

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 14, 2017

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. 2016AP2179-CR

Cir. Ct. No. 2011CF19

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN K. PERKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Juneau County:
JOHN P. ROEMER, JR., Judge. *Affirmed.*

Before Lundsten, P.J., Blanchard, and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. John Perkins appeals a criminal judgment convicting him of five counts of possession of child pornography. The issue on appeal is whether the police could properly rely upon certain evidence seized during a warrantless search of Perkins’s house to support the application for a subsequent warrant that was used to further search Perkins’s house. For the reasons discussed below, we conclude that the original evidence was legally obtained by consent and did not taint the warrant. Accordingly, we affirm the judgment of conviction.

BACKGROUND

¶2 The circuit court made the following factual findings, which were supported by testimony at the suppression hearing.

¶3 On January 27, 2011, Juneau County Sheriff’s Deputy Scott Jennings was dispatched to investigate a complaint from T.C. that Perkins was secretly videotaping people while they were in a bathroom in his house. As Jennings was speaking to T.C. on the front porch of Perkins’s house, Perkins came out and led Jennings into the entryway of the house to speak with him.

¶4 Jennings advised Perkins that he had received a complaint that Perkins had a camera hidden in a closet and was recording people in the bathroom. Jennings asked Perkins if he could “take a look around,” and Perkins responded, “Go ahead. I’m not hiding anything.”

¶5 Perkins then led Jennings to a bedroom, opened the door to a closet in the bedroom, and told Jennings to take a look. When Jennings looked into the closet, he immediately smelled a strong odor of marijuana. Jennings continued to search the closet, looking for a camera or false wall that could hide a camera.

Perkins then told Jennings that he “shouldn’t dig too hard.” When Jennings asked why, Perkins said he had marijuana in the closet.

¶6 At that point, Jennings discontinued his search of the closet and began questioning Perkins about the marijuana. Perkins admitted to growing marijuana and pointed out to Jennings that he had stored marijuana on the top shelf of the closet. Jennings then contacted a supervisor, who advised Jennings that a detective would be sent to the house to take over the investigation. While waiting for the detective, Jennings attempted to maintain control of the marijuana and the house’s occupants, who in addition to Perkins and T.C., included T.C.’s two minor children and T.C.’s boyfriend Brian Klass.

¶7 Detective Benjamin Goehring arrived. He did not request or obtain any additional consent from Perkins to enter or search the house. After speaking briefly with Jennings, Goehring went into the bedroom with Perkins and began to question Perkins about the marijuana and the complaint of a hidden camera. While Goehring was questioning Perkins in the bedroom, Goehring looked into the closet and noticed that some paneling at the back of the closet moved when he touched it.

¶8 Meanwhile, Jennings entered the bathroom with Klass. In the bathroom, Jennings observed a mirror that had been removed from the wall. A portion of the silver backing of the mirror had been scraped off so that one could see through that portion of the mirror.

¶9 After questioning Perkins in the bedroom, Goehring went into the bathroom and observed the mirror with its partially scraped off silver backing. Goehring also noticed a hole in one of the bathroom walls where it appeared the mirror previously had been mounted. Wires were visible in the hole. When

Goehring pushed on the bathroom wall, he discovered that it moved. The part of the bathroom wall that moved was adjacent to the bedroom closet with the loose panel at its back.

¶10 After observing the bathroom, Goehring spoke with Jennings again. Goehring asked Jennings if there were additional individuals in the residence, besides Perkins, T.C., Klass, and the children. After Jennings responded that he had not had an opportunity to perform a protective sweep, Goehring walked through the house and discovered a marijuana plant in the basement. Goehring then placed Perkins under arrest and called for a search warrant. Execution of the search warrant revealed multiple images of child pornography, which formed the basis for the charges in this case.

¶11 On this appeal, Perkins argues that the facts set forth in the affidavit to obtain the search warrant were tainted because the police exceeded the scope of the consent Perkins had provided, and continued to search after consent had been withdrawn.

