COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2052-CR **Cir. Ct. No. 2010CF5450**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD J. WARRIOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Edward J. Warrior appeals a judgment of conviction entered upon his guilty pleas to two counts of armed robbery. He contends that the circuit court should have suppressed the evidence that police officers found when they entered his home because, he claims, police coerced his

family's consent to the entry by making false statements. We conclude that Warrior forfeited his claim by failing to raise it in the circuit court. We affirm.

¶2 A litigant who fails to raise a claim in circuit court forfeits the right to raise the issue on appeal.[1] *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501, 505 (1997). The party seeking to raise a claim on appeal has the burden to show that the claim was raised first in circuit court. ***Ibid.*** We therefore must determine whether Warrior has carried his burden here. Our inquiry requires us to review the proceedings and legal principles that underlie the challenge Warrior hopes to pursue.

¶3 Warrior moved to suppress evidence after the State charged him with two counts of armed robbery. In support of his motion, he alleged that the police found the evidence after entering his home without consent.

¶4 Law enforcement entry into a home is a search within the meaning of the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. *See* ***State v. Boggess***, 115 Wis. 2d 443, 449, 340 N.W.2d 516, 521 (1983). Although the Federal and the Wisconsin Constitutions generally require that law enforcement conduct searches pursuant to a warrant, one exception to the warrant requirement is a search conducted with

[1] The supreme court used the word "waived" to describe the effect of a litigant's failure to raise an issue in circuit court in ***State v. Caban***, 210 Wis. 2d 597, 604, 608, 563 N.W.2d 501, 505, 506 (1997). We instead use the term "forfeited," in light of the decision in ***State v. Ndina***, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612. The ***Ndina*** court explained that, while courts sometimes use "forfeiture" and "waiver" interchangeably, the terms represent distinct concepts. ***Id.***, 2009 WI 21, ¶29, 315 Wis. 2d at 670, 761 N.W.2d at 620. When the right to make an objection or to assert a claim on appeal is lost because a party failed to raise the issue in the circuit court, the proper term is "forfeiture." *See* ***id.***, 2009 WI 21, ¶¶29–31, 315 Wis. 2d at 670–671, 761 N.W.2d at 620.

consent. *See* ***State v. Krajewski***, 2002 WI 97, ¶24, 255 Wis. 2d 98, 112–113, 648 N.W.2d 385, 390–391.

¶5 At the suppression hearing in this case, Milwaukee Police Officer Eric Draeger testified for the State that he and a fellow officer knocked on the door of Warrior's home after a confidential informant reported that "a person [and] property related to a robbery would be located in that residence." Warrior's mother, Sheila Watson, opened the door. According to Draeger, he made false statements to Watson that the police were investigating a complaint of shots fired in the home, and he asked Watson for permission to enter the home to talk. Draeger testified that Watson "said 'yes,' and opened the door more fully so [the officers] could come in." After entering the home, the police found evidence linking Warrior to a robbery.

¶6 Warrior presented witnesses who testified that his mother and brother stood in the doorway of the family's home and refused to permit the officers to come inside. Warrior's witnesses said that the officers did not accept the refusal and instead walked into the home.

¶7 Warrior argued that his witnesses were credible and that no one in his household gave the officers consent to enter his home. The circuit court, however, believed Draeger. It denied the suppression motion upon a finding that the police entered Warrior's home with consent.

¶8 Whether an individual consented in fact to the police entering a home is a question of historical fact. ***State v. Artic***, 2010 WI 83, ¶30, 327 Wis. 2d 392, 413, 786 N.W.2d 430, 440. We will not disturb the circuit court's finding of consent in fact unless the finding is contrary to the great weight and clear preponderance of the evidence. ***Ibid.*** Moreover, the circuit court is the sole judge

of the credibility of the witnesses testifying at a suppression hearing. ***State v. Harrell***, 2010 WI App 132, ¶8, 329 Wis. 2d 480, 489, 791 N.W.2d 677, 682.

¶9 On appeal, Warrior does not challenge either the circuit court's credibility determinations or the circuit court's finding that police entered his home with Watson's permission. Instead, Warrior points to the evidence that Draeger lied to Watson about the reason police sought entry into the home. Relying on that evidence, Warrior contends that any consent Watson gave was involuntary because "it was given through the use of coercion, trickery, and deceit."

¶10 The State responds to Warrior's appellate arguments by asserting that Warrior challenges the voluntariness of Watson's consent for the first time on appeal. Warrior disagrees, asserting that voluntariness is a component of the analysis whenever the State offers consent as the justification for a warrantless search. *See* ***Artic***, 2010 WI 83, ¶30, 327 Wis. 2d at 412–413, 786 N.W.2d at 440 (reflecting that the consent exception to the warrant requirement involves two components: first, whether police received consent in fact, and second, whether the consent was given voluntarily). We agree with the State.

