COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2231-CR **Cir. Ct. No. 2013CF2790**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM JOSEPH BRESKA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Adam Joseph Breska appeals from a judgment of conviction, entered upon his guilty plea, on one count of possession with intent to deliver less than 200 grams of tetrahydrocannabinols (THC). Breska contends that a warrantless search of the basement in which he was staying was unlawful, so the

circuit court erred in denying his motion to suppress physical evidence and incriminating statements he made to police. We affirm.

BACKGROUND

¶2 On June 13, 2013, Breska's eighty-two-year-old grandmother, G.B., walked into the Wauwatosa Police Department to report that Breska had beaten her up in her own home. Officer Michael McDermott met G.B. in the lobby and processed the complaint paperwork. McDermott informed G.B. he would be going over to her house to arrest Breska. G.B. told McDermott she believed Breska was likely in the basement where he sometimes slept; she also noted that she used the basement for laundry and sewing and that her daughter, Breska's mother, used the basement as well. McDermott asked if he could search the residence; according to him, G.B. responded, "[Y]es. Go ahead."

¶3 McDermott and several other officers drove to the house, about four blocks from the police station, taking G.B. with them. One of the officers, Bradley Isaacson, was familiar with Breska from prior drug investigations. At the house, officers began knocking on the doors and windows and ringing the doorbell, trying to get Breska to come out. McDermott estimated this continued for about five minutes before G.B. gave them a key.

¶4 McDermott opened a door that led directly to the basement stairs. Police announced themselves again. After about thirty seconds, Breska came up the stairs. At the top, he stopped briefly and turned around, but the officers grabbed him and pulled him up to the landing, placing him under arrest for battery.[1] McDermott transported Breska to the police station where, after

[1] Breska does not contend that police lacked probable cause for this arrest.

receiving ***Miranda***[2] warnings, Breska gave a statement explaining that he hit G.B. because he was annoyed by her cleaning the kitchen table.

¶5 Prior to Breska's arrest, Isaacson had separately asked G.B. for consent to search the house. After Breska was in custody, Isaacson and other officers entered to do a protective sweep of the home to secure it for G.B. to re-enter—though she expected Breska to be the only one in the house, she said she could not be certain he was.[3] While sweeping the basement, Isaacson saw in plain view "a green leafy substance and some orange pills" and "bags with the corners missing" on a night stand and sixty dollars on the floor.

¶6 Isaacson went outside to talk to G.B., explaining what he saw in the basement. He asked her permission to get it out of the house, and she agreed that she wanted it out. A subsequent search of the basement yielded more than $400 in currency, about 180 grams of marijuana, various packaging materials, and a B.B. gun. Isaacson requested a K-9 unit from the Milwaukee Police Department, but G.B. told officers she did not want another dog in the house out of concern for her smaller dog's safety, so the drug dog was not sent in. After being debriefed about what police found in the basement, G.B. told Isaacson that Breska had been staying with friends in West Allis and that most of his clothes were at a different friend's house.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[3] Breska takes issue with the protective sweep, asserting that "[a] protective sweep of a residence in conjunction with an arrest is permissible if police reasonably believe that the area harbors an individual posing a danger to officers or other." However, he does not show that this argument was raised in the circuit court and, in any event, the protective sweep came after McDermott and Isaacson both obtained consent to enter and search the house.

¶7 When he returned to the police station, Isaacson interviewed Breska. After receiving his ***Miranda*** warnings again, Breska talked about his drug use and sales. He also consented to a search of his cell phone, which yielded further evidence "indicative of narcotic distribution." Breska was formally charged with aggravated battery against a vulnerable victim as an act of domestic violence and possession with intent to deliver 200 grams or less of THC.

¶8 Breska moved to suppress all physical evidence recovered from G.B.'s basement and all derivative evidence, including his statements to police, because there had been no search warrant. Breska also alleged that G.B.'s consent had been "manipulated" by police. After a suppression hearing, the circuit court denied the motion.[4] The State dismissed the battery charge when G.B. could not be located to be served with a subpoena for trial, and Breska entered a guilty plea on the possession charge.

[4] The State has asked us to remand this matter, contending that the circuit court ruled only on the suppression of Breska's statement to McDermott about the assault, not on the statement to Isaacson about drugs. The circuit court commented expressly on the assault statement to address the State's alternate argument that the statement was admissible even if the search was ruled illegal. The circuit court noted that Breska gave that statement while the search of G.B.'s residence was still occurring, so the statement was not derivative and would be admissible, regardless of the search's legality. However, the circuit court then expressly stated that it "denies the defendant's motion *in its entirety*." (Emphasis added.) This encompasses the portion of Breska's motion seeking to suppress the drug statement.

