STATE OF CONNECTICUT *v.* LUIS F. WILLIAMS
(AC 27941)

Bishop, DiPentima and Mihalakos, Js.

Argued May 20—officially released September 16, 2008

(Appeal from Superior Court, judicial district of New Britain, D'Addabbo, J.)

Paul Bialobrzeski, for the appellant (defendant).

Elizabeth S. Tanaka, certified legal intern, with whom were *Bruce R. Lockwood*, assistant state's attorney, and, on the brief, *Scott J. Murphy*, state's attorney, and *Paul N. Rotiroti*, senior assistant state's attorney, for the appellee (state).

Opinion

MIHALAKOS, J. The defendant, Luis F. Williams, appeals from the judgment of conviction, rendered after a jury trial, of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b), possession of a controlled substance with intent to sell within 1500 feet of a school in violation of General Statutes § 21a-278a (b) and criminal possession of a firearm in violation of General Statutes § 53a-217. On appeal, the defendant claims that the trial court improperly failed to grant his motion to suppress. We affirm the judgment of the trial court.

The following facts are relevant to our resolution of the defendant's appeal. On September 3, 2004, police officers from the New Britain and Waterbury police departments, aided by two United States marshals, executed an arrest warrant for the defendant at an efficiency apartment at 636 Riverside Avenue in Waterbury. The officers entered the apartment and found the defendant sitting on the couch in the living room, which was located directly in front of the door, and the defendant's brother, Josue Williams, lying on the floor next to the couch. The defendant was arrested and handcuffed.

Detective Mark Santopietro removed the cushions from the couch where the defendant had been sitting and discovered a pistol. Santopietro immediately notified the other officers of the presence of a firearm. Shortly after Santopietro's discovery, Sergeant Harold Setzer noticed a box of what he believed to be ammunition.[1] Concerned that there might be other individuals in the apartment, Setzer moved to do a protective sweep of the apartment.[2]

Setzer walked six to eight feet from where the defendant was located to a kitchen counter. At the counter, he saw Styrofoam cups filled with numerous bags of a substance he believed to be heroin. He next moved to the bedroom, where he opened a closet door and saw narcotics packaging and a narcotics sifter. Setzer did not seize any of the items he discovered but instead left them in place for the forensic staff. Setzer's entire sweep took less than one minute.

The defendant was charged with possession of a narcotic substance with intent to sell by a person who is not drug-dependent in violation of § 21a-278 (b), possession of a controlled substance with intent to sell within 1500 feet of a school[3] in violation of § 21a-278a (b) and criminal possession of a firearm in violation of § 53a-217. On May 16, 2006, the defendant filed a motion to suppress all tangible evidence recovered from him and the apartment and any resulting statements he made. The court denied the motion in a memorandum of decision filed June 20, 2007.[4] The defendant subsequently was found guilty, after a jury trial, of all charges. The

defendant thereafter appealed, challenging the court's denial of his motion to suppress the drugs found on the kitchen counter.

We first set forth our standard of review. "[O]ur standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the court's [ruling] . . . . Because a trial court's determination of the validity of a . . . search [or seizure] implicates a defendant's constitutional rights . . . we engage in a careful examination of the record to ensure that the court's decision was supported by substantial evidence. . . . However, [w]e [will] give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses." (Citation omitted; internal quotation marks omitted.) *State* v. *Kimble*, 106 Conn. App. 572, 579, 942 A.2d 527, cert. denied, 287 Conn. 912, A.2d (2008).

In the present case, the court determined that the contraband seized from the defendant's kitchen was discovered during a search incident to a lawful arrest. Specifically, the court concluded that the area searched was within the defendant's immediate control incident to his lawful arrest. We agree.

