COURT OF APPEALS
DECISION
DATED AND FILED

January 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2029-CR **Cir. Ct. No. 2012CF3142**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAMION L. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

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

¶1 BRASH, J. Damion L. Brown appeals from a judgment of the circuit court convicting him of one count of possession of heroin with intent to deliver. Brown argues that the circuit court erred in denying his motion to

suppress the evidence seized during a warrantless search of his residence. We disagree and affirm.

BACKGROUND

¶2 On June 19, 2012, Milwaukee Police Officer Zebdee Wilson was in the parking lot of the Walgreens located at 5101 West Capitol Drive in Milwaukee. Officer Wilson was sitting in an undercover vehicle in plain clothes. While in the Walgreens parking lot, Officer Wilson observed a maroon Ford sedan driven by Phillip James Schmidt pull into the parking lot. Shortly after Schmidt arrived, Officer Wilson observed a silver Infiniti pull into the Walgreens parking lot. Officer Wilson saw two men inside the Infiniti: the driver, later identified as Donte Lamar Williams, and a front seat passenger, later identified as Brown. Officer Wilson observed Brown get out of the Infiniti and approach Schmidt's vehicle. Officer Wilson then observed Schmidt hand Brown cash, and Brown drop an object into Schmidt's hand. Officer Wilson observed Brown conduct a similar transaction with another individual. Based on his training and experience, Officer Wilson suspected that multiple hand-to-hand drug transactions had occurred.

¶3 Shortly after Schmidt left the Walgreens parking lot, Officer Wilson radioed for a uniformed officer to stop Schmidt's vehicle. Schmidt was subsequently stopped by Milwaukee Police Officer Melissa Takacs, and Officer Wilson arrived on the scene shortly thereafter. Officer Wilson found what he believed to be narcotic pills in Schmidt's front pants pocket. While searching Schmidt's vehicle, Officer Wilson found three baggies, each containing what was later determined to be heroin. Schmidt stated that he purchased the heroin from a man in the Walgreens parking lot for $300.

¶4 On June 20, 2012, Schmidt assisted police in monitoring a phone call between Schmidt and Brown that discussed another purchase of heroin to be delivered near North 52nd Street and West Capitol Drive in Milwaukee. Based upon information provided by Schmidt, Milwaukee Police Officer Bodo Gajevic observed a silver Infiniti parked outside of 3776 North 52nd Street in Milwaukee. Schmidt confirmed that this was the same Infiniti that met him at the Walgreens parking lot the previous day. Officer Gajevic then saw two men exit 3776 North 52nd Street, get into the Infiniti, and drive northbound on North 52nd Street towards West Capitol Drive. Officer Wilson observed the Infiniti approaching West Capitol Drive and, from his vantage point, could see the same two individuals inside that he observed the previous day; Williams and Brown. Thereafter, the Infiniti was stopped and Brown and Williams were arrested. After the Infiniti was stopped, Officer Wilson identified the driver as Williams, and the front passenger as Brown. Schmidt, arriving shortly thereafter, also identified Brown as the man who sold him the heroin the previous day.

¶5 Officer Gajevic arrived at the scene and spoke with Williams. Williams informed Officer Gajevic that he and Brown lived together at 3776 North 52nd Street. During the course of their conversation, Officer Gajevic asked Williams for consent to search the 3776 North 52nd Street residence; Williams gave his consent. During the search of 3776 North 52nd Street, officers found approximately 124 grams of heroin packaged into six baggies. As a result, Brown was charged with one count of possession with intent to deliver a controlled substance contrary to WIS. STAT. §§ 961.41(1m)(d)4. (2013-14)[1] and 939.50(3)(c),

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

and one count of delivery of a controlled substance contrary to §§ 961.41(1)(d)1. and 939.50(3)(f).

¶6 On January 14, 2013, Brown filed a motion to suppress all physical evidence seized during the search of 3776 North 52nd Street. In support of his motion, Brown argued that the search was without a warrant and was "not upon a valid consent of the defendant's roommate, Donte Williams, was outside the permissible scope of any such consent, and that the consent was coerced."

