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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

Circuit Court Case No.
2017CF000214

-vs-

ASHLEY L. MONN,

Appeal Case No.
2019AP000640-CR

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR BARRON COUNTY, BRANCH II, THE HONORABLE J.M. BITNEY, PRESIDING

BRIEF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

TABLE OF AUTHORITIES

STATE OF WISCONSIN

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ISSUES PRESENTED

SHOULD THE EVIDENCE FOUND IN THE DEFENDANT'S PURSE BE SUPPRESSED BECAUSE IT WAS OBTAINED IN VIOLATION OF HER FOURTH AMENDMENT RIGHTS?

The Circuit Court did not find that the defendant's Fourth Amendment rights had been violated and did not order the suppression of the items found in her purse. The circuit court found that she had voluntarily consented to the search of her purse and that decision on her

part attenuated any potential Fourth Amendment violation regarding the officers entry into the trailer where she was initially located.

STATEMENT ON ORAL ARGUMENT

This is a one-judge appeal under Wis. Stat. 752.31(2)(f) and (3), making publication inappropriate. Wis. Stat. 809.23(1)(b)4; see also *Waukesha County v. Genevieve M*., 2009 WI App 173, ¶5, 322 Wis. 2d 131, 766 N.W.2d 640.

The State does not believe Oral Argument is necessary. The State believes that the parties' briefs will adequately address the issues raised by this appeal.

INTRODUCTION

This case is about whether the defendant's Fourth Amendment rights as a guest were violated when she was detained, after officers entered the residence of her male companion to arrest him on a valid warrant, and her purse was searched after she voluntarily disclosed the existence of a "dope pipe" that was in it.

Under long settled precedent from the Supreme Court of the United States, officers can enter a residence to arrest a suspect on an outstanding warrant if they have reason to believe he lives there and is inside the residence. *Payton v. New York*, 445 U.S. 573 (1980). Both of those conditions are present in this case: The officers had a warrant for the defendant's companion, Joe Perzichilli, they also had information from

the owner of the trailer who indicated that he allowed Mr. Perzichilli to stay at the trailer in exchange for doing work on his farm. The owner also told one of the deputies on scene that he thought Mr. Perzichilli was in fact at the trailer. The address the trailer was located at was 316 16 ½ Avenue in Almena, Wisconsin. Under the circumstances and pursuant to *Payton*, the officers could enter the residence and arrest. Mr. Perzichilli on the warrant.

During the course of the officers entry into the trailer, after they had announced their presence and knocked on the door numerous times, they located Mr. Perzichilli and the defendant. He was taken into custody on the warrant and she was detained, in handcuffs, while the officers checked the trailer for any other individuals due to the fact they had information that another individual named James Rahn may have been present in the trailer.

One of the deputies subsequently spoke with the defendant concerning why nobody answered the door when the officers were announcing themselves and knocking on the door. The officers made the decision that the defendant was going to be released. She subsequently indicated she had property in the trailer, including a purse, that she wished to obtain. Due to concerns for their own safety, the officers declined to allow her to go into the trailer and instead told her they would go and obtain her property and bring it out to her and she would be on her way.

The total time the defendant was detained was approximately 10 minutes. She was in handcuffs the entire time.

One of the deputies subsequently obtained her property, including the purse at issue as well as car keys to her vehicle which was on location. Prior to giving her purse to her, again due to concerns for their own safety, the officers asked if there was anything in the purse they needed to be concerned about, specifically any type of weapon. They also asked for permission to look in the purse at which point according to the testimony of two deputies, the defendant voluntarily disclosed there was a "dope pipe" in the purse. This disclosure took place prior to a search being conducted of the purse and prior to the defendant specifically giving any type of consent to search the purse.

The defense filed multiple suppression motions challenging initially the search of the defendant's purse. The circuit court denied the motion indicating in its initial decision that any detention of the defendant was temporary and that the defendant voluntarily consented to the search of her purse. The circuit court also found that she volunteered that the deputies would find the pipe in her purse.