¶11 "Wisconsin law requires movants to 'state with particularity the grounds for the motion.'" ***Caban***, 210 Wis. 2d at 605, 563 N.W.2d at 505 (citation and brackets omitted). The rule includes no exception for Fourth Amendment challenges. ***Id.***, 210 Wis. 2d at 606, 563 N.W.2d at 505. The particularity requirement ensures that the opposing party and the circuit court have notice of the specific issue that the movant intends to challenge. ***Id.***, 210 Wis. 2d at 605, 563 N.W.2d at 505.

¶12 We determine whether a movant raised an issue by examining both the written motion and the courtroom proceedings. ***Id.***, 210 Wis. 2d at 606, 563 N.W.2d at 505. In this case, Warrior's suppression motion did not include an allegation that police entered Warrior's home pursuant to an involuntary consent. Rather, Warrior alleged only that "the evidence to be elicited at the evidentiary hearing will establish that Watson did not give law enforcement permission to enter her home." Warrior also failed to make an argument during the suppression hearing that police entered his home pursuant to a consent given involuntarily.

¶13 Warrior, however, directs our attention to a comment made by the State. During its argument to the circuit court, the State remarked that "the issue with consent is whether it's voluntary, meaning free from coercion." We do not agree that this comment by the State demonstrates that Warrior raised and argued the claim that consent was involuntary. Indeed, the totality of the arguments offered by the State reflect its understanding that Warrior challenged only the police officer's version of the historical facts, specifically, that the police received permission to enter his home. The State argued: "the issue would be whether [Warrior's family members] in fact consented at all or whether the police simply pushed past them when they were telling [the police] not to come in. And I guess to answer that question, the court looks at the credibility of the witnesses."

¶14 We add that the prosecutor did not try to handcuff Warrior to the State's characterization of the issues, but said: "the defense can correct me if I'm wrong. Their – [t]heir complaint is about the initial entry. And I guess that's the credibility issue."

¶15 Warrior offered no correction. To the contrary, he argued: "to an extent I agree. I think the issues are clear. The issue is whether there was consent to enter." Warrior went on:

> there was this conversation about why the cops were there. And there was suspicion about why they were there. And [the citizens] did not give [the police] consent to enter. And that it was the officers that took it upon themselves to enter the home without consent. And that's the challenge here.

¶16 Warrior's contention that he preserved the question of voluntariness for appellate review is further undermined by the circuit court's discussion of the parties' arguments. The circuit court described the State's position that police officers are permitted to misrepresent the reason that they seek permission to enter a home, and the circuit court noted that Warrior did not challenge that position:

> [t]here's no argument that [the officers] could, under the case cited by the State, they could come up with that story [that] there was a shooting in the area and they wanted to talk to [Warrior's family members] to see if anything -- if it came from the house. And that's not being argued by the defense.

Warrior did not respond by suggesting that the circuit court misunderstood the basis for his motion or had overlooked any of his arguments.

¶17 A defendant must raise an issue with enough prominence to ensure that the circuit court understands it is asked to make a ruling. *See* ***Bishop v. City of Burlington***, 2001 WI App 154, ¶8, 246 Wis. 2d 879, 889, 631 N.W.2d 656, 660. The Record here shows that Warrior did not demonstrate to the circuit court that he sought a ruling on a claim that police entered his home pursuant to an involuntary consent. He therefore forfeited the claim on appeal. *See* ***id.***, 2001 WI App 154, ¶9, 246 Wis. 2d at 889, 631 N.W.2d at 660.

¶18 The rule that issues are forfeited if not raised in the circuit court serves principles of fairness and policies of judicial administration. *See* ***Schill v. Wisconsin Rapids School District***, 2010 WI 86, ¶45, 327 Wis. 2d 572, 597–598, 786 N.W.2d 177, 190–191. The rule does not deprive an appellate court of power to consider, in the exercise of judicial discretion, a forfeited issue in a proper case. ***Caban***, 210 Wis. 2d at 609, 563 N.W.2d at 506–507. Nonetheless, we usually do not make an exception to the forfeiture rule unless the issue presented is one of law and involves no questions of fact. *See* ***State v. Bodoh***, 226 Wis. 2d 718, 737, 595 N.W.2d 330, 339 (1999). Such is not the case here.

¶19 "The determination of 'voluntariness' is a mixed question of fact and law based upon an evaluation of 'the totality of all the surrounding circumstances.'" ***Artic***, 2010 WI 83, ¶32, 327 Wis. 2d at 414, 786 N.W.2d at 440–441 (citation omitted). Resolution of the question involves examining multiple factors surrounding the consent and assessing the characteristics of the person who consented; no single factor controls. ***Id.***, 2010 WI 83, ¶33, 327 Wis. 2d at 414, 786 N.W.2d at 441. We therefore conclude that the issue Warrior presents is particularly inappropriate for our consideration now. Fairness and sensible judicial policy militate against addressing the merits of a fact-intensive question that Warrior did not pursue in circuit court and that the State might have developed in detail had it received proper notice that the issue was in dispute. Accordingly, we follow our normal practice and decline to consider a forfeited claim for the first time on appeal.

By the Court.—Judgment affirmed.

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