¶7 A hearing on Brown's motion to suppress was held on February 8, 2013. At the suppression hearing, Williams testified that after he and Brown were arrested, he was taken into an alley and spoke with Officer Gajevic. Williams testified that Officer Gajevic asked him what his address was and for permission to search the residence. Williams further testified that he declined to give consent to search his residence twice. Williams testified that Officer Gajevic then asked Williams if he was on parole and for the name of his parole agent. Williams testified that, at this point, he suspected that Officer Gajevic might have been on the phone with Williams's parole agent. Williams testified that when Officer Gajevic again asked for permission to search his residence he "thought about a number of consequences" such as going to jail or having his parole revoked. Williams further testified that, as a result of these concerns, he told Officer Gajevic he could search his apartment.

¶8 Officer Gajevic also testified at the suppression hearing. Officer Gajevic testified that he spoke with Williams after Williams was pulled over and arrested. Officer Gajevic testified that he identified himself as a police officer and explained to Williams the nature of the investigation over the past two days and that Williams was under arrest "for party to the crime of dealing heroin." Officer

Gajevic further testified that he informed Williams that, based on the investigation, police believed that "there might be heroin contained within 3776 North 52nd Street." Officer Gajevic testified that Williams responded that "there wouldn't be any heroin in his apartment." Officer Gajevic testified that he asked Williams for consent to search his apartment and "further advised him that it would be his option to give consent, that I wanted him to do it willingly[,]" but "in the alternative, I would attempt to apply for a search warrant based upon the information that we'd obtained so far in our investigation." Officer Gajevic specifically testified that the phrase he used—"attempt to apply"—was the phrase he always used because a "search warrant is not guaranteed." Officer Gajevic then testified that Williams advised him that he could "[g]o ahead and search [the apartment]" and that "[t]here's not going to be any heroin in [Williams's] room." Officer Gajevic further testified that after Williams consented to the search, he told Williams that "[Williams] still would be arrested and, based upon that statement, would that change his opinion at all, if I could still conduct a search of the address of 3776 North 52nd Street consensually." Officer Gajevic testified that Williams responded "go ahead. He would give consent to conduct a search."

¶9 Agent Daniel Isaacson, a field supervisor for the Wisconsin Department of Corrections, also testified at the suppression hearing. Agent Isaacson testified that he was riding along with the officers who made the traffic stop of Brown and Williams on the day they were arrested. Agent Isaacson testified that he saw Officer Gajevic speaking with Williams and heard him tell Williams that police suspected there were drugs at his residence. Agent Isaacson further testified that he heard Officer Gajevic tell Williams that "he could get consent from him to search the residence, or he would apply through the court system to get a search warrant for that residence." Agent Isaacson testified that he

then heard Williams give consent to Officer Gajevic to search his residence. Agent Isaacson testified that he did not hear anything stated about Williams facing any type of action regarding his supervision. Agent Isaacson further testified that he did not hear Officer Gajevic threaten Williams and did not hear Officer Gajevic ask Williams multiple times for consent.

¶10 At the conclusion of the evidentiary phase of the suppression hearing, the circuit court set a briefing schedule for supplemental briefs from the parties and a date for oral ruling. On May 24, 2013, the circuit court denied Brown's motion to suppress. In its oral ruling, the circuit court noted that there was conflicting testimony and it found "more credible the testimony of Agent Isaacson and Officer Gajevic with respect to what occurred back on this date in question." The circuit court found that "Williams consented to the search freely and voluntarily in the absence of any express or implied duress or coercion" and that "no deception or trickery was used in order to obtain the consent from Mr. Williams."

¶11 On September 9, 2013, Brown pled guilty to count one, possession of heroin with intent to deliver. Count two, delivery of heroin, was dismissed and read in. The circuit court sentenced Brown to seven years of initial confinement followed by seven years of extended supervision. This appeal follows.

