COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1966-CR **Cir. Ct. No. 2012CF161**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS L. PETRIE,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. After the denial of his motion to suppress evidence, Dennis Petrie was convicted upon his no-contest pleas to two counts of burglary and one count each of theft and criminal damage to property, contrary to

WIS. STAT. §§ 943.10(2)(a), 943.10(2)(b), 943.20(1)(a), 943.20(3)(d), and 943.01(1) (2011-12).[1] He appeals the judgments. We affirm because we conclude the evidence supporting the charges against him was seized and admitted pursuant to valid warrants and a broad but voluntary consent.

¶2 Petrie was arrested on suspicion of burglarizing the property of Wayne Sargent. Police[2] obtained a search warrant to search Petrie's home and outbuildings for twenty-seven items—power tools, firearms, and jewelry—Sargent identified as missing. The search began in the evening. Detective Matt Walsh brought with him police reports from other area burglaries including one in which Petrie was named as a suspect. Police could not complete the search that night.

¶3 The next day, Walsh told Petrie's wife, Barbara, that officers had come upon contraband from other burglaries as they searched for Sargent's property and asked for her permission to search beyond the scope of the warrant. Walsh produced a consent-to-search form that permitted "a complete search" of the basement and outbuildings and authorized police to "take … any property which they may desire." Walsh told Barbara and her daughter, Sarah Pfister, that giving consent would make it "simpler" than having to repeatedly seek additional search warrants and thereby would shorten the search. Barbara and Pfister wanted to think about it. They conferred and also telephoned Pfister's husband for his advice. Barbara agreed to consent. Before she signed the form, Walsh read it

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

[2] Law enforcement officers of the Sheboygan County Sheriff's Department and the City of Sheboygan Police Department were involved. "Police" refers to either or both.

verbatim to her and Pfister. Walsh advised Barbara she could revoke her consent at any time.

¶4 Later, Barbara signed a second consent-to-search form presented to her by Detective Gerald Urban that authorized police to search and "take from my home" a Dell computer and Petrie's footwear.[3] Urban also told Barbara she could revoke her consent at any time. She never did so, but she did ask that, due to an anxiety problem, police go through her daughter rather than dealing directly with her. Police honored her request.

¶5 At the end of the four-day search, police confiscated hundreds of items known or suspected to be stolen. Two criminal complaints charged Petrie with eleven felonies and eight misdemeanors in cases involving several property owners. On Petrie's motion, the circuit court ruled that the four Sargent counts forming the basis of this appeal should proceed first.

¶6 Petrie moved to suppress all of the seized evidence, including the enumerated Sargent items, on the basis that the search far exceeded the scope of the search warrant. After extensive hearing on the motion, the circuit court found that Barbara freely and voluntarily consented to continue the search beyond the warrant's parameters. Petrie moved for reconsideration, arguing that the court failed to address his argument that, even if Barbara's consent was valid, it was limited to a *search* of the property and did not extend to a *seizure* of any items. The court denied the motion. It found that the consent forms plainly authorized officers to "take" property from the premises and that, while she wanted police to

[3] Shoe impressions were found near a Sargent outbuilding.

consult with her before taking items, some items may have been processed and removed at times she had chosen to leave the property.

¶7 Petrie entered no-contest pleas and judgment was entered against him. His eight-year total sentence was stayed pending this appeal.

¶8 Petrie contends that the circuit court erred in denying his motion to suppress because the consent form was equivocal, ambiguous, and overly broad. He also contends Barbara was coerced by threats that the search could last up to ten days if police had to seek a warrant and that, as she was sixty-one, had no post-high-school education, worked as a school "lunch lady," and suffers from anxiety, her consent could not have been voluntary. Petrie again asserts that even if Barbara's consent was valid, it was limited to allowing police to search for contraband, not to seize it. Finally, Petrie argues that the search was a prohibited general search. We disagree all around.

