

RECEIVED

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

12-01-2014

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

APPEAL NO. 2014AP001589-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ZOLTAN M. PETER,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM THE CIRCUIT COURT OF WALWORTH COUNTY,
THE HONORABLE DAVID REDDY PRESIDING

Daniel A. Necci
District Attorney for
Walworth County, Wisconsin

By: Haley J. Rea
Assistant District Attorney
Attorney for Plaintiff-
Respondent
State Bar No. 1067866

ADDRESS:

P.O. Box 1001
Elkhorn, WI 53121
(262) 741-7198

TABLE OF CONTENTS

Table of Authorities.	2
Statement of Issues.	3
Statement of Publication and Oral Argument.	3
Statement of the Case and Facts	3
Argument.	3-18
I. The "plain view" of warrantless seizures Applies	3-9
A. Standard of review.. . . .	3-4
B. The Incriminating Nature of the Marijuana Found In Peter's Vehicle Was Immediately Apparent After Officer Hackett Illuminated the Plastic Bag Containing The Marijuana Using His Flashlight.	4-9
II. Even if evidence of the marijuana found in Peter's vehicle should have been kept out of trial, introduction of the evidence nonetheless would constitute harmless error.	9-18
A. Applicable Law.	9-10
B. Additional Facts.	10-16
C. Discussion.	16-18
Conclusion.	18
Certification.	19

TABLE OF AUTHORITIES

<i>Arizona v. Hicks</i> , 480 U.S. 321 (1987).	8
<i>Horton v. California</i> , 496 U.S. 128 (1990).	4
<i>Illinois v. Andreas</i> , 463 U.S. 765 (1983).	4
<i>State v. Bell</i> , 62 Wis. 2d 534, 215 N.W.2d 535 (1974).	4
<i>State v. Grande</i> , 169 Wis.2d 422, 485 N.W.2d 282 (Ct. App. 1992).	17
<i>State v. Guy</i> , 172 Wis. 2d 86, 492 N.W.2d 311 (1992).	5
<i>State v. Harris</i> , 2008 WI 15, 307 Wis. 2d 555, 745 N.W.2d 397.	10
<i>State v. Johnston</i> , 184 Wis. 2d 794, 518 N.W.2d 759 (1994).	4
<i>State v. Knapp</i> , 2005 WI 127, 285 Wis.2d 86, 700 N.W.2d 899.	3
<i>State v. Norman</i> , 2003 WI 72, 262 Wis. 2d 506, 663 N.W.2d 97.	10
<i>State v. Sutton</i> , 2012 WI App 7, 338 Wis.2d 338, 808 N.W.2d 411.	8
<i>State v. Thoms</i> , 228 Wis. 2d 868, 599 N.W.2d 84 (Ct. App. 1999).	10
<i>State v. Turner</i> , 136 Wis.2d 333, 401 N.W.2d 827 (1987).	4
<i>United States v. Jacobsen</i> , 466 U.S. 109 (1984).	4

STATEMENT OF THE ISSUE

DID THE TRIAL COURT PROPERLY FIND THAT THE MARIJUANA
IN PETER'S VEHICLE WAS LAWFULLY SEIZED?

Trial court answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication of this court's opinion nor oral argument is necessary in this case. The issues presented are adequately addressed in the brief and under the rules of appellant procedure, publication of this decision is not appropriate because it is a one judge appeal. See Sec. 809.23(1)(b)(4), Wis. Court Rules and Procedures.

STATEMENT OF THE CASE

The facts in addition to those cited by the Defendant-Appellant, hereinafter Peter, will be included within the argument section of this brief.

ARGUMENT

I. THE "PLAIN VIEW" OF WARRANTLESS SEIZURES APPLIES.

A. Standard of Review.

" 'Whether evidence should be suppressed is a question of constitutional fact.' " *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis.2d 86, 700 N.W.2d 899 (citation omitted). A finding of constitutional fact consists of the circuit court's findings of historical fact, and its application of those historical facts to constitutional

principles. See *State v. Turner*, 136 Wis.2d 333, 343-44, 401 N.W.2d 827 (1987). This court reviews the former under the clearly erroneous standard and the latter *de novo*. See *id.*

B. The Incriminating Nature of the Marijuana Found In Peter's Vehicle Was Immediately Apparent After Officer Hackett Illuminated the Plastic Bag Containing The Marijuana Using His Flashlight.