DISCUSSION

¶12 On appeal, Brown argues that the circuit court erred in denying his motion to suppress the evidence seized during a warrantless search of his residence. Specifically, Brown argues that Williams's consent to search the 3776 North 52nd Street residence was coerced because Officer Gajevic threatened to call Williams's probation officer if Williams did not consent. Williams further

argues that he initially denied giving consent, and that Officer Gajevic threatened to get a search warrant if Williams did not consent. Brown also argues, for the first time on appeal, that the record does not show that there was probable cause to arrest Williams, thus invalidating the consent.

¶13 As a preliminary matter, we note that in most instances, a defendant who pleads guilty waives all non-jurisdictional defects and defenses. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). However, WIS. STAT. § 971.31(10) makes an exception to this rule, allowing for appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea. *See* ***Smith***, 122 Wis. 2d at 434-35. "Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact, which we review under two different standards." ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. "We uphold a circuit court's findings of fact unless they are clearly erroneous." ***Id.*** "We then independently apply the law to those facts *de novo*." ***Id.***

¶14 Under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution, warrantless searches are *per se* unreasonable. *See* ***State v. Artic***, 2010 WI 83, ¶¶28-29, 327 Wis. 2d 392, 786 N.W.2d 430. However, "[o]ne well-established exception to the warrant requirement is a search conducted pursuant to consent." ***Id.***, ¶29. "The State has the burden of proving consent by clear and convincing evidence." ***State v. Tomlinson***, 2002 WI 91, ¶21, 254 Wis. 2d 502, 648 N.W.2d 367.

¶15 In ***Artic***, the Wisconsin Supreme Court stated:

> To determine if the consent exception is satisfied, we review, first, whether consent was given in fact by words, gestures, or conduct; and second, whether the

> consent given was voluntary. The question of whether consent was given in fact is a question of historical fact. We uphold a finding of consent in fact if it is not contrary to the great weight and clear preponderance of the evidence.

Id., 327 Wis. 2d 392, ¶30 (internal citations omitted). "The determination of 'voluntariness' is a mixed question of fact and law based upon an evaluation of 'the totality of the surrounding circumstances.'" ***Id.***, ¶32 (citations omitted). "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." ***Id.***, ¶33. Factors that we may consider include:

> (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent; (2) whether the police threatened or physically intimidated the defendant or "punished" him by the deprivation of something like food or sleep; (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 as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and (6) whether the police informed the defendant that he could refuse consent.

Id.

¶16 Brown first argues that the State failed to establish that Williams freely and voluntarily consented to the search because he was "confronted with his probationary status when he purportedly gave consent," and because he "initially denied consent to search." We disagree.

¶17 In reviewing a circuit court's denial of a motion to suppress evidence, we will "'uphold findings of evidentiary or historical fact unless they are clearly erroneous.'" *See* ***State v. Dubose***, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582 (citation omitted). "Confronted with the conflict of testimony, it

[is] the [circuit] court's obligation to resolve it." ***State v. Owens***, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989). We defer to the circuit court's credibility determinations. *See* ***id.*** at 929-930. "The credibility of [witnesses] testifying at a suppression hearing outside the presence of the jury is a question for determination by the [circuit] court." ***State v. Flynn***, 92 Wis. 2d 427, 437, 285 N.W.2d 710 (1979).

¶18 Here, there was conflicting testimony as to whether Officer Gajevic threatened Williams with revocation, and as to whether Williams denied consent several times prior to consenting to the search. Williams testified that he declined to give consent to search his residence twice and only gave consent because he suspected that Officer Gajevic might have been on the phone with Williams's parole agent and he was concerned about "a number of consequences" such as going to jail or having his parole revoked. Conversely, Officer Gajevic testified that Williams was polite and responsive to his questions and clearly stated to Officer Gajevic that he could go ahead and conduct a search and that no heroin would be found. Furthermore, Agent Isaacson testified that he did not hear Officer Gajevic threaten Williams and did not hear Officer Gajevic ask Williams multiple times for consent.

¶19 The circuit court found "more credible the testimony of Agent Isaacson and Officer Gajevic with respect to what occurred back on this date." In its oral decision, the circuit court summarized its findings of fact based on the witness testimony related to Williams's consent as follows:

> Officer Gajevic was the only officer that spoke with Mr. Williams regarding consent. He was direct and up-front with Mr. Williams. Officer Gajevic advised Mr. Williams about the investigation and only asked for consent after he explained the information that they had and the options that were available.

