

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 12, 2010

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. 2009AP692-CR

Cir. Ct. No. 2008CF1464

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HEZEKIAH LASTER, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RUSSELL W. STAMPER, Reserve Judge, and JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Hezekiah Laster, Jr., appeals from a judgment of conviction for possessing with intent to deliver heroin (three grams or less), contrary to WIS. STAT. § 961.41(1m)(d)1. (2007-08),¹ entered on his guilty plea. Laster argues the circuit court erroneously denied his motion to suppress drug evidence obtained from his apartment after he was illegally arrested and his roommate (who was his girlfriend) gave officers consent to search the apartment.² We reject his arguments and affirm.

BACKGROUND

¶2 Laster lived with his girlfriend, Brenda Johnson, in a large apartment building on Wells Street in Milwaukee. On March 24, 2008, police searched the apartment in the presence of both Laster and Johnson. The police recovered heroin and other evidence. Laster was charged with one count of possession with intent to deliver heroin.

¶3 Laster filed a suppression motion, arguing that although the police had reasonable suspicion to stop Laster, he was illegally arrested and this illegal arrest led to his girlfriend giving coerced consent to search the apartment. At the suppression hearing, two officers testified for the State and Johnson testified for the defense. Officer James McNichol of the Milwaukee Police Department testified about the investigation that led them to Laster's apartment. He said the apartment building was in "nuisance status" due to past drug dealing and the

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² The motion to suppress was denied by the Honorable Jeffrey A. Kremers. The Honorable Russell W. Stamper, Reserve Judge, accepted Laster's plea and sentenced him.

police department had a working relationship with the landlord to try to combat drug dealing. The police had established a target area for drug enforcement that included Laster's apartment building.

¶4 McNichol said that on March 18, 2008, the police stopped a man one block from the apartment building. After heroin was found on the man, he told police that he had purchased the drugs from a man who lived on the second floor of the apartment building. The man described the seller as a black male, approximately sixty to sixty-five years of age, with a heavy build.

¶5 McNichol said that he contacted the landlord's security department and asked about drug sales and the man the informant described. McNichol said the head of security "went through their records and ... [Laster] came across his desk somehow." McNichol obtained a photograph of Laster from police records.

¶6 On March 24, 2008, McNichol stopped another individual in front of the apartment building. The man told the police that he was in the area to purchase drugs from someone who lived on the second floor of the apartment building. He identified the seller as a man named "Ziek." McNichol showed Laster's photo to the man, who said the man in the photo was Ziek. The man agreed to call Laster and tell him he was there to purchase narcotics. McNichol went to the second floor of the apartment building and waited in a common area, which both individuals the police had stopped identified as the location where they had purchased drugs from Laster.

¶7 McNichol said he was informed by other officers that the call to Laster had been placed. He said he waited a few minutes on the second floor and then Laster approached the officer from an apartment down the hallway. McNichol, who was dressed in plain clothes with his badge around his neck, said

he identified himself as a police officer. McNichol said Laster's "body tensed up" and that Laster's hands were at his sides, with his hands in fists. McNichol testified that Laster "kind of pulled away from me, took a couple steps back" and seemed to be moving "towards the stairway or exit." McNichol said he "figured that [Laster] was either going to fight with me or try to discard the narcotics. I wasn't sure, but Mr. Laster was placed in handcuffs at that time."

¶8 McNichol said he asked Laster if he had narcotics and Laster said no and gave McNichol consent to search him. McNichol found no narcotics on Laster, who at that time was dressed in a t-shirt, boxer shorts and slippers. McNichol said he explained to Laster that the police were there to investigate reports of drug dealing and then proceeded down the hallway to Laster's apartment.

¶9 McNichol said that when they arrived at the apartment, Officer Matthew Wenzel "was there already, doing the knock and talk investigation and I think he had just made contact with Mr. Laster's girlfriend." McNichol said Wenzel asked Johnson if they could come in and explained the reason for their presence. McNichol said he asked Johnson's permission to search the apartment and she gave it. McNichol testified that Wenzel obtained Johnson's signature in his memo book that confirmed her consent and that this occurred within "[a] few minutes" of when they entered the apartment.

¶10 McNichol said that when he asked and received Johnson's consent to search the apartment, Laster was present and did not say anything. McNichol said they searched the apartment and that while they did so, Laster never told them not to. McNichol testified that "Laster was very cooperative throughout the whole thing."

¶11 Wenzel testified that he reached the door ahead of McNichol, who was close behind him with Laster. Wenzel said he “knocked on the door and there was a response pretty much immediately and if I recall exactly, I said, Officer, Milwaukee Police Department and Mr. Laster said, ‘Just open the door, it’s me.’” Johnson opened the door.

¶12 Wenzel testified that he explained to Johnson that there were allegations of drug dealing and suggested that they talk about it inside the apartment, away from other tenants in the hallway; she agreed. Next, Wenzel said he and McNichol had a “joint conversation” with Johnson in the apartment:

[Wenzel:] ... [We] explain[ed] that the reason we were there was there [were] allegations of narcotics being sold, which she denied and had no knowledge of, she said. And we, this was basically it and we asked, Do you mind if we search the premises? Which she agreed to.