"Ordinarily, police may not conduct a search unless they first obtain a search warrant from a neutral magistrate after establishing probable cause. . . . [A] search conducted without a warrant issued upon probable cause is per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions. . . . One recognized exception to the warrant requirement is where the search has been undertaken incident to a lawful custodial arrest. . . . Under article first, § 7, of the constitution of Connecticut, our Supreme Court has recognized that the police may make a search without a warrant incidental to a lawful custodial arrest." (Internal quotation marks omitted.) *State* v. *Aylward*, 88 Conn. App. 90, 98, 868 A.2d 106 (2005). Accordingly, once the defendant was placed under arrest pursuant to a valid warrant, Setzer properly conducted a search for any weapons or evidence within the immediate control of the defendant. See *Chimel* v. *California*, 395 U.S. 752, 762–63, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

The defendant argues that under the circumstances of this case, the kitchen counter was not within his immediate control because there was little or no probability that he could have launched an attack on the police from his position face down and handcuffed in

the living room.[5] This argument has been rejected under more dubious circumstances. See *State* v. *Fletcher*, 63 Conn. App. 476, 481–82, 777 A.2d 691 (valid search incident to arrest when police handcuffed defendant, then opened closet four feet next to where he was standing, moved pile of clothing to reveal floorboards, removed floorboards themselves and discovered hidden cavity containing contraband), cert. denied, 257 Conn. 902, 776 A.2d 1152 (2001). The defendant's argument seems to suggest that it was impossible for him to reach the kitchen counter from his location in the living room. The record and common sense suggest otherwise.

The defendant's apartment had an open area between the kitchen and the living room. The kitchen counter where Setzer searched was located six to eight feet from where the defendant was sitting. The short distance between the defendant and the kitchen counter, coupled with the contraband's location in a cup on top of the counter, does not allow us to conclude that it would have been impossible for the defendant to have reached items located in the area Setzer searched. Similarly, the fact that the defendant was handcuffed does not foreclose the possibility that he might have been able to reach a weapon located close by. See id., 482. Accordingly, we conclude that the court properly denied the defendant's motion to suppress.

The judgment is affirmed.

In this opinion DiPENTIMA, J., concurred.

[1] It was later discovered that the objects Setzer observed were spent shotgun cartridges.

[2] A "protective sweep" is a "cursory inspection of those spaces where a person may be found." *Maryland* v. *Buie*, 494 U.S. 325, 335, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990).

[3] The apartment where the defendant was arrested was located within 1500 feet of Barnard Grammar School.

[4] The court's thorough memorandum of decision provides a separate analysis for each piece of evidence the defendant's motion sought to suppress. Specifically, the court analyzed the defendant's motion in relation to (1) the firearm found in the couch, (2) the drugs discovered on the kitchen counter, (3) the items found in the closet and (4) his subsequent statement to the police. The defendant on appeal has not challenged the court's ruling as it pertains to the firearm found in the couch, the items seized from the closet or his subsequent statements. Accordingly, we will not review those aspects of the court's ruling.

[5] The defendant also argues that the search was unconstitutional because there is little or no probability that his brother could have launched an attack on the police. This argument, however, is irrelevant to the question of whether the police officers conducted a proper search incident to an arrest but, rather, addresses the question of whether the police officers conducted a proper protective sweep of the defendant's apartment. But see concurring opinion. In response to this argument, the state urges us to adopt the logic of *Commonwealth* v. *Bui*, 419 Mass. 392, 395–96, 645 N.E.2d 689, cert. denied, 516 U.S. 861, 116 S. Ct. 170, 133 L. Ed. 2d 111 (1995), and find that the police may conduct a protective sweep for weapons in addition to unsecured persons when they have a reasonable belief that other people might be present on the premises. In light of our conclusion that Setzer's search of the kitchen counter was constitutionally permissible as a search incident to the defendant's arrest, we see no reason to decide whether a box containing a large amount of several kinds of ammunition provided the necessary reasonable, articulable suspicion that the apartment was harboring a person posing a danger to those on the arrest scene, which is required to conduct a constitutionally permissible protective sweep. See *State* v.

Cortes, 276 Conn. 241, 253, 885 A.2d 153 (2005).