COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP2612-CR **Cir. Ct. No. 2008CF5130**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. GREEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Michael D. Green, *pro se*, appeals from a judgment of conviction entered upon his no-contest plea to possession with intent to deliver more than ten but not more than fifty grams of heroin as a second or subsequent offense. He contends that the circuit court erred by denying his motion to

suppress evidence found when police searched the apartment that he shared with Nicole Sprewell. Because the totality of the circumstances supports the circuit court's conclusion that Sprewell freely and voluntarily consented to the search, we affirm.

I.

¶2 The evidence presented at the suppression hearing underlies Green's claims on appeal. Milwaukee Police Officer Brent Miscichoski testified that a confidential informant passed information to the police in the fall of 2008 that "Gravy," subsequently identified as Green, was selling large amounts of cocaine on the south side of Milwaukee. Miscichoski determined that Green drove a vehicle registered to Sprewell at the address of 3100 West Howard Avenue, Apartment 8, Milwaukee, Wisconsin. Approximately two weeks later, police watched Green leave the apartment building at 3100 West Howard Street and arrested him on the authority of several municipal warrants.

¶3 Miscichoski telephoned Sprewell at her workplace and they spoke at approximately 5:30 p.m. Miscichoski said Green was under arrest and that police wanted Sprewell's consent to search her apartment because police had information that it contained "a large amount of illegal drugs." Sprewell told Miscichoski that she would try to meet him at the apartment but that she was scheduled to work until late in the evening and needed to find a co-worker who could take her place. Sprewell then telephoned a lawyer, Jonathan LaVoy.

¶4 LaVoy testified that he has handled hundreds of drug cases and that he has a "very good" understanding of the law governing police searches and seizures. He arranged to meet with Sprewell at his office. Before she arrived, he called Miscichoski, who confirmed that Green was under arrest. Miscichoski and

LaVoy each testified somewhat differently about the information Miscichoski provided LaVoy regarding the basis for Green's arrest. LaVoy recalled Miscichoski saying that Green was under arrest for a drug offense. Miscichoski testified that he disclosed Green's arrest for municipal warrants. No dispute exists, however, that Miscichoski said that a drug detection dog had sniffed at the Howard Avenue apartment door and signaled the presence of drugs. Miscichoski explained that the police wanted Sprewell's consent to search the apartment, and the conversation included a discussion about the possibility of the police securing a search warrant. Miscichoski told LaVoy: "[i]f I don't get consent, you know, I can go downtown and apply for a search warrant. Would a judge give me one, I don't know, but I believe I had enough."

¶5 When Sprewell arrived at LaVoy's office, LaVoy explained to her that if she did not consent to a search, the police "had the right to attempt to try to get a search warrant," and if they succeeded and found contraband during a search, "she very well could be arrested and prosecuted." During the meeting, LaVoy again called Miscichoski. LaVoy explained that he was not "comfortable" with advising Sprewell to cooperate with law enforcement. Miscichoski assured LaVoy that Sprewell was not a target of the investigation, and Miscichoski offered to put in writing that the police would not seek charges against her.

¶6 LaVoy explained the offer to Sprewell. LaVoy told her that charging decisions ultimately rest with the district attorney, but in his experience prosecutors honor promises made by police "out on the street." LaVoy testified that his focus was to protect Sprewell from criminal prosecution and that the agreement proposed by Miscichoski was "about as good as you can do" short of

securing a letter from the district attorney promising immunity from prosecution.[1] LaVoy advised Sprewell to consent to the search.

¶7 LaVoy accompanied Sprewell to the Howard Avenue apartment, and they arrived at approximately 7:00 p.m. Miscichoski met them there and signed an agreement not to seek charges against Sprewell based on the results of the search. Sprewell consented to a search of her home.

¶8 The circuit court concluded that Sprewell gave her consent to the search freely and voluntarily and denied Green's motion to suppress the narcotics and other evidence seized from the apartment. Green entered a plea bargain with the State and resolved the charges against him with a no-contest plea to a single offense. He now appeals, arguing that Sprewell's consent to search was not valid.[2]

II.

¶9 The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution generally require that law enforcement conduct searches pursuant to a warrant. ***State v. Krajewski***, 2002 WI 97, ¶24, 255 Wis. 2d 98, 112, 648 N.W.2d 385, 390. Consent to search is a well-established exception to that requirement. *See* ***id.***, 2002 WI 97, ¶24, 255 Wis. 2d at 113, 648 N.W.2d at 391. The consent exception is satisfied when consent is given in fact

[1] A Wisconsin district attorney has the power to enter into an agreement with a witness promising not to exercise the discretionary power to prosecute in exchange for cooperation with an investigation. *See* ***State v. Jones***, 217 Wis. 2d 57, 63–64, 576 N.W.2d 580, 583 (Ct. App. 1998).

