complained of.

¶6 No evidence was obtained from a search of persons found on the premises. However, police seized the marijuana plant observed in the window of the upper unit along with other evidence of the use and growing of marijuana. Police then arrested Huber, who lived in the unit.

¶7 Huber filed a motion to suppress the evidence gathered from his residence. He argued that Welnicke had conducted an unreasonable warrantless search when she entered the driveway and observed the marijuana plant in the window of the upper unit. He also argued that the search was overly broad because it authorized officers to search any persons on the premises.

¶8 Following an evidentiary hearing on the matter, the circuit court rejected Huber's arguments. It ruled that (1) Huber lacked a reasonable expectation of privacy in the driveway that was open to the public and served as the only means of access to the entrance to his residence; and (2) the warrant was not overly broad when it authorized police to search both the premises and any person found on the premises. The court then denied Huber's subsequent motion for reconsideration.

¶9 Huber eventually pled no-contest to the charge of manufacturing/delivering THC in an amount less than 200 grams. He now challenges the order denying his suppression motion as permitted by WIS. STAT. § 971.31(10) (2011-12).[1]

¶10 On appeal, Huber first contends that the circuit court erred when it determined that Welnicke's actions did not constitute an unreasonable search.

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

Huber submits that his driveway could not be encroached upon by police without a warrant. Accordingly, he maintains that Welnicke's observation of the marijuana plant from this vantage point was unlawful and the subsequent warrant obtained was tainted.

¶11 The Fourth Amendment to the United States Constitution protects persons from unreasonable searches and seizures. Whether a police officer's conduct violates the prohibition on unreasonable searches and seizures is a question of law we review without deference to the circuit court. ***State v. Davis***, 2011 WI App 74, ¶8, 333 Wis. 2d 490, 798 N.W.2d 902. However, we will uphold the circuit court's factual findings unless they are clearly erroneous. ***Id.***

¶12 Whether police conduct constitutes an unreasonable search and seizure "depends, in the first place, on whether the defendant had a legitimate, justifiable or reasonable expectation of privacy that was invaded by the government action." ***State v. Rewolinski***, 159 Wis. 2d 1, 12, 464 N.W.2d 401 (1990). A person has no reasonable expectation of privacy in an item that is in plain view of an officer who has a right to be in the position to have the view. ***State v. Edgeberg***, 188 Wis. 2d 339, 345, 524 N.W.2d 911 (Ct. App. 1994).

¶13 Examining Welnicke's actions in this case, we are satisfied that they did not constitute an unreasonable search. As noted by the circuit court, "The essential fact is that there is no front entrance to the apartment, which suggests that if you want to get to [Huber's] apartment, you have to go up that driveway." Here, Welnicke did just that to investigate the anonymous report. Because the driveway was open to the public and the only means of access to Huber's residence, we conclude that Welnicke had a right to be in the position she was in when she made her plain view discovery.

¶14 Huber next contends that the circuit court erred when it determined that the search warrant obtained by the State was not unconstitutionally overbroad. Specifically, he objects to the language in the warrant authorizing officers to search both the premises as well as "any persons found therein or thereon" for the evidence complained of.

¶15 When reviewing a search warrant, we afford great deference to the magistrate's probable cause determination. *See* ***State v. Marquardt***, 2005 WI 157, ¶23, 286 Wis. 2d 204, 705 N.W.2d 878. That determination will stand "unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause." ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991).

¶16 Here, we are satisfied that the search warrant was not unconstitutionally overbroad. Just as the magistrate made a practical commonsense determination that there was a fair probability contraband would be found inside Huber's residence, she could make the same practical commonsense determination that there was a fair probability the same contraband would be found on persons inside Huber's residence at the time of the search.[2] Indeed, many of the incriminating items actually seized—marijuana, rolling papers, baggie tie-offs, etc.—all could just as readily be concealed in a person's pocket.

[2] Huber cites ***Ybarra v. Illinois***, 444 U.S. 85 (1979), as a case standing against general searches of people. We view that case as distinguishable from the present one. In ***Ybarra***, police obtained a warrant to search a public tavern and one named employee of the tavern for drugs. ***Id.*** at 88. In executing that warrant, they searched all the patrons and found heroin on the defendant. ***Id.*** at 88-89. The Supreme Court concluded that the search was unconstitutional, as the defendant's "mere propinquity" to others suspected of criminal activity, "without more," did not give police probable cause to search him. ***Id.*** at 91. Unlike ***Ybarra***, the warrant at issue in this case was not directed at any specific individual on the premises.

¶17 For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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