The defense filed a subsequent motion to reconsider and then challenged the entry into the trailer, which had not been the subject of its previous motion. The circuit court denied the motion to reconsider. The circuit court found that even if there had been a Fourth Amendment

violation for the entry into the trailer, there wasn't sufficient nexus between any entry into the residence and finding of the pipe in her purse due to the consent given by the defendant that occurred in between.

STATEMENT OF THE CASE

On May 6, 2017, at approximately 1:30 AM, Barron County Deputies Darren Hodek, Donald Weise and Jeffrey Wolfe went to a trailer located at 316 16 ½ Avenue in Almena, Wisconsin looking for one of two individuals that had outstanding warrants for the arrest. The individuals were Joseph Perzichilli or James Rahn (38:5, 13). Prior to going to the trailer, Deputy Hodek testified that he spoke to the owner of the property, Dean Sellent, who verified that he allowed Mr. Perzichilli to stay at the trailer in exchange for him doing work for Mr. Sellent. Mr. Sellent also indicated that he thought Mr. Perzichilli was at the trailer but he didn't know for certain. (38:12, 32-34). The trailer was located out in a gravel pit and the deputies believed there may be two subjects there with outstanding warrants. (38:36). According to the testimony of Deputy Hodek, the officers called out to people to come out and ultimately entry was made into the trailer by force and Mr. Perzichilli was found in the trailer and taken into custody. The defendant was also found in the trailer and was brought outside and placed in handcuffs. (38:12-13) According to the testimony of Deputy Weise, once she was brought outside and placed in handcuffs, the total time he had contact with her was approximately 10 minutes. (38:37). That

time also encompassed the discussion of why no one answered the door when the deputies knocked, as well as a discussion with her regarding property that she may have had inside the trailer, and discussions with her regarding her purse once that was retrieved from the trailer. (38:37-40) The deputies also discussed with her whether any weapons were in the purse due to concerns on their part that they didn't want to hand her a purse that may contain a weapon. (38:8, 40). There was also discussion that included the defendant going into the trailer on her own to obtain her property. But due to safety concerns, the deputies were not going to allow her to go into an unknown area where there could be weapons. (38:38).

According to the testimony of both Deputy Hodek and Deputy Weise, prior to either them looking in the purse, the defendant volunteered that there was a "dope pipe" in the purse. She further told the deputies it was for methamphetamine. (38:9, 40). She was subsequently arrested based on what was found in her purse.(38:40). She also had her own vehicle at the trailer. (38:34, 40, 41).

According to the testimony of Deputy Hodek, the defendant was also told she was going to be free to go after Mr. Perzichilli was taken into custody, but prior to her asking the deputies to retrieve her purse and other items from inside the trailer. (38:6,7). There is a discrepancy in Deputy Hodek's testimony regarding whether the handcuffs were removed from her. In his direct examination he indicated he didn't recall if they had been

taken off but in his cross-examination he indicated that he believed she remained in handcuffs the entire time.(38:6, 13)

ARGUMENT

The defendant was not illegally detained as a result of the deputies entry into Perzichilli's residence since they had a valid warrant for his arrest. The detention of her after she and Perzichilli came out of the trailer was not an unreasonable detention under all of the circumstances. The deputies had probable cause to search her purse once she disclosed on her own initiative that she had a "dope pipe" in her purse.

The Fourth Amendment to the United States Constitution In Article I, Section 11 of the Wisconsin Constitution protect "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV; Wis. Const. art. I, § 11. The Wisconsin Supreme Court has historically interpreted article I, § 11 and its protections against unreasonable searches and seizures in a manner consistent with the United States Supreme Court's interpretations of the Fourth Amendment. *State v. Felix*, 2012 WI 36, ¶ 38, 339 Wis. 2d 670, 811 N.W.2d 775 (finding no reason "to depart from our customary practice of interpreting Article I, Section 11 in accord with the Fourth Amendment").