[2] A circuit court's order denying a motion to suppress evidence may be reviewed on appeal from a judgment of conviction notwithstanding the defendant's no-contest plea. *See* WIS. STAT. § 971.31(10).

and the consent given is voluntary. *See* ***State v. Artic***, 2010 WI 83, ¶30, 327 Wis. 2d 392, 412–413, 786 N.W.2d 430, 440. Green disputes only the second of the two requirements.

¶10 The State has the burden of proving that a subject voluntarily consented to a search. *See* ***id.***, 2010 WI 83, ¶32, 327 Wis. 2d at 413, 786 N.W.2d at 440. Whether the State satisfied its burden is a question of constitutional fact to which we apply a two-step standard of review. ***Id.***, 2010 WI 83, ¶23, 327 Wis. 2d at 410, 786 N.W.2d at 439. We uphold the circuit court's findings of historical fact unless they are clearly erroneous, and we independently apply those historical facts to constitutional principles. ***Ibid.***

¶11 "[V]oluntary consent cannot be summed up in a 'talismanic definition.'" ***Id.***, 2010 WI 83, ¶32, 327 Wis. 2d at 413, 786 N.W.2d at 440 (citation omitted). Rather, voluntariness is determined by the totality of the circumstances. ***Id.***, 2010 WI 83, ¶32, 327 Wis. 2d at 414, 786 N.W.2d at 441. Relevant factors include: (1) whether the police used deception, trickery, or misrepresentation to obtain consent; (2) whether the police used threats, physical intimidation, punishment, or deprivation to obtain consent; (3) whether the conditions surrounding the request for consent were congenial, non-threatening, and cooperative, or the opposite; (4) the response to the request to search; (5) the characteristics of the person asked to give consent; and (6) whether the police stated that consent could be withheld.[3] *See* ***id.***, 2010 WI 83, ¶33, 327 Wis. 2d at

[3] The supreme court has discussed factors relevant to determining the voluntariness of consent to search in the context of a challenge to the validity of a defendant's consent. *See, e.g.*, ***State v. Artic***, 2010 WI 83, ¶33, 327 Wis. 2d 392, 414, 786 N.W.2d 430, 441. Neither party suggests that the factors discussed in ***Artic*** are not relevant when, as here, the person who consented to the search is not the defendant in a subsequent criminal prosecution.

414, 786 N.W.2d at 441. These factors are not exclusive. ***Ibid.*** Rather, we determine after examining all of the surrounding circumstances whether the consent was '"an essentially free and unconstrained choice.'" ***Id.***, 2010 WI 83, ¶32, 327 Wis. 2d at 413, 786 N.W.2d at 440 (citation omitted).

¶12 Green argues that the police deceived and threatened Sprewell to obtain her consent to search.[4] His contentions implicate the first and second ***Artic*** factors. We reject his argument. The totality of the circumstances demonstrates that she gave her consent freely and voluntarily.

¶13 Most significant here is that Sprewell consulted with LaVoy before she consented to the search of her apartment. The opportunity to consult with a lawyer, while not necessarily determinative, is critically important in assessing whether a subject voluntarily consented to a search. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.2(k), at 122 (4th ed. 2004) ("[A] consent is much more likely than otherwise to be upheld as voluntary if it was given following consultation with counsel."); *see also* ***State v. Graf***, 721 N.W.2d 381, 386–387 (N.D. 2006) (collecting cases). Sprewell's opportunity to discuss her options with a lawyer knowledgeable about the law of search and seizure provides substantial assurance that her ultimate decision was knowingly, intelligently, and voluntarily made.

[4] Neither party suggests that Green may not challenge the voluntariness of Sprewell's consent. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.3, at 39 (4th ed. 2004) (2011-12 supplement) (observing that when a third party's voluntary consent would be effective against the defendant, the defendant "of course may also question whether that consent was voluntary").

¶14 Although Sprewell had her lawyer's expert assistance in understanding the unfolding situation, Green nonetheless argues that Miscichoski deceived her by offering a signed agreement not to seek charges against her because district attorneys, not police officers, decide whether to issue criminal charges. *See* ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶27, 271 Wis. 2d 633, 653, 681 N.W.2d 110, 119. LaVoy, however, fully advised Sprewell about the limits of the agreement. Thus, Green's argument lacks merit.