A search occurs when police infringe on an expectation of privacy that society considers reasonable. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). If there is no infringement, there is no search. *Illinois v. Andreas*, 463 U.S. 765, 771, (1983). It is well established that the police may seize evidence without a warrant when the evidence is in plain view. See *State v. Johnston*, 184 Wis. 2d 794, 809, 518 N.W.2d 759 (1994). Under the plain view doctrine, "objects falling within the plain view of an officer who has a right to be in the position to have the view are subject to valid seizure and may be introduced in evidence." *State v. Bell*, 62 Wis. 2d 534, 540, 215 N.W.2d 535 (1974) (citations omitted). A person has no reasonable expectation of privacy in an item that is in plain view. *Horton v. California*, 496 U.S. 128, 133 (1990).

For the plain view doctrine to apply, the State must satisfy three prerequisites. *State v. Guy*, 172 Wis. 2d 86, 101-02, 492 N.W.2d 311 (1992). First, the evidence must be in plain view. *Id.* Second, the police officer must have a lawful right of access to the object. *Id.* Third, the incriminating character of the object must be immediately apparent, meaning the police must show they had probable cause to believe the object was evidence or contraband. *Id.*

In this case, Peter argues only that the *third* requirement was not met: He claims that the plain-view doctrine does not apply because the incriminating nature of the clear plastic bag immediately observed by the officer was not apparent. (Peter's Brief at 5). Therefore, the question is whether the incriminating nature of what Officer Hackett observed was immediately apparent.

The circuit court held that the officers use of a flashlight to see the marijuana did not detract from the baggie being in plain view, stating:

Because the second factor is that the officer must have had a prior justification for being of [sic] the position from which he discovered the evidence in plain view. So I have already found that he was lawfully inside the vehicle, replacing the beer, looking at the beer [R45:35-36]. So I am going to find that simple fact that he had to use the flashlight after he had initially identified the plastic bag does not detract from the finding that the evidence was in plain view. He saw a baggie, used the flashlight, he saw a green leafy

substance that he believed to be marijuana. As I have already indicated, he was - he had a prior justification for being in that position.

R44:45-46. The court continued that the officer did not touch the baggie to determine whether marijuana was inside it, but simply shined his flashlight on the baggie, which was inside an open compartment, to see the suspected marijuana. R45:44, 47. Finally the court stated,

As to that third prong with respect to the baggie, then I believe that - I have already found it was in plain view and it was then not only the plastic bag but the green leafy substance. For all the reasons stated earlier, for justification that there was probable cause to believe there was that connection between the beer and the criminal activity, it would be the same here. It's just simply the drugs - suspected drugs and the criminal activity because of the accident at night, single car. There was no other vehicle or individual in the area.

So I am going to find that the plain view doctrine then was satisfied with respect to the search of the vehicle.

R45:48.

The trial court's findings are supported by the record. Officer Hackett testified that on September 29, 2011 at approximately 7:19 p.m. he was dispatched to a one car accident on Church Street in the Village of East Troy, Walworth County, Wisconsin. R45:5. Upon arrival, Officer Hackett observed a car that had come into contact with a tree in front of a house. R45:5. Witnesses on the scene told Officer Hackett that the driver was unconscious. R45:6. When

Officer Hackett made contact with the driver, later identified as Peter, Peter was conscious and very disoriented. R45:6-7. Officer Hackett observed a good amount of blood on Peter's face coming from his forehead and blood on Peter's arm. R45:7. There was a great deal of glass inside the car, and Officer Hackett observed that the windshield had been broken and that there was hair sticking in the windshield. R45:7. Emergency personnel arrived on scene and eventually moved Peter to an ambulance. R45:7.

After rescue arrived, Officer Hackett observed a 12-pack of Miller Lite in the back seat on the floor of Peter's vehicle. Officer Hackett then opened the vehicle's back door and inspected the 12-pack and determined that it was unopened. R45:8. After setting the 12-pack of beer back down, Officer Hackett observed a corner of a plastic bag sticking out of the compartment behind the front passenger seat. R45:8, 37. Officer Hackett described the compartment as where you would put magazines on the back of the seat. R45:16. Using his flashlight, Officer Hackett looked into the compartment and saw that the plastic bags contained a green leafy substance that resembled marijuana. R45:8-9, 16-17, 37-38, 40-41. Officer Hackett observed the suspected marijuana before he removed the bag from the compartment. R45:41-42.