STANDARD OF REVIEW

¶12 When reviewing a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2015-16);¹ *State v. Hindsley*, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48. However, we will independently determine whether the facts found by the circuit court satisfy applicable constitutional provisions. *Id.*

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

DISCUSSION

¶13 A warrantless search does not violate the Fourth Amendment when it is conducted pursuant to freely and voluntarily given consent. *State v. Phillips*, 218 Wis. 2d 180, ¶23, 577 N.W.2d 794 (1998). Whether a defendant actually consented to a search is a factual determination. *Id.*, ¶¶16-20. However, the permissible scope of a search is a question of law “‘defined by its expressed object,’” meaning that the police are permitted to search where the objects sought could be found. *State v. Kelley*, 2005 WI App 199, ¶13, 285 Wis. 2d 756, 704 N.W.2d 377 (quoted source omitted). The constitutional standard for evaluating the scope of consent given is one of objective reasonableness—that is, “‘what would the typical reasonable person have understood by the exchange between the officer and the suspect?’” That same standard applies to the question whether an individual has unequivocally withdrawn consent. *State v. Wantland*, 2014 WI 58, ¶33, 355 Wis. 2d 135, 848 N.W.2d 810 (quoted source omitted).

Scope of Search

¶14 Perkins first asserts that he “originally consented to the search of the bedroom closet by Officer Jennings and nothing more.” However, the undisputed testimony was that Jennings did not tell Perkins that he wanted to look in any particular location in the house, and that Perkins did not ask Jennings or any other law enforcement officer to confine the search to any particular location in the house. Perkins’s verbal consent to allow the police to “go ahead” in response to a request to “look around” was given in the context of a complaint that Perkins had set up a hidden camera in a closet to record activity in a bathroom. Any reasonable person would have understood from that verbal exchange that the police were seeking consent to look in the bathroom, the closet, and anywhere else

in the house where there might be recording equipment, a computer to which recordings could be transmitted, or discs containing recordings.

¶15 Perkins next argues that, by leading Jennings directly to the bedroom closet, Perkins was implicitly limiting the scope of his consent to the bedroom closet. However, the bedroom closet, which was adjacent to the bathroom was a logical starting point to search for any evidence that Perkins had been recording activity in the bathroom from a camera hidden in the closet. We therefore see nothing in Perkins's conduct in leading Jennings to the closet that is inconsistent with Perkins's prior broad verbal consent to a search.

¶16 Perkins also contends that his consent was limited to allowing Jennings to look around, and did not extend to Goehring. However, it is well established that, once permission has been given for one officer to enter and search a home, additional officers may participate in the search so long as they do not expand its scope. *State v. Johnston*, 184 Wis. 2d 794, 811, 518 N.W.2d 759 (1994). We therefore conclude that all of the items found in, and observations made about, the bathroom and bedroom by Jennings and Detective Goehring were within the scope of the consent to search given by Perkins.

¶17 As to the marijuana plant found in the basement, we note that the discovery of that plant was not mentioned in the affidavit for the search warrant. Accordingly, we need not consider whether the search of the basement was also within the scope of Perkins's consent, or was otherwise authorized as a safety measure, because the only challenge on appeal is to allegedly tainted allegations in the affidavit for a search warrant.

Withdrawal of Consent

¶18 Perkins contends that his statement to Jennings that Jennings “shouldn’t dig too hard” in the closet constituted a withdrawal of consent to search his house. However, we are not persuaded that the statement constituted an unambiguous withdrawal of consent. An equally, if not more, reasonable interpretation of that statement is that Perkins did not want Jennings moving things around in the closet. Perkins did not ask Jennings to stop, to wait, or to leave, did not explicitly state that he was withdrawing his consent to search, and made no other objection as Jennings, and later Goehring, continued to search Perkins’s house. We conclude that Perkins’s consent to search remained in effect throughout the time period described in the affidavit for the search warrant.

Conclusion

¶19 Because Perkins has failed to show that any of the evidence supporting the search warrant was illegally obtained, the circuit court properly denied the motion to suppress additional evidence obtained pursuant to the execution of the search warrant.

By the Court.—Judgment affirmed.

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