Alternatively, the drug-statement portion of the suppression motion was denied *sub silentio*. The sole basis Breska offered for suppressing the drug statement was the allegedly unlawful search. Once the circuit court deemed the search lawful, no basis for suppression remained. We therefore decline the invitation to remand because it is unnecessary.

¶9 Breska now appeals. As he sees it, "[t]he central issue of the case is whether or not consent was offered to search and was the consent sufficient to support the nature and extent of the search conducted."[5]

DISCUSSION

¶10 We use a two-step analysis in reviewing a motion to suppress. *See* ***State v. Dubose***, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582. We review the circuit court's factual findings and uphold them unless clearly erroneous. *See* ***State v. Smiter***, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920. We then review the application of constitutional principles to those facts. *See* ***id.***

¶11 The Fourth Amendment protects citizens from unreasonable searches. *See* ***id.***, ¶10. Warrantless searches are *per se* unreasonable, subject to a few limited exceptions. *See* ***State v. Kieffer***, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998). "One well-established exception to the warrant requirement is a search conducted pursuant to consent." ***State v. Artic***, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430. The State must show, by clear and convincing evidence, that it in fact obtained such consent. *See* ***State v. Sobczak***, 2013 WI 52, ¶11, 347 Wis. 2d 724, 833 N.W.2d 59.

¶12 To determine whether the consent exception was satisfied, we review whether consent was given in fact and then whether that consent was voluntary. *See* ***Artic***, 327 Wis. 2d 392, ¶30. The question of whether consent was

[5] Elsewhere in his brief, Breska contends that this "was perhaps by argument a search incident to arrest." There is no indication, however, that Breska made this argument in the circuit court, or that the parties in the circuit court considered the question to be anything other than one of whether G.B.'s consent was a valid exception to the warrant requirement.

given is a question of historical fact that we uphold so long as it is not contrary to the great weight and the clear preponderance of the evidence. *See* ***id.*** Whether consent was voluntary is a mixed question of fact and law. *See* ***id.***, ¶32.

¶13 The circuit court properly applied the consent requirements to its analysis. While G.B. testified that she gave consent only once, for officers to simply "look around," the circuit court found the officers' testimony, that G.B. consented to a search at least three times, to be more credible. It therefore found that G.B. "consented to the search of her basement."[6] This ruling is not contrary to the great weight and clear preponderance of the evidence. *See* ***id.***, ¶30.

¶14 In considering whether consent was voluntarily given, there are several non-exclusive factors for the courts to consider. *See* ***id.***, ¶33; *see also* ***State v. Phillips***, 218 Wis. 2d 180, 198-203, 577 N.W.2d 794 (1998). These factors include: (1) whether the police used deception, trickery, or misrepresentation to obtain consent; (2) whether the police made threats or physically intimidated the person; (3) the conditions attending the request for consent, *i.e.*, whether they were congenial and non-threatening or the opposite; (4) the response to the search request; (5) characteristics of the person granting consent, like age, intelligence, emotional condition, and prior experience with police; and (6) whether the police advised that consent could be refused.[7] *See* ***Artic***, 327 Wis. 2d 392, ¶33.

[6] The circuit court therefore necessarily rejected any assertion by Breska that G.B.'s consent was for the limited purpose of finding and arresting him.

[7] Breska contends without elaboration that we should also consider the fact that no consent form was offered for G.B. to sign. Consent need not be written to be voluntary, *see* ***State v. Artic***, 2010 WI 83, ¶57, 327 Wis. 2d 392, 786 N.W.2d 430, and consent forms are not a legal requirement, *see* ***State v. Vorburger***, 2002 WI 105, ¶97, 255 Wis. 2d 537, 648 N.W.2d 829.

¶15 The circuit court addressed each of the ***Artic*** factors to determine whether G.B.'s consent was voluntary. It stated that "[t]here is no evidence to suggest the officers made any misrepresentations or deceived" G.B. to obtain consent, nor was there evidence of any physical intimidation. It noted that there was nothing to suggest the conditions were "threatening or anything but congenial." It further noted that G.B. "affirmatively gave officers permission to search her basement in direct response to the questions on multiple occasions."