As these facts demonstrate, the requirements of the plain view doctrine were satisfied, and, therefore, the seizure of the marijuana in the vehicle was justified.

Citing *State v. Sutton*, 2012 WI App 7, 338 Wis.2d 338, 808 N.W.2d 411 and *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), Peter argues that the seizure of the marijuana was illegal. Peter's reliance on *Sutton* and *Hicks* to support his position, however, is misplaced. In *Sutton*, a law enforcement officer entered a vehicle as part of a protective search for weapons. *Id.* at ¶5. During the search, the officer located two opaque vials inside the driver's side "map pocket". *Id.* The officer opened the opaque vials and located pills she believed to be Ecstasy. *Id.* In declining to apply the "plain view" doctrine, the Court of Appeals stated that, "Although the opaque cylinders were 'in plain view' the pills were not." *Id.* at ¶9. Similarly, in *Hicks*, the United States Supreme Court held that moving parts of stereo equipment in order to view its serial number to determine if they were stolen constituted a search. *Hicks*, 480 U.S. at 324-325.

Unlike *Sutton* or *Hicks*, however, in this case Officer Hackett immediately observed the suspected marijuana after he illuminated the bags with his flashlight. The contents of the bags in this case were observed by Officer Hackett

without opening or moving the bags. The clear plastic bags containing the suspected marijuana were found in plain view in the open compartment behind the back passenger seat. All Officer Hackett did was look into the already opened compartment using his flashlight and from that vantage point the officer saw the marijuana. The trial court correctly found that Officer Hackett saw the corner of the bags sticking out of the opened back seat compartment, and that the officer did not open anything up but merely looked inside the compartment using his flashlight to see the marijuana in the clear plastic bags. Only after observing the marijuana did Officer Hackett remove the bags.

Accordingly, Peter's Fourth Amendment rights were not violated and the circuit court did not err in denying the motion to suppress.

II. EVEN IF EVIDENCE OF THE MARIJUANA FOUND IN PETER'S VEHICLE SHOULD HAVE BEEN KEPT OUT OF TRIAL, INTRODUCTION OF THE EVIDENCE NONETHELESS WOULD CONSTITUTE HARMLESS ERROR.

A. Applicable Law.

Even if the marijuana found in Peter's vehicle should have been suppressed, the introduction of such evidence nonetheless would constitute harmless error. An error is harmless if the beneficiary of the error proves beyond a reasonable doubt that the error did not contribute to the

verdict obtained. See *State v. Harris*, 2008 WI 15, 307 Wis. 2d 555, ¶ 42, 745 N.W.2d 397. Alternatively stated, an error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. See *id.* ¶ 43.

When determining whether an error is harmless, a reviewing court "consider[s] the error in the context of the entire trial and consider[s] the strength of untainted evidence." *State v. Thoms*, 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999). In applying the harmless-error test:

the reviewing court should consider a variety of factors, including but not limited to the frequency of the error, the nature of the State's case, the nature of the defense, the importance of the erroneously included or excluded evidence to the prosecution's or defense's case, the presence or absence of evidence corroborating or contradicting the erroneously included or excluded evidence, whether erroneously admitted evidence merely duplicates untainted evidence, and the overall strength of the prosecution's case.

State v. Norman, 2003 WI 72, ¶ 48, 262 Wis. 2d 506, 663 N.W.2d 97.

B. Additional facts.

On May 25, 2012, Peter was charged with one count of operating a motor vehicle while under the influence of an intoxicant - 2nd offense contrary to Wis. Stat. § 346.63(1)(a), and one count of operating a motor vehicle

with a detectable amount of a controlled substance in his blood - 2nd offense contrary to Wis. Stat. §346.63(1)(am).

R1. Peter plead not guilty and the case was tried by a jury. R47. At the conclusion of the jury trial, Peter was acquitted of operating a motor vehicle while under the influence of an intoxicant, however, was found guilty of operating a motor vehicle with a detectable amount of a controlled substance in his blood. R24, R25.

