COURT OF APPEALS DECISION DATED AND FILED

September 18, 2012

Diane M. Fremgen
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. 2011AP2898-CR

Cir. Ct. No. 2010CF4727

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

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

¶1 PER CURIAM. Ronald Harris appeals the judgment, entered upon his guilty plea, convicting him of being a felon in possession of a firearm, contrary

to WIS. STAT. § 941.29(2)(a) (2009-10).[1] Harris argues that the circuit court erred when it denied his motion to suppress evidence obtained after police entered his apartment.[2] We affirm.

BACKGROUND

¶2 The evidence presented at the suppression hearing underlies Harris's claims on appeal. Officer Brendan Dolan testified that he was dispatched to an apartment building to respond to a call from a woman who stated that her boyfriend had pointed a gun at her during an argument. Officer Dolan and two other officers, Kevin Zimmermann and Eileen Donovan-Agnew, met the caller, Iesha Evans, in the lobby of the building. Evans subsequently gave two differing statements to the officers; however, in both statements Evans maintained that her boyfriend, Harris, had a gun.

¶3 Officer Dolan testified that he and the other officers went to Harris's apartment, knocked on the door, and identified themselves as police officers. Officer Dolan testified that as the officers stood in the hallway, they had their guns drawn and held in the "low, ready position" to the officers' side and pointed to the floor.

¶4 When the door opened, Officer Dolan asked if they could enter. Harris did not say anything, but he took a step backwards. Officer Dolan

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] A defendant may appeal the denial of a motion to suppress evidence even though he or she has pled guilty. *See* WIS. STAT. § 971.31(10).

understood Harris's step back to be a "nonverbal communication as to allowing you to enter."

¶5 The officers entered the apartment and Officer Dolan began speaking with Harris. Harris did not ask them to leave. Harris eventually told the officers that he had a gun, which the officers found in his waistband.

¶6 Officer Zimmermann similarly testified that after they spoke with Evans, the three officers went up to the apartment. Officer Zimmermann had his gun drawn and at his side because they were responding to a report of a man with a gun.

¶7 Officer Zimmermann testified that Officer Dolan knocked on the door and stated, "Milwaukee Police Department." Harris opened the door. Officer Zimmermann testified that Harris asked why they were there. Officer Dolan asked Harris if he had a weapon. Harris did not answer the question. The officers asked if they could come in and talk to him. Harris did not answer verbally, but "backed away from the door and allowed us to come in."

¶8 Harris also testified at the suppression hearing. He testified that he heard a knock at his door and asked who was there. After being told it was the Milwaukee Police Department, Harris opened the door and asked the officers what was going on. The officers relayed that a woman said Harris had pulled a gun on her and asked whether he had a gun. During the suppression hearing, Harris was asked whether the officers sought permission to enter his apartment, and he testified:

> No, they did not ask to come in. They kind of, when I opened the door and they asked if I had a gun, they just kind—kind of bum-rushed me, kind of just stepped, you know, stepped into the unit and kind of—not

> forcefully, but kind of shouldered me all the way back. I took about four steps back after they kind of rushed me. When I opened the door, they kind of—they kind of—you know, they didn't wait for me to say anything. They kind of rushed into the door.

¶9 In its oral ruling, the circuit court found that the testimony from the officers was credible and that Harris's testimony was not. As relevant to this appeal, the court then made the following factual findings:

> So it's a situation where they're investigating a crime. Now, they approach the door. They knock on the door. They announce who they are. So this isn't a case where they're doing some kind of no-knock busting in of the door, which I think would change things in this case. But they're announcing themselves, and the door is opened to them when they announce themselves.
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> At that point they see the individual who they believe may have committed a crime, and the crime involves a gun. They ask if they can come in, and he steps back. Now, is it a true consent type of situation? Well, it's a type of consent to enter the apartment. Even opening the door to the police, once they've announced themselves, is a consent of some type to talk to them.
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> It's not a consent to search, but that's not what they did. So I think at that point the officers are still legally there, legally allowed to talk to Mr. Harris.