¶15 Moreover, as the State points out, Miscichoski abided by the agreement with Sprewell and did not seek charges against her. In comparable circumstances involving a challenge to the voluntariness of a confession, the supreme court opined that "[a]lthough a promise was made to the defendant, it was fulfilled. Therefore, it was not part of an impermissible, coercive police tactic which could have rendered the confession involuntary." ***State v. Owens***, 148 Wis. 2d 922, 931, 436 N.W.2d 869, 873 (1989). Similarly, the agreement in this case does not undermine the voluntariness of Sprewell's consent.

¶16 Green argues at some length that Sprewell's consent to search was involuntary because, he contends, Miscichoski threatened to obtain a search warrant. Such a threat can undermine the voluntariness of consent when there are no grounds for a warrant. *See* ***State v. Trecroci***, 2001 WI App 126, ¶54, 246 Wis. 2d 261, 289, 630 N.W.2d 555, 569. Green's reliance on this principle is misplaced, however, because the circuit court did not find that Miscichoski threatened to obtain a warrant.

¶17 The circuit court found that the discussion about a search warrant involved "state[ments] that [police] could and possibly will seek a search warrant if in fact [Sprewell] does not consent." An officer's statement of intent to seek a

warrant is not the same as a statement that the officer will obtain a warrant. The latter statement might, in some circumstances, suggest that the subject cannot protect his or her privacy by refusing to consent to a search. *See* 4 LAFAVE, *supra*, § 8.2(c), at 73. A police officer's statement of intent to apply for a warrant, however, accurately reflects the "legal position of the person from whom the consent is sought." *See* ***id.***, § 8.2(c), at 70. Here, the facts found by the circuit court reflect that Miscichoski merely discussed the possibility of applying for a search warrant in the event that Sprewell refused to allow a search. Such discussion does not run afoul of ***Trecroci***.

¶18 Green, however, believes that any discussion about a warrant in this case was improper because, he alleges, the police lacked probable cause to secure one. His argument rests on a false premise. The State need not, as Green assumes, demonstrate probable cause for a warrant to validate a consensual search. *See* ***State v. Hartwig***, 2007 WI App 160, ¶6, 302 Wis. 2d 678, 683, 735 N.W.2d 597, 599. Indeed, even in circumstances—unlike those here—where an officer couples a request to search with a threat to obtain a search warrant, the existence of probable cause need only be arguable and the officer need only express a genuine intention to get a warrant. *See* ***State v. Kiekhefer***, 212 Wis. 2d 460, 473, 569 N.W.2d 316, 324 (Ct. App. 1997).

¶19 In this case, the circuit court did not find that the police made an express threat to obtain a search warrant. Consequently, we need not and will not consider Green's various arguments that the information available to Miscichoski was insufficient to support probable cause for a warrant because, *inter alia*, the

information allegedly was unreliable or rested on "hearsay."[5] *See* ***State v. Zien***, 2008 WI App 153, ¶3, 314 Wis. 2d 340, 344, 761 N.W.2d 15, 17 (we decide cases on the narrowest possible ground). We similarly decline to address Green's arguments that Miscichoski did not express a "genuine" intention either to obtain or to seek a warrant. The contention that Miscichoski was insincere about his intention to obtain a warrant is not tethered to the facts of this case. As to the suggestion that Miscichoski was insincere when he said he "could and possibly will" seek a warrant, Green offers no citation to any controlling authority holding that a police officer must make a firm commitment to applying for a search warrant before explaining to a subject that officers "could and possibly will" initiate the warrant application process. We do not consider arguments unsupported by legal authority. ***Kruczek v. Wisconsin Department of Workforce Development***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 582, 692 N.W.2d 286, 296.

¶20 We turn to Green's contention that Miscichoski misled Sprewell and LaVoy by saying that a drug detection dog signaled the presence of contraband in the Howard Avenue apartment. This argument rests on a mistake of law. Green appears to believe that Miscichoski could not rely on the results of the dog sniff because Miscichoski learned about those results from another officer. The rule is long settled, however, that a police officer may rely on information received through police channels. *See* ***Desjarlais v. State***, 73 Wis. 2d 480, 491, 243 N.W.2d 453, 459 (1976); *see also* ***State v. McAttee***, 2001 WI App 262, ¶11, 248 Wis. 2d 865, 873, 637 N.W.2d 774, 779 ("arresting officer may rely on collective knowledge of police force conveyed to the officer prior to arrest").