At trial, the state called two witnesses: Village of East Troy Police Officer Aaron Hackett, and Mr. Edward Oliver, a chemist employed by the Wisconsin State Laboratory of Hygiene in Madison, Wisconsin.

Officer Hackett's Trial Testimony:

On September 29, 2011 at approximately 7:19 p.m. Officer Hackett was dispatched to a car versus tree accident in the Village of East Troy, Walworth County, Wisconsin. R47:74, 77. Upon arrival, Officer Hackett observed a vehicle with the front end smashed into a tree. R47:75. A witness informed Officer Hackett that the driver was unconscious when 911 was called, but that he was now conscious. R47:75. Officer Hackett approached the vehicle and visually identified the driver as Zoltan Peter. R47:75. Peter had a substantial amount of blood coming down the right side of his body and on his forehead. R47:75. The windshield of the

vehicle had been cracked and there was a tuft of hair and a piece of flesh in the glass, leading Officer Hackett to believe Peter's skull had come in contact with the windshield. R47:75. Peter, who was the only occupant of the vehicle, was confused and did not know what had happened. R47:75-76, 92.

After rescue arrived on scene, Officer Hackett looked into Peter's vehicle and in the back seat located an unopened 12-pack of Miller lite beer and plastic bags containing a small amount of marijuana. R47:76-77, 93-94. After locating the marijuana, Officer Hackett investigated the scene to try and determine what caused the accident. R47:79. Officer Hackett testified:

After finding the marijuana, I just, I took a step back and I walked into the street just to see what had happened - you know - what caused this accident. That it just - If you're familiar, I guess to explain, Church Street at that location...there is a curve and the vehicle just went straight...It didn't try to make a curve, it just - it went straight. Ran over a mailbox. Ran over a sapling. And then ultimately came into contact with a large tree in front of the house.

...

I stood in the roadway. I - you know - I looked for pieces of cars, something that would maybe indicate that a collision had happened prior causing him to leave the roadway. And so I was - you know - I was pretty confused as to - as to what caused this accident. I did not have a - I did not have an explanation.

R47:79-80.

Officer Hackett testified that he then left the scene and followed the ambulance to the hospital to continue his investigation because he had questions about the cause of the accident and felt further investigation was needed. R47:80, 83, 94-95. Officer Hackett was unaware at that time if he was investigating an OWI related accident or not. R47:94. Officer Hackett testified that he had an unexplained accident, which is indicate of someone who may be under the influence. R47:98.

Upon arrival at the hospital, Officer Hackett testified that he entered the emergency room with Peter and stood in the room as Peter was assessed by medical personnel. R47:84. Officer Hackett testified Peter told medical personnel that he remembered driving north on 120 and going into the village square, but could not remember anything after that. Peter also told medical staff that he had been suffering from seizures and that he did not recall taking his medication that day. R47:85, 96.

While at the hospital, Officer Hackett stated that Peter consented to a blood draw. R47:85. Officer Hackett witnessed medical staff draw Peter's blood, which was then properly packaged and handed to Officer Hackett. R47:85.

Peter's blood was subsequently mailed to the Wisconsin State Hygiene Laboratory for testing. R47:85.

Mr. Edward Oliver's Trial Testimony:

Mr. Oliver, who has a Bachelor of Science in Chemistry, testified that he is a chemist employed at the Wisconsin State Laboratory of Hygiene in Madison, Wisconsin. R47:101. Part of his job at the laboratory is to analyze samples of blood for the presence of alcohol or other drugs, including THC. R47:101-102. Mr. Oliver testified that he has held this position at the lab for the last twelve years and has tested thousands of blood samples for the presence of THC and testified to those results in court. R47:102. Mr. Oliver testified that he tested Peter's blood sample, which was inspected upon arrival at the lab and found to be sealed and properly labeled. R47:102-103. Mr. Oliver stated that Peter's sample was originally tested for alcohol and then for drugs. R47:108-109. The methods used to test Peter's blood were approved and validated. R47:113.

