

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 7, 2011

A. John Voelker
Acting 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. 2010AP102-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2007CF302

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW CEPHUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
WILBUR W. WARREN, III, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Andrew Cephus appeals from a judgment convicting him of two counts of armed robbery, and one count of second-degree recklessly endangering safety. He contends that the circuit court erred in denying his motion to suppress evidence gathered at his home. Because we conclude that

Cephus' live-in girlfriend voluntarily consented to the search that he challenges, we affirm.

¶2 The charges against Cephus stemmed from a robbery of two women outside of a tavern in Kenosha. As the victims walked to their cars, they were confronted by a man wearing a mask and carrying a large knife. The man demanded the victims' belongings and poked one of the victims in the stomach with the knife. The victims handed over their purses to the man. Afterwards, they flagged down a police officer for help and provided a general description of the assailant.¶3 Approximately four days later, police responded to a domestic dispute near the scene of the robbery. They learned that the defendant in that case, Cephus, possessed a knife and matched the general description of the robber. Consequently, Detective Peter Falk went to Cephus' home to inquire further. There, he met Lachele Mims, who described herself as Cephus' "common law" wife.¹ Mims informed Falk that Cephus had recently given her a purse as a gift. Falk observed the purse and found it to be consistent with one of the purses taken in the robbery. A subsequent search of Cephus' home revealed additional items related to the robbery.

¶4 Cephus filed a motion to suppress the evidence gathered at his home. The circuit court held a hearing on Cephus' motion at which both Falk and Mims testified. According to Falk, when he first approached Cephus' home, he knocked on the front door and waited outside. Mims opened the door and asked who he was. Falk introduced himself and explained that he was aware of the domestic

¹ Wisconsin abolished common law marriage in 1917. See *In re Van Schaick's Estate*, 256 Wis. 214, 216, 40 N.W.2d 588 (1949). Accordingly, we describe Mims as Cephus' live-in girlfriend.

dispute and wanted to talk to her about a few things. Mims invited him inside, telling him to be careful because there was broken glass on the floor near the front door.

¶5 Once inside the home, Falk testified that he explained the circumstances of the robbery he was investigating and asked Mims if she had seen Cephus in possession of any such purses. Mims acknowledged that Cephus had recently given her a purse as a gift and produced it in response to Falk's request. After determining that Mims' purse matched one of the purses taken in the robbery, Falk asked if he could search the home. Mims indicated that he could. Afterward, they continued to talk while waiting for another officer to bring over a consent-to-search form, which Falk filled in and Mims signed after being given another opportunity to decline. Falk then conducted his search.

¶6 Falk testified that he returned to the home two days later after realizing that there were additional items of evidence in the basement that were related to the robbery. Again, he knocked on the door of the home, made contact with Mims, and explained why he was there. He then asked her for permission to go into the basement and gather the evidence, and Mims consented.

¶7 Mims provided a different account of Falk's initial entry into the home. According to Mims, she first saw Falk standing in the hallway outside the door to her bedroom. She speculated that he had let himself into the home by putting his hand through the broken glass near the entry door and unlocking it. Once inside, Falk explained why he was there and asked about purses, to which Mims responded, "there's only one purse that I know ain't mine and I got the purse and I showed him the purse." Mims admitted that she showed Falk the purse voluntarily. However, she testified that she felt like she had to sign his

consent-to-search form partly because he was already inside the home without her invitation.²

¶8 At the close of the testimony, the State argued that the search of Cephus' home was a valid consent search. The defense, meanwhile, argued that Mims' consent was involuntary due to Falk's illegal and intimidating manner of entry. The circuit court ultimately denied Cephus' motion to suppress, finding that Mims had given consent to search the home. However, the court reached this conclusion without determining how Falk first entered Cephus' home. According to the court, the entry was immaterial because nothing of evidentiary value was observed, seized, or discovered at that time.

¶9 Following his conviction by a jury, Cephus appealed, arguing that the circuit court erred in denying his motion to suppress. In the initial briefing, the parties disputed whether Falk let himself into Cephus' home before Mims consented to the search. Because this court believed that Falk's method of entry was relevant to the issue of Mims' consent, we remanded the case for further fact-finding.

¶10 On remand, the circuit court held an evidentiary hearing at which Mims and Falk again testified. Based on the evidence from that hearing, as well evidence from the previous suppression hearing, the court found that Falk "is a credible witness who only entered the Cephus residence once during the day in question ... after the door was unlocked and he was invited in" whereas Mims "is

² Mims also indicated that she was "[a] little bit" intimidated by the fact that Falk was armed and police had drawn their guns on Cephus during the domestic dispute. However, Mims acknowledged that Falk never drew his gun from the holster during their encounter.

confused with respect to which officers entered the residence at which times and under what circumstances.” The court then reiterated its conclusion that Mims had given consent to search the home.

¶11 The Fourth Amendment to the United States Constitution generally requires that law enforcement conduct searches pursuant to a warrant. *State v. Krajewski*, 2002 WI 97, ¶24, 255 Wis. 2d 98, 648 N.W.2d 385. Consent to search is a well-established exception to that requirement. *See id.* The consent exception is satisfied when consent is given in fact and the consent given is voluntary. *State v. Artic*, 2010 WI 83, ¶30, 327 Wis. 2d 392, 786 N.W.2d 430.

¶12 The issue of whether consent was given is a question of historical fact, and the circuit court’s finding of consent will be upheld if not contrary to the great weight and clear preponderance of the evidence. *Id.* The issue of whether consent was given voluntarily is a mixed question of law and fact based upon the totality of the circumstances. *Id.*, ¶32. The totality of the circumstances includes: (1) whether the police used deception in obtaining consent, (2) whether the police threatened or physically intimidated the person giving consent, (3) whether the conditions attending the request were congenial, (4) how the person responded to the request, (5) whether the person’s characteristics showed a particular susceptibility to intimidation, and (6) whether the police informed the person that he or she could refuse. *See id.*, ¶33.

¶13 In his initial brief challenging the circuit court’s decision, Cephus described Falk’s allegedly illegal entry as “[a] key factor in determining whether Ms. Mims voluntarily consented to the search.” Now that the circuit court has determined that the illegal entry did not take place, Cephus’ argument on consent falls apart. The only way he can still prevail is to show either that the circuit

court's finding of fact is clearly erroneous, *see State v. Phillips*, 218 Wis. 2d 180, 186 n.4, 577 N.W.2d 794 (1998), or that the State nonetheless failed to prove that Mims' consent was involuntary. He has not shown either.

¶14 We are satisfied that the record supports the circuit court's finding that Falk waited outside Cephus' home until Mims invited him inside. Likewise, we are satisfied that Mims voluntarily consented to the search of Cephus' home. Here, there is no dispute that Mims nominally gave consent to search the home. Her consent was voluntary because (1) Falk used no deception in explaining why he was there; (2) he did not act in an intimidating manner; (3) the interaction prior to Mims giving formal consent was so congenial that she voluntarily retrieved a suspicious purse so that Falk could inspect it; (4) Mims responded to the request for consent without any hesitation, which was reiterated by her willingly allowing Falk to search the basement again on a later occasion; (5) Mims showed no particular susceptibility to intimidation in her personal characteristics; and (6) Falk testified that he gave Mims another opportunity to decline consent after obtaining the consent to search form.³

By the Court.—Judgment affirmed.

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

³ Because we sustain the finding that Falk did not illegally enter Cephus' home, we need not address the issue of whether the consent was sufficiently attenuated from the initial entry to allow admission of the evidence.