Whether police conduct violates the guarantee against unreasonable searches and seizures presents a question of constitutional fact. On review, an appellate court independently reviews questions of constitutional facts. But an appellate court will uphold the circuit court's factual findings unless they are

clearly erroneous. *State v. Brereton*, 2013 WI 17, ¶ 17, 345 Wis. 2d 563, 826 N.W.2d 369. "A finding is clearly erroneous if 'it is against the great weight and clear preponderance of the evidence.'" *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748 (citations omitted)

I. *Payton* authorized the officers' entry into the trailer to arrest Perzichilli on an outstanding arrest warrant.

A. The Fourth Amendment prohibits unreasonable seizures and (absent consent or exigent circumstances) warrantless entries.

The United States Constitution and the Wisconsin Constitution prohibit unreasonable seizures. U.S. Const. amend. IV; Wis. Const. art. 1, § 11.[1] "An arrest is a seizure invoking protections afforded under the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution." *State v. Ferguson*, 2009 WI 50, ¶ 17, 317 Wis. 2d 586, 767 N.W.2d 187.

In general, "if the police have probable cause to make an arrest, they do not need a warrant." *Ferguson*, 317 Wis. 2d 586, ¶ 17 (citing *United States v. Watson*, 423 U.S. 411, 417–23 (1976)). "However, when the police must enter a home to arrest, if they have not obtained a warrant in advance, the entry and arrest are presumptively unlawful." *Id.* (citing *Payton*, 445 U.S. at 586). "This presumption is based on 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.'" *Id.* (quoting *Payton*, 445 U.S. at 601).

[1] Because Article I, Section 11 of the Wisconsin Constitution is "substantively identical," to the Fourth Amendment to the United States Constitution, this Court interprets Article I, Section 11 "consistently with the Fourth Amendment." *State v. Weber*, 2016 WI 96, ¶ 17, 372 Wis. 2d 202, 887 N.W.2d 554 (quoting *State v. Richter*, 2000 WI 58, ¶ 27, 235 Wis. 2d 524, 612 N.W.2d 29).

B. Officers may enter a residence to execute an arrest warrant if they reasonably believe the suspect resides there.

"A police officer with an arrest warrant can enter the suspect's residence to execute the warrant if there is reason to believe he will be found there." *United States v. Pallais*, 921 F.2d 684, 690 (7th Cir. 1990) (citing *Payton*, 445 U.S. at 603). In *Payton*, the Supreme Court reasoned, "If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." *Payton*, 445 U.S. at 602–03.

"Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton*, 445 U.S. at 602–03. Accordingly, "*Payton* allows the police to enter a residence armed only with an arrest warrant" if "the facts and circumstances present the police with a reasonable belief that" (1) "the subject of the arrest warrant resides in the home," and (2) "the subject of the warrant is present in the home at the time entry is effected." *State v. Blanco*, 2000 WI App 119, ¶ 16, 237 Wis.2d 395, 614 N.W.2d 512; *see also State v. Kiper*, 193 Wis.2d 69, 85–86, 532 N.W.2d 698 (1995).

But if the police do not have reason to believe that the person named in the warrant lives at the place where the police are executing the warrant, they may not enter on the arrest warrant alone, based on the Supreme Court's decision in *Steagald v. United States*, 451 U.S. 204 (1981). In *Steagald*, the

police received information that a federal fugitive could be found at a certain address "during the next 24 hours." *Id.* at 206. The police went to that address with an arrest warrant and found cocaine, but no fugitive. *Id. Steagald*, who was not the fugitive but was outside of the home the police searched, was arrested and indicted on federal drug charges. *Id.*