¶9 "We review suppression motions using a two-step process." ***State v. Pender***, 2008 WI App 47, ¶8, 308 Wis. 2d 428, 748 N.W.2d 471. "First, we uphold the circuit court's findings of historical fact unless clearly erroneous." ***Id.*** "Whether those facts require suppression is a question of law reviewed without deference to the circuit court." ***Id.***

¶10 "[A] warrantless search conducted pursuant to consent [that] is 'freely and voluntarily given' does not violate the Fourth Amendment." ***State v. Phillips***, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998). We first must determine whether the person consented. ***State v. Artic***, 2010 WI 83, ¶30, 327 Wis. 2d 392, 786 N.W.2d 430. Consent may be in the form of words, gesture, or conduct. ***State v. Tomlinson***, 2002 WI 91, ¶37, 254 Wis. 2d 502, 648 N.W.2d 367.

Whether a person consents is a fact determination we uphold on appeal unless clearly erroneous. ***Phillips***, 218 Wis. 2d at 196-97.

¶11 In determining whether the consent to search was voluntary, the State must prove voluntariness by clear and convincing evidence. ***Id.*** at 197. Whether the consent was voluntary is a question of constitutional fact we review independently, applying constitutional principles to the found facts. ***Id.*** at 194-95. The test is whether, under the totality of the circumstances, consent was given without duress or coercion, either expressed or implied. ***Id.*** at 197-98. We consider several factors in determining the voluntariness of consent:

> [W]hether any misrepresentation, deception or trickery was used to entice the [person] to give consent; whether the [person] was threatened or physically intimidated; the conditions at the time the request to search was made; the [person's] response to the agents' request; the [person'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.

State v. Bermudez, 221 Wis. 2d 338, 349, 585 N.W.2d 628 (Ct. App. 1998).

¶12 The circuit court made these findings: Walsh sought Barbara's consent to broaden the search because, while searching for items in the warrant, police encountered many items suspected to be from other thefts; Walsh's statement that obtaining a warrant would prolong the time Barbara would need to be out of her home was solely informational; Barbara conferred with her daughter before making a decision and gave additional consents, both written and recorded, to Urban; police did not use trickery, deception, misrepresentation, threats, or physical intimidation; the atmosphere was congenial and cooperative and the tone was conversational; despite her testimony that she suffers from anxiety, Barbara's

recorded consent demonstrated no distress; and nothing about her emotional status, age, or intelligence suggested an inability to understand and to freely and voluntarily consent to the search. The record supports these findings.

¶13 Petrie's claim that Barbara was not advised that she was consenting to a seizure goes nowhere. The first consent form she signed plainly authorized police to "to take … any property they may desire." Walsh's, Barbara's and Pfister's testimony and Walsh's police report all confirm that Walsh read the consent form to Barbara and Pfister word for word before Barbara signed it. The second consent form Barbara signed likewise authorized police to "take" the computer and Petrie's shoes. If Barbara did not understand that items would be confiscated, she could have revoked her consent when she saw police taking items and tagging them for removal.

¶14 We conclude that the State has proved by clear and convincing evidence that Barbara consented to a search outside the scope of the warrant; that, under all of the circumstances, her consent was voluntary and not the product of duress or coercion; and that her consent was informed such that she understood that items police believed to be stolen would be seized.

¶15 Finally, Petrie asserts that police used the warrant as a pretext to rummage around and the lack of particularity in the Walsh consent form resulted in a prohibited general search. He contends all evidence seized should have been suppressed. We disagree.

¶16 A search conducted in "flagrant disregard" of the warrant's limits undermines the Fourth Amendment's particularity requirement and requires suppression of all items seized, including those within the scope of the warrant. ***Pender***, 308 Wis. 2d 428, ¶9. Police here searched pursuant to the warrant on the

first night and did not act in flagrant disregard of its limits. As they searched for Sargent's property, they encountered large quantities of possible contraband.

¶17 The more expansive search began the next day after Barbara gave her consent. Officers were advised that Barbara had agreed to broaden the search to include any items police suspected were stolen. "A consent search is constitutionally reasonable to the extent that the search remains within the scope of the actual consent." ***State v. Rogers***, 148 Wis. 2d 243, 248, 435 N.W.2d 275 (Ct. App. 1988). One consenting to a search may restrict the scope of the search as he or she chooses. ***Florida v. Jimeno***, 500 U.S. 248, 252 (1991). "The standard for measuring the scope of [a person's] consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the [person]?" ***Id.*** at 251. A reasonable person would have understood that Barbara broadly consented to a search of the basement and all outbuildings and to a seizure of "any property which they may desire." Police did not exceed the scope of that consent.

By the Court.—Judgments affirmed.

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