COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP352-CR **Cir. Ct. No. 2009CT1474**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK A. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Mark Miller appeals his conviction for operating a motor vehicle while under the influence of an intoxicant as a third offense. He

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

challenges the circuit court's denial of his motion to suppress evidence obtained as a result of a warrantless entry into his home. Miller argues that, although he gave consent for the entry, his consent was not voluntary. I disagree and affirm.

Background

¶2 In March 2009, a police officer was dispatched to a private residence to "deal with a barking dog complaint." Finding no one home, the officer took custody of the dog. Later that night, the officer was on a routine patrol of the area when he observed a vehicle turn into the driveway of the same house and then saw Mark Miller walking from the driver's side of the vehicle into the house. The officer, intending to ask Miller about the dog, went to the house's front door with another officer as backup. The officer spoke with Miller at the front door and noticed signs of intoxication. After several minutes, and after Miller had repeatedly declined to consent to the officers' entry, Miller agreed to let the officers enter to do field sobriety testing. The officers entered and obtained evidence of Miller's intoxication.

¶3 Miller was charged with operating a motor vehicle while under the influence of an intoxicant as a third offense. He moved to suppress, arguing that the consent he gave for the entry was not voluntary. The circuit court denied Miller's motion, and Miller entered a plea of no contest. Miller appeals.

Discussion

¶4 It is undisputed that Miller gave consent to the officers' entry for purposes of conducting field sobriety testing. The issue is whether Miller's consent was voluntary. Miller argues that it was not. I disagree.

¶5 In determining whether Miller's consent was voluntary, I apply the following principles:

> The State bears the burden of proving that consent was given freely and voluntarily, and it must satisfy that burden by clear and convincing evidence.… The determination of "voluntariness" is a mixed question of fact and law based upon an evaluation of "the totality of all the surrounding circumstances." …
>
> In considering the totality of the circumstances, we look at the circumstances surrounding the consent and the characteristics of the defendant; no single factor controls.... [Relevant factors may include]: (1) whether the police used deception, trickery, or misrepresentation …; (2) whether the police threatened or physically intimidated the defendant …; (3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite; (4) how the defendant responded to the request to search; (5) what characteristics the defendant had …; and (6) whether the police informed the defendant that he could refuse consent.

State v. Artic, 2010 WI 83, ¶¶32-33, 327 Wis. 2d 392, 786 N.W.2d 430 (citations omitted), *cert. denied*, 2010 WL 4156225 (U.S. Nov. 29, 2010) (No. 10-7108).

¶6 First, Miller argues that his consent was not voluntary because, before he gave consent, he "repeatedly" refused to give consent for the officers' entry. Miller suggests that this fact alone is enough to show that his consent was not voluntary. However, while "[a]n initial refusal of a request to search will weigh against a finding of voluntariness," ***id.***, ¶56, it remains only one factor among others and is not determinative, *see* ***id.***, ¶33 ("no single factor controls"). Accordingly, the particular facts here must be examined.

¶7 The circuit court found that the officer spoke with Miller for approximately eleven minutes and, during that time, "probably asked several times if they could come into the home." One of these instances was apparently

unrelated to Miller's intoxication—it occurred at the outset of the conversation, when the officer sought to "go into the residence to deal with the paperwork relative to the dog complaint." Miller declined. Subsequently, the officer expressed his concern that Miller had been driving in an "impaired state," and Miller responded by claiming that a "friend had driven him home and was currently upstairs sleeping." The officer then asked if he could come inside to find that person, and Miller declined. At some point, Miller also stated to the officer, "I'm going to bed"; however, Miller did not in fact move from the front door. Finally, the officer asked Miller if he would submit to a field sobriety test, and Miller agreed. The officer then asked Miller if he wanted to do the test inside or outside the house, and Miller chose inside.

¶8 Miller suggests that it is significant that the officers "were in their military style uniforms" and "were armed." Miller does not explain what he means by his description, but, in any event, the record merely reflects that the officers were in uniform, and there is no indication that their appearance was out of the ordinary or that they brandished their weapons in any fashion.

¶9 In addition, Miller points out that the officer did not inform him that his consent could be withheld. Miller, however, essentially conceded at the suppression hearing that he knew that he could refuse to give consent. When asked if he thought he was "within [his] legal rights to slam the door on these officers," he responded, "Yeah. I do think it was within my rights, as rude as that would be."[2] Given this acknowledgment, Miller does not explain why it matters

[2] At another point in his testimony, Miller made a statement that might be taken to partially contradict his statement quoted in the above text. The circuit court, however, plainly accepted as true that Miller believed he could close the door and refuse to give consent.

to voluntariness that the officers did not affirmatively tell him what he already believed to be true.

¶10 Additional factors support the circuit court's finding that consent was voluntary. The officers did not engage in trickery and there was no physical intimidation. Also, Miller agreed at the suppression hearing that his "perception of what went on that night was clear," thus supporting the court's finding that Miller's intoxication did not prevent him from exercising his rights.

¶11 Miller, focusing on his initial refusal to consent, asserts that it must follow that his subsequent consent was mere "acquiescence to [the officer's] persistent assertion of authority." In support, he relies on ***State v. Bermudez***, 221 Wis. 2d 338, 585 N.W.2d 628 (Ct. App. 1998). But the relevant language in ***Bermudez*** refers to an "unlawful assertion of authority." *See* ***id.*** at 348. No such assertion of authority to enter Miller's house was made here.

¶12 I also observe that the conversation between Miller and the officer did not, as Miller suggests, involve persistent badgering. Rather, the requests appear to have evolved with the subjects being discussed—first the dog, then the possible other driver, and finally the officer's desire to conduct a field sobriety test on Miller. This shifting focus does not support Miller's suggestion that the officer created the impression that he would not take "no" for an answer. Rather, so far as the record discloses, each time Miller said "no" the officer accepted that answer.

¶13 For the above reasons, I agree with the circuit court and conclude that the State has met its burden of showing that Miller's consent was voluntary. Accordingly, I affirm the circuit court.

By the Court.—Judgment affirmed.

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