¶16 On the fifth factor, characteristics of the person, the circuit court made extensive observations. It noted that G.B. had "multiple prior encounters" with police regarding Breska. She was eighty-two years old, but did not appear to have hearing or comprehension issues. There was nothing to suggest G.B. "was particularly emotionally or physically susceptible to police manipulation" and, in fact, "it was clear that she was not someone that was going to be pushed around by anyone[.]" The circuit court further observed that G.B. had sought police assistance on her own, told police "not to use too much force" when arresting Breska, and told them she did not want the drug dog to enter her house. Thus, the circuit court rejected any suggestion that "when asked to search her house [G.B.] was suddenly so overwhelmed that she had no choice but to relent."

¶17 On the final factor, the circuit court noted that G.B. was not informed that she could refuse consent, which weighs against a finding of voluntariness. However, such a warning is not required and, practically speaking, G.B. evidently knew she had some right to say no to the police, given that she had excluded the drug dog from her home. Based on its observations, the circuit court concluded that, "based on the totality of the circumstances, the consent given by [G.B] was voluntary."

¶18 We note that Breska does not contend that he expressly objected to the search at the scene. *Cf.* ***Georgia v. Randolph***, 547 U.S. 103, 106 (2006) (where one co-occupant consents to a search but another "physically present" co-occupant objects, warrantless search as to objector is invalid). However, in an undeveloped argument citing ***State v. Guard***, 2012 WI App 8, 338 Wis. 2d 385, 808 N.W.2d 718, Breska appears to assert he has an overriding privacy interest in the basement space.

¶19 Aside from the fact that the circuit court explained that Breska did not have exclusive use of the basement, a privacy interest is merely the threshold concern, as the warrant requirement does not apply if the defendant has no reasonable expectation of privacy. *See* ***id.***, ¶16. The privacy interest in ***Guard*** mattered to establish that a warrantless entry into the common hallway of a duplex, which provided the only access to the upper unit, was a Fourth Amendment violation, *see* ***id.***, and that the women who purportedly gave consent for the entry lacked the authority to do so, *see* ***id.***, ¶¶2, 26-27. Breska does not challenge his grandmother's authority to give consent to the police to search her home.

¶20 Ultimately, given our deference to the circuit court's factual findings—Breska does not show that any of them are contrary to the great weight and clear preponderance of the evidence—we agree with its legal conclusions that G.B. consented to the search of her home, including her basement, and that consent was voluntarily given, so the consent exception to the warrant requirement

was satisfied. As the search was lawful, there was no basis on which to grant suppression, so the motion was properly denied.[8]

By the Court.—Judgment affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

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[8] We find it necessary to comment on the brief submitted on Breska's behalf by Attorney Scott D. Connors.

The brief indicates it is an appeal from the circuit court's order denying suppression. The circuit court never entered any order; it made only an oral ruling and, in any event, such a ruling is non-final. An order must be in writing and final to be appealable. *See* WIS. STAT. § 808.03(1) (2013-14) (finality) (all references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted); ***Ramsthal Advert. Agency v. Energy Miser, Inc.***, 90 Wis. 2d 74, 75, 279 N.W.2d 491 (Ct. App. 1979) ("in writing" requirement). We review the suppression ruling because the appeal from the final, written judgment of conviction brings before this court all prior non-final rulings of the circuit court. *See* WIS. STAT. RULE 809.10(4).

The brief is wholly devoid of record citations, contrary to WIS. STAT. RULE 809.19(1)(e). Several assertions fail to include citation to legal authority and, when the brief does cite to authority, it frequently omits pinpoint citations. *See* ***id.***; *see also* SCR 80.02(3)(a)-(b). The State additionally notes that the table of authorities has not been alphabetized, contrary to RULE 809.19(1)(a).

The appendix is inadequate and, as a result, the certification thereof is false. When counsel signs the appendix certification required by WIS. STAT. RULE 809.19(2)(b), he is certifying that the appendix "contains, at a minimum … the findings or opinion of the circuit court … [and] portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues." *See* ***id.***; *see also* RULE 809.19(2)(a). However, the appendix includes only a copy of the judgment of conviction, which has absolutely zero bearing on the search and suppression issues raised in this appeal. Minimally, the appendix should have included portions of the transcript wherein the circuit court announced its ruling and its reasoning therefor.

We remind counsel that we do not search the record for facts to support a party's contentions, *see* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463, nor need we consider arguments unsupported by legal authority, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Further, violations of the rules of appellate procedure may result in sanctions, including rejection of the brief, dismissal of the appeal, or monetary or other sanctions against counsel personally. *See* WIS. STAT. RULE 809.83(2). We note, however, that we are satisfied that the circuit court ruled properly on the question before it; a compliant brief would not have altered our holding.