Mr. Oliver testified that Delta-9-THC is the active compound in the drug marijuana that's consumed and that causes impairment in individuals. R47:104, 106. The results of Peter's blood specimen was 1.3 nanograms per milliliter of Delta-9-THC. R47:104-106. Mr. Oliver further testified that he is familiar with Wisconsin's laws concerning driving

with a restricted controlled substance and that Delta-9-THC is a restricted controlled substance. R47:105, 106. Because Delta-9-THC is a restricted controlled substance, Peter cannot have it in his system and operate a vehicle. R47:118. Mr. Oliver also testified that his laboratory is able to report results that are greater than 1.0 for Delta-9-THC, and that amounts less than that will be reported as not detected. R47:106. Although Mr. Oliver was unable to testify as to when the THC was ingested, he was able to testify with certainty that the THC was ingested prior to the blood being drawn. R47:119.

After the state rested, Peter's called Darlene Schedler and Maria Peter.

Ms. Darlene Schedler's Trial Testimony:

Ms. Schedler testified that she heard Peter's accident and called 911. R47:124-125. After calling 911, Ms. Schedler stated she approached the vehicle and observed Peter, who was seated in the driver's seat and was the only occupant of the vehicle. R47:125, 132. Ms. Schedler stated that Peter's body was bobbing up and down, his eyes were rolled back in his head and his mouth appeared clenched. R47:126. Ms. Schedler further testified that Peter's actions reminded her of epileptic seizures that she had witnessed from a member in her family who suffers from seizures. R47:128-131.

Ms. Maria Peter's Trial Testimony:

Ms. Maria Peter also testified that Zoltan Peter is her son and that he was diagnosed with epilepsy in August of 2011, prior to the accident in this case. R47:134, 137.

C. Discussion

As the above facts indicate, there is overwhelming evidence to support Peter's conviction for operating a motor vehicle with a detectable restricted controlled substance in his blood.

Peter's blood sample taken following his accident, was tested by the Wisconsin State Laboratory of Hygiene with a result of 1.3 nanograms per milliliter of Delta-9-THC obtained. R47:104-106. Mr. Oliver testified that Delta-9-THC is the active compound in the drug marijuana, and that once consumed causes impairment in individuals. R47:104, 106. Mr. Oliver further testified that he is familiar with Wisconsin's laws concerning driving with a restricted controlled substance and that Delta-9-THC is a restricted controlled substance. R47:105, 106. Because Delta-9-THC is a restricted controlled substance, Peter cannot have it in his system and operate a vehicle. R47:118. This evidence was uncontradicted at trial.

Moreover, although Officer Hackett testified that he found a small amount of marijuana in Peter's vehicle,

Officer Hackett explained that discovery simply prompted him to investigate the unexplained accident further. Peter's was never charged with possession of marijuana.

In addition, Peter's defense at trial centered on the fact that he was not impaired at the time of his accident, but that his accident was caused by an epileptic seizure. See Darlene Schedler Testimony (R47:123-132); Ms. Maria Peter's Testimony (R47:134-143); State's Closing Argument (R47:169-173; and Peter's Closing Argument (R47:173-179).

Finally, the jury was properly instructed on the elements of driving with a detectible restricted controlled substance in the blood. R47:159-161. The jurors were also instructed that they were not bound by an expert's opinion, that they were the sole judges of facts, and that the court is the judge of the law. R47:156, 165. Jurors are presumed to follow all instructions given. *State v. Grande*, 169 Wis.2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992).

Based on these facts, even without the brief mention at trial that a small amount of marijuana was found in Peter's vehicle prompting Officer Hackett's further investigation, there undoubtly is strong uncontradicted evidence that Peter was driving with a detectible amount of a restricted controlled substance in his blood. This evidence is more than sufficient for the jury to find beyond a reasonable

doubt that Peter had committed the offense of driving with a detectible amount of a restricted controlled substance in his blood. Accordingly, even if it was error to admit evidence of marijuana in Peter's vehicle, it was harmless error as there is no reasonable possibility that this error contributed to Peter's conviction.

CONCLUSION

For the reasons set forth above, the State respectfully requests that the trial court be affirmed in its decision that the marijuana was in plain view, and that the trial court be affirmed in Peter's judgment of conviction.

Dated this ____ day of December, 2014.

Respectfully submitted,

HALEY J. REA
Assistant District Attorney
Walworth County, Wisconsin
State Bar No. 1067866

Walworth County Judicial Center
PO Box 1001
Elkhorn, WI 53121
262-741-7198

CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c).

_____ Monospaced font: 10 characters per inch; double spaces; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides.

The length of the brief is _____ pages.

I also certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: _____

Signed,

Attorney