[THE STATE:] And, did you have her sign your memo book?

[Wenzel:] I did. She verbally agreed and I ... wrote out the exact verbiage and had her sign it in front of me.

Wenzel said that he did not recall Laster saying anything during the time the officers were in the apartment and that Laster “didn’t object to anything as far as the search.”

¶13 Johnson also testified. She said:

Police officer and two [building] security guards brought [Laster] home in handcuffs and I answered the door and I looked out for a while. Then [Laster] said, Open the door and I cooperated and opened it and they brought him in in handcuffs and set him in a chair straight across from me and they started to ask me questions about things [and] I told them I didn’t know.

Johnson said she did not recall signing Wenzel's memo book "specifically for a search warrant," although she recalled that she "signed a lot of things that day." When asked whether she gave the officers permission to search the apartment, Johnson testified: "It was never said, Can I have permission to search your apartment?"

¶14 In his argument to the circuit court, trial counsel acknowledged that the officers had reasonable suspicion to stop Laster and briefly search him, but argued that the stop became an illegal arrest when the officers kept Laster in handcuffs and proceeded to his apartment. The fruit of the illegal arrest, trial counsel argued, was that Laster was induced to tell Johnson to open the door. Trial counsel further asserted that Johnson's consent was not knowing, voluntary and non-coerced because Laster had been illegally arrested.

¶15 The circuit court denied Laster's motion to suppress, rejecting trial counsel's theory that Laster's alleged illegal arrest induced Johnson to open the door and consent to the search. The circuit court noted that "there is no evidence on this record ... that [Johnson] felt coerced or she felt pressured or she didn't voluntarily consent." The circuit court stated:

I see no basis on this record for finding that she [did not] have the authority to allow [a] search of the premises and she didn't testify she felt pressured by Mr. Laster.

If he had said, "Let them search" or, "I want you to let them search. That is the only way they are going to take the handcuffs off of me", or something like that, maybe that is a different situation. But that is not what we have here.

¶16 In making its findings, the circuit court implicitly found that the officers were credible and that Johnson's testimony was not credible. The circuit court commented:

I thought [Johnson] was fairly evasive on the stand. Well, she was evasive or she has a very bad memory or inadequate memory of what occurred.

She doesn't know what she signed, when, who asked her what, when. She just knows she opened the door and she signed a lot of things. That is about all she said with any clarity....

But the officers testified quite clearly and ... there wasn't any dispute that that was her signature on the memo book and the officers testified that she signed the memo book giving consent to search.

¶17 The circuit court also held that Johnson “had as much right to consent to a search of the premises as Mr. Laster did.” It found that Laster “didn't speak up and say, No, you can't search, which would have been a problem for the officers if he had said, No, in the face of ... [Johnson] saying, yes.” For these reasons, the circuit court denied the motion to suppress.

¶18 Laster ultimately entered a guilty plea and he was convicted and sentenced to three years of initial confinement and three years of extended supervision. This appeal follows.

STANDARD OF REVIEW

¶19 “In reviewing a motion to suppress, we uphold the circuit court's findings of fact unless they are clearly erroneous, and review the application of constitutional principles to those facts de novo.” *State v. Grady*, 2009 WI 47, ¶13, 317 Wis. 2d 344, 766 N.W.2d 729.

DISCUSSION

¶20 Laster argues that the motion to suppress should have been granted because he was illegally arrested and the “purported ‘consents’ were the fruits of an unlawful arrest” that were not sufficiently attenuated from the unlawful arrest.

(Some capitalization omitted.) Specifically, Laster argues that Johnson’s consent to search the apartment was obtained “as a result of Mr. Laster’s illegal arrest and must be suppressed as the search was tainted by the illegal arrest.” We reject this argument because we conclude that even if Laster was under arrest,³ there was probable cause to support the arrest.

¶21 “An arrest is not constitutionally justified unless the police have probable cause to suspect that a crime had been committed.” *State v. Young*, 2006 WI 98, ¶22, 294 Wis. 2d 1, 717 N.W.2d 729. “Probable cause requires that an arresting officer have sufficient knowledge at the time of the arrest to ‘lead a reasonable police officer to believe that the defendant probably committed or was committing a crime.’” *Id.* (citation omitted).

¶22 The State argues that the police officers in this case “had reliable information which made it much more likely than not that Laster was selling heroin.” The State explains:

Officer McNichol, who detained Laster, had received information from various sources that someone was selling heroin from a second floor apartment in the building....

On March 13, 2008, two officers stopped a person approximately one block from [the building]. This person admitted he had just bought the heroin found in his possession from an older black man who lived on the second floor of that building.

³ A detention can escalate into an arrest even if the officer does not tell the individual he or she is under arrest. “[T]he test for whether a person has been arrested ‘is whether a reasonable person in the defendant’s position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances.’” *State v. Marten-Hoye*, 2008 WI App 19, ¶14, 307 Wis. 2d 671, 746 N.W.2d 498 (citation and one set of quotation marks omitted). For purposes of this opinion, we will assume that Laster was under arrest at the time he returned to his apartment with McNichol.