The Supreme Court held that the officer's entry under the circumstances was unreasonable. It recognized that while the arrest "warrant embodied a judicial finding that there was probable cause to believe the [fugitive] had committed a felony" and thus authorized the officer to seize the fugitive, the warrant "did absolutely nothing to protect [*Steagald's*] privacy interest in being free from an unreasonable invasion and search of his home." *Steagald*, 451 U.S. at 213. To protect the homeowner, the Court held that absent consent or exigent circumstances, the police must obtain a search warrant to enter the home of a third-party to search for the subject of an arrest warrant. *Id.* at 205–06; *see also Blanco*, 237 Wis.2d 395, ¶ 13 (noting that under *Steagald*, "an arrest warrant is insufficient to enter a third-party's home, even if the police believe that the subject of the arrest warrant is present there").

Payton and *Steagald* do not "divide the world into residences belonging solely to the suspect on the one hand, and third parties on the other." *Blanco*, 237 Wis.2d 395, ¶ 14 (quoting *Valdez v. McPheters*, 172 F.3d 1220, 1225 (10th Cir. 1999) (reconciling *Payton* and *Steagald*)). Instead, "[t]he rule announced in *Payton* is applicable so long as the suspect 'possesses common authority over, or some other significant relationship to,' the residence entered by police." *Id.*

(quoting *Valdez*, 172 F.3d at 1225). In short, police "entry into a residence pursuant to an arrest warrant is permitted when 'the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality . . . warrant a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect is within the residence at the time of entry.'" *Id.* (quoting *Valdez*, 172 F.3d at 1225–26).

In this case, it is uncontroverted that the trailer was in fact Perzichilli's residence and that the deputies had a valid warrant for him. The testimony of deputies indicated that they spoke to Dean Sellent who owned the trailer. Mr. Sellent advised them that he allowed Perzichilli to stay there in exchange for working for Mr. Sellent. He even advised that he believed Perzichilli was at the trailer, but wasn't completely certain. Based on this information, the officers could reasonably believe Perzichilli lived at the trailer.

The deputies did not violate the Fourth Amendment rights of Perzichilli when they entered the trailer looking for Mr. Perzichilli, nor did they violate the Fourth Amendment rights of Ms. Monn, who arguably would have been his guest. The entry into the trailer was permissible under the Fourth Amendment.

II. The detention of Monn after she was removed from the trailer was reasonable under the circumstances.

Wisconsin statute 968.24, which is Wisconsin's codification of the *Terry* stop, allows the detention and temporary questioning of a suspect without arrest for investigative purposes. Under *Terry v. Ohio*, 392 U.S. 1 (1968), a police officer may, in the appropriate circumstances, detain a person for purposes of

investigating possible criminal behavior even though there is no probable cause to make an arrest. During the course of a *Terry* stop, officers may try to obtain information confirming or dispelling their suspicions. See. *State v. Quartana*, 213 Wis.2d 440 (Wis. Ct. App. 1997). There is no question that the State bears the burden of proving that a warrantless seizure was reasonable and in conformity with the Fourth Amendment.

In this case, Ms. Monn was only briefly detained for approximately 10 minutes. Although she was in handcuffs, she was clearly told that she was going to be free to leave. (38:6, 7, 15) Any delay that prevented her from leaving was due to her asking the deputies to retrieve her purse and other belongings from inside the trailer. (38:6, 7) Given the fact that these items were located inside the trailer, and that one of them was a purse, it was not unreasonable for the deputies to retrieve her property and also to make sure, for their own safety, that her purse did not contain any weapons. It would make no sense for the deputies to put themselves in danger by returning her purse to her without making sure it did not contain any items that could harm them. Although Ms. Monn indicated there were no weapons in the purse, it was not unreasonable for the deputies to ask to look to verify that for their own safety, when she was asked if the deputies could look in the purse to make sure. Both deputies testified that Ms. Monn gave consent for them to do so. (38:8, 40)

III. Ms. Monn freely consented to the search of her purse and provided probable cause for the deputies to do so when she volunteered that she had a “dope pipe” in it.