[5] We note that probable cause for a search warrant may be based on hearsay. *See* ***State v. Schaefer***, 2003 WI App 164, ¶4, 266 Wis. 2d 719, 731, 668 N.W.2d 760, 765–766.

¶21 Also meritless is Green's contention that Miscichoski deceived Sprewell and LaVoy with the statement that police had information about "a large amount of illegal drugs in [the] apartment." As the State aptly argues, this statement is plainly derived from the confidential informant's tip that Green "was selling large amounts of cocaine on the south side of Milwaukee." Moreover, the drug detection dog's alert further supported the statement. Green's real complaint appears to be that the quality of the information was insufficient to support a search warrant. We have already explained, however, that this is not a relevant consideration here. *See* ***Hartwig***, 2007 WI App 160, ¶6, 302 Wis. 2d at 683, 735 N.W.2d at 599.

¶22 We next consider Green's contention that Miscichoski misled LaVoy about the basis for Green's arrest. Green acknowledges that the circuit court did not make an explicit finding as to whether Miscichoski accurately recalled saying that Green was arrested on open warrants or whether LaVoy more accurately recalled the officer saying that Green was arrested on drug charges. Green contends, however, that this court should credit LaVoy's testimony. Instead, we abide by the rule that "if a circuit court fails to make a finding that exists in the [R]ecord, an appellate court can assume that the circuit court determined the fact in a manner that supports the circuit court's ultimate decision." *See* ***State v. Martwick***, 2000 WI 5, ¶31, 231 Wis. 2d 801, 817, 604 N.W.2d 552, 559. Thus, we assume that the circuit court believed Miscichoski and concluded that he was truthful when discussing Green's arrest with LaVoy.

¶23 In sum, Green fails to show that either threats or deception influenced Sprewell's decision to permit a search, and the first two ***Artic*** factors therefore weigh against his contention that the consent was invalid. We turn to the remaining factors, which require only a brief review.

¶24 The third and fourth ***Artic*** factors are the conditions surrounding the request to search and the subject's response to the request. *See* ***Artic***, 2010 WI 83, ¶33, 56, 327 Wis. 2d at 414, 786 N.W.2d at 441. Here, Miscichoski did not accompany the request with a show of force, but instead made the request by telephone. *Cf.* ***id.***, 2010 WI 83, ¶46, 327 Wis. 2d at 419, 786 N.W.2d at 443. His approach allowed Sprewell ample time and opportunity to seek advice from any adviser of her choosing. She consulted a lawyer who accompanied her to her home and remained with her until she made her final decision.[6] These factors weigh in favor of voluntariness.

¶25 The fifth factor turns on Sprewell's characteristics. *See* ***id.***, 2010 WI 83, ¶33, 56, 327 Wis. 2d at 414, 786 N.W.2d at 441. The testimony reflected that Sprewell was independent, employed, and wise enough to contact a lawyer promptly in response to an officer's request to search her home. Nothing suggests that she was "particularly susceptible to improper influence, duress, intimidation, or trickery." This factor weighs in favor of voluntariness.

¶26 The final ***Artic*** factor is whether the police told Sprewell that she could refuse to consent. *See* ***ibid.*** This factor, however, is not significant here. The circuit court found that Sprewell conferred with LaVoy about whether or not she would consent and that she understood the consequences of the decision.

[6] In his brief-in-chief, Green argues that the police seized Sprewell's apartment while she was at work and would not have allowed her to enter her home absent consent to search. Green did not argue to the circuit court that Sprewell's consent was involuntary because police unlawfully seized her apartment. We do not address arguments raised for the first time on appeal. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 204, 776 N.W.2d 838, 845. In his reply brief, Green asserts that his arguments in the circuit court raised the issue by implication. "A litigant must raise an issue with sufficient prominence such that the [circuit] court understands that it is being called upon to make a ruling." ***Bishop v. City of Burlington***, 2001 WI App 154, ¶8, 246 Wis. 2d 879, 889, 631 N.W.2d 656, 660.

Because Sprewell understood that she had the right to withhold consent, the extent to which the police advised her of that right carries little weight in assessing the voluntariness of her consent. ***Id.***, 2010 WI 83, ¶61, 327 Wis. 2d at 425, 768 N.W.2d at 446.

¶27 The totality of the circumstances supports the circuit court's conclusion that Sprewell freely and voluntarily consented to the search of her apartment. We affirm.

By the Court.—Judgment affirmed.

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