¶10 The circuit found that Harris consented to the officers' entry into his apartment when he stepped back from the door in response to their request to enter and denied his suppression motion. Harris subsequently pled guilty to possessing a firearm as a felon.

DISCUSSION

¶11 The Fourth Amendment to the U.S. Constitution and Article I, Section 11 of the Wisconsin Constitution each state that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated." "Whether police conduct has violated the constitutional guarantees against unreasonable searches and seizures is a question of constitutional fact. Thus, we give deference to the circuit court's findings of evidentiary and historical fact, but we independently apply those historical facts to the constitutional standard." ***State v. Tomlinson***, 2002 WI 91, ¶19, 254 Wis. 2d 502, 648 N.W.2d 367 (internal citation omitted).

¶12 Here, the police entered Harris's apartment without a warrant. "Searches conducted without a warrant are presumptively unreasonable." ***Id.***, ¶20. Consent to search, however, is a well-established exception to the warrant requirement. ***State v. Krajewski***, 2002 WI 97, ¶24, 255 Wis. 2d 98, 648 N.W.2d 385. The consent exception is satisfied when consent is given in fact by words, gestures, or conduct, and the consent given is voluntary. *See* ***State v. Artic***, 2010 WI 83, ¶30, 327 Wis. 2d 392, 786 N.W.2d 430, *cert. denied*, 131 S. Ct. 671 (2010). The State is required to prove consent by clear and convincing evidence. ***Tomlinson***, 254 Wis. 2d 502, ¶21.

1. Whether consent was given in fact.

¶13 First, Harris argues that a silent step backward did not establish consent to enter his apartment. "The question of whether consent was given in fact is a question of historical fact."[3] ***Arctic***, 327 Wis. 2d 392, ¶30; *see also*

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[3] Harris argues that the circuit court's determination that he "step[ped] back" is a finding of fact, and its subsequent determination that Harris provided "a type of consent to enter" is a legal conclusion. He continues: "Although the factual finding is undoubtedly subject to the 'great weight/clearly erroneous' standard of review, the court's consent determination, as a legal conclusion, should be subject to *de novo* review." Citing ***State v. Johnson***, 177 Wis. 2d 224, 233, 501 N.W.2d 876 (Ct. App. 1993) ("Like the entry itself, however, the constitutional significance of the undisputed facts regarding the issue of consent must receive independent, appellate review.").

(continued)

Tomlinson, 254 Wis. 2d 502, ¶36. "We uphold a finding of consent in fact if it is not contrary to the great weight and clear preponderance of the evidence." ***Arctic***, 327 Wis. 2d 392, ¶30.

¶14 Harris posits that one can draw multiple inferences from his act of stepping back when confronted by three armed officers: "he may have lost his balance, or needed space to open the door. More likely, Mr. Harris took a step back because he was surprised to find himself confronted by three armed officers who would not respond to his (reasonable) question—'what are you doing here?'" While the multiple inferences Harris offers are possible characterizations of events, the finding of the circuit court was not against the great weight of the evidence, and we uphold the circuit court's conclusion that Harris's actions were sufficient to give consent to enter.[4] *See* ***State v. Phillips***, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998) ("Consent to search need not be given verbally; it may be in the form of words, gesture, or conduct."); *cf.* ***Tomlinson***, 254 Wis. 2d 502, ¶36 ("[A]lthough Tomlinson's formulation of the events is one possible characterization of events, the finding of the circuit court on this issue was not against the great weight of the evidence, and we uphold the circuit court's conclusion that the girl's actions were sufficient to give consent to enter.").

We are not convinced that the circuit court's findings should be dissected in the manner Harris suggests. We are bound by our supreme court's most recent pronouncements, and here, the relevant pronouncement is that consent in fact is a question of historical fact. *See* ***Kramer v. Board of Educ. of the Sch. Dist. of the Menomonie Area***, 2001 WI App 244, ¶20, 248 Wis. 2d 333, 635 N.W.2d 857 (where decisions appear to be inconsistent or in conflict, we follow the most recent pronouncement); *see also* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

[4] In his reply brief, Harris states that he "does not dispute the circuit court's findings of fact. Instead, he accepts the court[']s findings regarding credibility, admits that three armed officers knocked on his door, and believes he responded by stepping back."