One well established exception to the warrant requirement is a search conducted pursuant to consent. *State v. Phillip*s, 218 Wis.2d 180 (Wis. 1998) and *State v. Artic*, 327 Wis.2d 392 (Wis. 2010). To determine if the consent exception is satisfied, a court first reviews whether consent was given in fact by words, gestures, or conduct; and second, whether the consent given was voluntary. *Phillips*, 218 Wis.2d at 196-97.

At the suppression hearing, both deputies Hodek and Weise testified that Ms. Monn gave them consent to search her purse. Ms. Monn did not testify to the contrary. The circuit court found that Ms. Monn gave consent in fact.

The second issue is whether Ms. Monn's consent was voluntarily given. The determination of voluntariness is a mixed question of law and fact upon an evaluation of the totality of the all the circumstances. In considering the totality of circumstances, the court is to look at the circumstances surrounding the consent and the characteristics of the defendant. No single factor controls. In *Phillips* and *Artic*, the court considered 5 non-exclusive factors: (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade the defendant to consent; (2) whether the police threatened or physically intimidated the defendant or "punished" the defendant by the deprivation of something like food or sleep; (3) whether the conditions attending the request to search were congenial, non-threatening or the opposite; (4) how the defendant responded to the request to search; (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and (6) whether the

police informed the defendant that they could refuse consent. *Phillips*, 218 Wis.2d as 198-203.

In examining these factors, it is clear that Ms. Monn consented to the search of her purse. There is no evidence that any of the deputies that dealt with Ms. Monn used any deception, trickery or misrepresentations in their discussions with Ms. Monn. There were no threats of any kind that were directed to Ms. Monn. The conditions of the deputies overall interaction with Ms. Monn was congenial and non-threatening. Ms. Monn readily responded to the request to search her purse by volunteering that she had a "dope pipe" in her purse. There was no testimony offered by Ms. Monn that would relate to the fifth factor from *Phillips* and there is nothing from the body cam footage that would cause this factor to weigh against consent on the part of Ms. Monn. There is no evidence suggesting Ms. Monn was susceptible to improper influence, duress, intimidation or trickery. *Phillips*, 218 Wis.2d at 202-03.

It is also clear from the body cams that the deputies did not inform Ms. Monn that she could refuse consent. However, as the court noted in *Phillips*, the state is not required to demonstrate that the defendant knew they could refuse consent. *Phillips*, 218 Wis.2d at 203.

The *Phillip*s factors clearly weigh in favor of Ms. Monn's consent to the search of her purse being voluntary. The circuit court's finding of consent was not in error.

Finally, Ms. Monn clearly volunteered that she had a "dope pipe" in her purse even before any search of it took place. The testimony of both deputies

Hodek and Weise was clear on this point. (38:9, 40) This fact alone clearly supported the circuit court's ruling in denying Ms. Monn's motion to suppress as it provided the deputies with probable cause to search her purse notwithstanding her consent.

CONCLUSION

The detention of Ms. Monn as a result of the arrest warrant for her companion was not unreasonable under all of the circumstances. She was detained for approximately 10 minutes and was told that she was going to be free to leave. The deputies' request to verify that she did not have any weapons in her purse before giving it to her was also not unreasonable. Ms. Monn voluntarily consented to the search of her purse and volunteered that she had drug paraphernalia in her purse prior to the search of it. The circuit court correctly denied her motion to suppress and this court should affirm that order.

For the foregoing reasons, the State respectfully requests that this court affirm the trial court's decision regarding the post-conviction motion.

Dated at Barron, Wisconsin, this 16th day of October 2019.

RESPECTFULLY SUBMITTED,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,333 words.

Dated this 16th day of October, 2019.

John M. O'Boyle
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH RULE 809.19

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 this 16th day of October, 2019.

Signed:

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