The person who provided this information was a reliable informant because he was already in trouble for possessing drugs, and had every reason to provide truthful information about his source both to try to ameliorate his situation as a drug buyer and to avoid getting into even more trouble by giving a false tip. The informant had a reliable basis for his knowledge because he had personally purchased the drugs in his possession from the man on the second floor.

The head of security for the apartment building suggested Laster, who lived in apartment 221, as a suspect because he had a prior conviction for dealing heroin.

On March 24, 2008, the police stopped a Cudahy [⁴] resident who was about to enter [the building]. The Cudahy resident admitted he was there to buy heroin from a man he knew as “Ziek” who lived on the second floor. When shown a photograph of Laster, the Cudahy man identified him as the person from whom he had been buying heroin for two months.

The Cudahy man agreed to call his supplier to let his supplier know he was there to buy drugs. Shortly after this call was made, the police observed Laster come out of his apartment.

The Cudahy man was a reliable informant because he admitted his past drug activity, and knew he could be in deeper trouble if he provided false information about his supplier. His information was reliable ... [he] correctly predicted Laster’s actions in responding to the call stating that the informant was there to buy drugs.

Based on this information from these informants the police had more than probable cause to believe that Laster was selling heroin.

(Citations, record cites and footnote omitted.)

⁴ The complaint identified the second informant’s residence as Cudahy.

¶23 We agree with the State’s analysis. The police had probable cause to arrest Laster at the time they took him to his apartment, even before they found the drugs in his apartment.

¶24 Laster argues that the undisputed facts do not support a finding of probable cause because the record does not support the State’s assertion that the informants’ information was reliable. We are unconvinced. “When a declarant makes statements against his penal interest that are closely related to the criminal activity being investigated, under circumstances providing the declarant with no apparent motive to speak dishonestly, such statements may be taken as establishing the declarant’s credibility and thus his veracity.” *State v. Romero*, 2009 WI 32, ¶36, 317 Wis. 2d 12, 765 N.W.2d 756 (footnotes omitted).

¶25 In addition to providing statements against their penal interest, the statements of both informants were consistent with one another. Both said they bought drugs from an African-American man on the second floor of the building. The second informant identified Laster from the photograph obtained after the first informant’s information led the police and building security to suspect Laster. The second informant placed a phone call to his supplier and, minutes later, Laster left his apartment and went to the common area on the second floor where both informants had previously told police they would meet Laster. We conclude the informants’ information and the other information known to the officers provided sufficient probable cause to arrest Laster for selling heroin, even prior to the time his apartment was searched.

¶26 Having concluded that Laster’s arrest was not illegal, we reject Laster’s argument that his illegal arrest tainted the subsequent search of his apartment.

¶27 Next, we consider Laster’s brief argument that Johnson’s consent was not given “freely and voluntarily” because the environment in which she gave her consent was coercive. At the outset, we observe that this issue was arguably abandoned at the circuit court when, at the conclusion of testimony at the suppression hearing, trial counsel stated, “let’s withdraw the consent issue” and proceeded to argue that the illegal arrest was what rendered Johnson’s consent ineffective. However, even if we consider this issue on its merits, we are unconvinced that the record supports Laster’s argument.

¶28 “Voluntariness of consent to search raises a mixed question of fact and law.” *State v. Vorburger*, 2002 WI 105, ¶88, 255 Wis. 2d 537, 648 N.W.2d 829. “This court reviews a circuit court’s determination as to the voluntariness of consent to search in two steps, examining the circuit court’s findings of fact under the clearly erroneous standard, but applying constitutional standards to those facts de novo.” *Id.* Applying these standards, we conclude that Johnson’s consent was freely and voluntarily given.

¶29 The circuit court made a specific finding that Johnson had provided no testimony that she felt pressured to consent. This finding is not clearly erroneous. Johnson never testified that she felt coerced to provide her consent to search; indeed, she said she could not recall giving consent. In addition, the officers—whose testimony the circuit court found credible—testified that they explained the reason for their visit and that Johnson freely consented. On appeal, Laster offers only speculation that Johnson’s consent was invalid due to his opinion that there was a “coercive environment.” The record does not support Laster’s argument that Johnson’s consent was coerced. We conclude, based on the circuit court’s factual findings, that Johnson’s consent was freely and voluntarily given.

¶30 Laster’s final argument concerns the fact that he did not voice his objection when the police obtained Johnson’s consent to search the residence. In *Georgia v. Randolph*, 547 U.S. 103 (2006), the Court held that even if a co-tenant gives consent, the search will be found unreasonable and invalid as to a co-tenant who was physically present at the scene and expressly refused to consent to the search. *Id.* at 106. Laster asks this court to “extend the law in *Randolph* to provide that consent is required from a co-tenant who is improperly detained when he is at his residence which is the subject of the search,” such that even though Laster did not voice an objection, his lack of specific consent would invalidate the search. Because we have concluded that Laster was lawfully arrested (and therefore not improperly detained) at the time the apartment was searched, we need not consider Laster’s invitation to create new law.

By the Court.—Judgment affirmed.

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