

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP571-CR

Cir. Ct. No. 2007CT1813

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DUSTIN T. NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
DAVID T. FLANAGAN III, Judge. *Affirmed.*

¶1 BRIDGE, J.¹ Dustin T. Nelson appeals a judgment convicting him of operating a motor vehicle under the influence, second offense. He challenges the circuit court's denial of his motion to suppress all evidence obtained during the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

warrantless search of his residence. He contends that officers did not have authority to search his residence under the Fourth Amendment because consent was not given for the search or, in the alternative, that if consent was given, it was not voluntary. We disagree and affirm the judgment.

BACKGROUND

¶2 The relevant facts are from the suppression hearing. At approximately 12:35 a.m. on the day in question, Nelson was involved in hit-and-run collision with a parked vehicle in the Village of Deerfield. A witness identified Nelson to Officer Robby Vick of the Dane County Sheriff's Department as the owner of the vehicle that caused the collision. Vick and another officer went to Nelson's residence to investigate the crash and to determine if there were any injuries associated with the accident. After observing damage to Nelson's vehicle, the officers went to the door, which was answered by Kari Reddy, Nelson's girlfriend. Vick testified that it appeared that Reddy had just woken up. Vick and Reddy offered differing views as to what subsequently transpired.

¶3 Vick testified that he told Reddy that he needed to speak with Nelson, that Reddy stated she did not want the officers to enter the residence and that she was going to try to wake Nelson. Vick and the other officer waited outside the door, but were able to observe Reddy trying to wake Nelson, who was asleep on a couch. Reddy returned to the door and advised the officers that she was unable to wake him. The officers asked Reddy several other times if they could enter the residence to wake Nelson, but she declined.² Vick explained they

² Vick could not remember specifically how many times they asked to enter the residence.

were investigating a crash in which Nelson was involved. Reddy did not appear to believe them, so the officers showed Nelson's damaged vehicle to Reddy. Vick again asked if they could enter the residence to check on Nelson, but Reddy refused. After Reddy unsuccessfully attempted to wake Nelson again, Reddy consented to the officers entering the house. Vick testified that this entire sequence lasted approximately three minutes.

¶4 Reddy testified that she was awoken by the officers at the door. The officers indicated that they were looking for Nelson and she advised them that she would see if he was home. The officers asked several times if they could enter the residence, but she told them "[n]o, I don't want you in the house." Reddy attempted to wake Nelson, but was unable to. The officers asked her approximately four additional times to try to wake Nelson, which Reddy attempted to do. The officers took Reddy out to look at Nelson's vehicle, but would not tell her what had happened. Reddy went inside the residence to try to wake Nelson again, and again declined the officers' request to enter the residence. When Reddy again attempted to wake Nelson, the officers entered the house without her permission. Reddy testified that this entire sequence lasted between thirty and forty-five minutes. On cross-examination, Reddy acknowledged that she did not want Nelson to be convicted or go to jail.

¶5 Nelson moved to suppress all evidence obtained when the officers entered his residence and the fruits of such evidence, arguing the officers did not have a warrant or permission to enter. The circuit court found Vick's testimony more credible and denied the motion. Nelson was subsequently convicted of operating a motor vehicle under the influence, second offense, in violation of WIS. STAT. § 346.63(1)(a). Nelson appeals this conviction, challenging the denial of his motion to suppress.

DISCUSSION

¶6 As a general matter, a search of a person's residence is not valid unless law enforcement officers have done so under the authority of a lawfully issued warrant. *State v. Munroe*, 2001 WI App 104, ¶8, 244 Wis. 2d 1, 630 N.W.2d 223. The warrant requirement is excused, however, where someone in a position to give consent to the search does so. *Id.* It is undisputed that the validity of the officers' entry into Nelson's residence is premised on consent and not a warrant.

¶7 Nelson first contends that Reddy did not consent to the officers entering his residence. He argues that Reddy's testimony that she did not consent was more credible than Vick's testimony to the contrary and, therefore, the circuit court erred when it found that she consented. Whether Reddy consented is a question of fact which is upheld unless clearly erroneous. *See State v. Schwegler*, 170 Wis. 2d 487, 498, 490 N.W.2d 292 (Ct. App. 1992).