¶15 Harris argues that ***Tomlinson***'s "pick an inference" standard is at odds with ***Gautreaux v. State***, 52 Wis. 2d 489, 492, 190 N.W.2d 542 (1971), where our supreme court stated that the "[S]tate has the burden of proving by clear and positive evidence the search was the result of a free, intelligent, unequivocal and specific consent." He submits that a multiple inference analysis is inconsistent with the requirement that consent be unequivocal. Again, to the extent there is any conflict between ***Gautreaux*** and ***Tomlinson***, the latter controls as the more recent pronouncement. *See* ***Kramer v. Board of Educ. of the Sch. Dist. of the Menomonie Area***, 2001 WI App 244, ¶20, 248 Wis. 2d 333, 635 N.W.2d 857.

2. Whether consent was voluntary.

¶16 Next, Harris argues that if he consented to the entry, his consent was not voluntary. Unlike consent in fact, "[v]oluntariness of consent is a question of constitutional fact." ***Phillips***, 218 Wis. 2d at 195. As such, "we give deference to the circuit court's findings of evidentiary and historical fact, but we independently apply those historical facts to the constitutional standard." ***Tomlinson***, 254 Wis. 2d 502, ¶19.

¶17 "[V]oluntary consent cannot be summed up in a 'talismanic definition.'" ***Arctic***, 327 Wis. 2d 392, ¶32 (citation omitted). Rather, voluntariness is determined by the totality of the circumstances. ***Id.*** Relevant factors include: (1) whether the police used deception, trickery, or misrepresentation to obtain consent; (2) whether the police used threats, physical intimidation, punishment, or deprivation to obtain consent; (3) whether the conditions surrounding the request for consent were congenial, non-threatening, and cooperative, or the opposite; (4) the response to the request to search; (5) the

characteristics of the person asked to give consent; and (6) whether the police stated that consent could be withheld. *See* ***id.***, ¶33. These factors are not exclusive. ***Id.*** Rather, we determine after examining all of the surrounding circumstances whether the consent was "'an essentially free and unconstrained choice.'" ***Id.***, ¶32 (citation omitted).

¶18 Harris argues that only the second factor is relevant to his case. He asserts that that he was intimidated into consenting when he was confronted by three armed officers at the door of his apartment. However, as the State points out:

> The problem with Harris's claim that he was intimidated into giving consent by the officers' drawn weapons is that his own testimony contradicts it. When he testified at the suppression hearing, Harris did not claim that he was intimidated into allowing the officers into the apartment because the officers' guns were drawn. In fact, he did not even testify that he saw the guns before the officers entered the apartment. Rather, he testified that the officers did not ask to come in but instead pushed their way in almost immediately after he opened the door.

We agree with the State that Harris cannot now plausibly argue that his consent was involuntary because he was intimidated by the officers.[5] Additionally, we

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[5] Harris asserts that the State cannot rely on his discredited testimony to claim that Harris did not see the officers' weapons. He submits: "The State cannot have it both ways. It cannot rely on the circuit court's credibility determination to support a finding of consent while at the same time rely on Mr. Harris'[s] discredited testimony to dispense with voluntariness." (Internal punctuation omitted.) This argument is perplexing.

According to Harris, the circuit court's finding that the officers displayed their weapons is enough for this court to conclude that he was intimidated. We disagree. Without additional facts (confirming, for example, that he saw the weapons prior to consenting)—which we cannot find on appeal—we cannot reach the conclusion that Harris seeks. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980) (court of appeals may not find facts). We fail to see how the State erred when it addressed the lack of critical facts to support Harris's position.

note that Harris is a former police officer who presumably knew that he was legally entitled to decline the officers' request.

¶19 Having considered the other relevant factors and the totality of the circumstances, we affirm.[6]

By the Court.—Judgment affirmed.

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

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[6] Because we affirm based on consent, we need not decide whether the entry was justified by exigent circumstances. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need to be addressed).