¶8 While acting as the finder of fact, the circuit court is the ultimate arbiter of the credibility of witnesses. *Gehr v. City of Sheboygan*, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977). When evidence supports the drawing of either of two conflicting but reasonable inferences, the trial court, and not this court, must decide which inference to draw. *See Onalaska Elec. Heating, Inc. v. Schaller*, 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980). Nelson has offered no basis on which to overturn the circuit court's credibility determination. That determination coupled with Vick's testimony provides a sufficient basis on which to find that Reddy consented. We therefore conclude that the circuit court's finding of consent was not clearly erroneous.

¶9 Nelson contends in the alternative that if consent was given, it was not voluntary. Whether consent is voluntary is a question of constitutional fact. *State v. Phillips*, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). We review questions of constitutional fact independently by applying constitutional principles to the circuit court’s factual findings. *Id.*

¶10 To fall within the warrant exception to the Fourth Amendment, “the consent must be voluntary under the totality of the circumstances and not the product of duress or coercion, express or implied.” *State v. Stankus*, 220 Wis. 2d 232, 237, 582 N.W.2d 468 (Ct. App. 1998). It is the State’s burden to establish by clear and convincing evidence that consent was voluntary. *Id.* at 237-38. Our review is of the totality of the circumstances, considering both the events surrounding the consent and the characteristics of the individual whose consent is sought. *State v. Bermudez*, 221 Wis. 2d 338, 348, 585 N.W.2d 628 (Ct. App. 1998).

¶11 In determining whether consent has been given voluntarily, we have examined the following factors:

whether any misrepresentation, deception or trickery was used to entice the defendant to give consent; whether the defendant was threatened or physically intimidated; the conditions at the time the request to search was made; the defendant’s response to the agents’ request; the defendant’s general characteristics, including age, intelligence, education, physical and emotional condition, and prior experience with the police; and whether the agents informed the individual that consent to search could be withheld.

Id. at 349-51. See also *Phillips*, 218 Wis. 2d at 198-203.

¶12 Citing *Munroe*, 244 Wis. 2d 1, ¶10, Nelson argues that most pertinent to the question of voluntariness in this case is the principle that “an initial

refusal to permit a search when asked ‘also militates against a finding of voluntariness.’” He focuses on the fact that Reddy told the officers more than once that they could not enter the residence. Nelson further argues that Reddy’s consent was not voluntary because she was intimidated by the officers. He points out that the officers were dressed “in their military style uniforms,” were armed, and “were extremely persistent in their requests to enter the home.”

¶13 We begin by observing that although the refusal to permit a search is a factor to be considered when determining whether consent has been voluntarily given, it does not, as Nelson seems to suggest, render subsequent consent per se involuntary. Although initial refusal to consent is considered, it is done so among other factors and in light of the totality of the circumstances. *See Bermudez*, 221 Wis. 2d at 348. In addition, the fact that the officers addressed Reddy in uniforms identifying them as officers of the law and were armed as is customary, did not alone create an environment of intimidation. *See, e.g., State v. Rodgers*, 119 Wis. 2d 102, 349 N.W.2d 453 (1984).

¶14 Our review is of the totality of the circumstances. *Bermudez*, 221 Wis. 2d at 348. Although Reddy initially denied the officers permission to enter the residence, Nelson does not contend, nor is there any evidence, that the officers threatened Reddy or engaged in any misrepresentation, deception, or trickery in order to obtain her consent. In addition, as explained above, there was no evidence of intimidation. With regard to Reddy’s characteristics, evidence is limited. There was no testimony that she was under the influence of alcohol or drugs at the time, that she was uneducated, or that she possessed below average intelligence. *See id.* at 351. She did, however, acknowledge that she did not want Nelson to be convicted or sent to jail. After reviewing all the circumstances, we conclude that the State met its burden of showing by clear and convincing

evidence that Reddy's consent "was secured without the use of 'actual coercive, improper police practices designed to overcome [her] resistance.'" *Id.* Accordingly, we conclude that Reddy's consent was voluntary.

¶15 For the foregoing reasons, we conclude that Reddy consented to the officers entering Nelson's residence. We conclude further that, under the totality of the circumstances, Reddy's consent was voluntary. We therefore affirm the denial of Nelson's suppression motion and the judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