> ….
>
> There's no credible testimony in this record that Officer Gajevic in any way threatened Mr. Williams with revocation if consent was not granted. And, in fact, after Officer Gajevic advised the defendant that he was still going to be arrested, Officer Gajevic asked if they could still go into the residence, and Mr. Williams advised him that he could.

¶20 The circuit court was clear when it stated it found the testimony of Officer Gajevic and Agent Isaacson to be more credible that Williams's testimony. We are bound by these credibility determinations. *See* ***Owens***, 148 Wis. 2d at 929-930 (we defer to the circuit court's credibility determinations). Accordingly, we reject Brown's argument that the State failed to establish that Williams freely and voluntarily consented to the search because he was "confronted with his probationary status when he purportedly gave consent," and because he "initially denied consent to search."

¶21 Brown next argues that the State failed to establish that Williams freely and voluntarily consented to the search because Officer Gajevic threatened to obtain a search warrant if Williams did not consent and there were no grounds for a valid warrant. This argument is misguided.

¶22 To be sure, a police officer may not threaten to obtain a search warrant when there are no grounds for a valid warrant. *See* ***State v. Kiekhefer***, 212 Wis. 2d 460, 473, 569 N.W.2d 316 (Ct. App. 1997). However, "[t]hreatening to obtain a search warrant does not vitiate consent if 'the expressed intention to obtain a warrant is genuine … and not merely a pretext to induce submission.'" ***Artic***, 327 Wis. 2d 392, ¶41 (citation omitted, ellipsis in ***Artic***).

¶23 Officer Gajevic testified that when he asked Williams if he would give consent to search the apartment, he told Williams that "in the alternative, I

would attempt to apply for a search warrant based upon the information that we'd obtained so far in our investigation." Officer Gajevic testified that he used the words "attempt to apply" because that's the "phrase I always use. A search warrant is not guaranteed. Whether or not I believe, in my own mind, I would be able to obtain one, it's still not my final decision on the granting of a search warrant." When asked on cross-examination what he would have included in his affidavit in support of a search warrant, Officer Gajevic replied that he would have included his "prior contacts with Mr. Brown," the "information that [he had] garnered regarding heroin dealing done by Mr. Brown by my informants over an extended period of time," and "the fact that on the day prior a delivery was made in the parking lot at 51st and Capitol where Mr. Brown was positively identified by Mr. Schmidt … a block away from their residence." Officer Gajevic further testified:

> So you take that history, the fact that a drug transaction occurred, a delivery of heroin prior thereto where Mr. Brown was positively identified, where the vehicle is located a block away from the residence, where the individual, from my understanding, who made the call prior to routinely visits or does these transactions right by Walgreens.
>
> [T]he fact that we observed two subjects … leave that residence and drive directly to where the transactions was to occur.

¶24 To the extent that Brown believes that we must find as a matter of law that there was probable cause to search his apartment in order to render Williams's consent voluntary, he is mistaken. The law does not require such a finding; rather, it is sufficient if "'the expressed intention to obtain a warrant is genuine.'" ***Kiekhefer***, 212 Wis. 2d at 473 (citation omitted). That is, as long as Officer Gajevic arguably had probable cause to obtain a search warrant, it was not coercive for him to state that he thinks he could obtain one. *See* ***id.***

¶25 The circuit court found Officer Gajevic's testimony that he believed he could get a search warrant based on the ongoing investigation of heroin activity, his prior contacts with Brown, and the events that occurred to be credible. We are bound by these credibility determinations. *See* ***Owens***, 148 Wis. 2d at 929-930 (we defer to the circuit court's credibility determinations). As such, we reject Brown's argument that the State failed to establish that Williams freely and voluntarily consented to the search because Officer Gajevic threatened to obtain a search warrant if Williams did not consent and there were no grounds for a valid warrant.

¶26 Based on the foregoing, we conclude that the State has met its burden of showing by clear and convincing evidence that Officer Gajevic obtained consent from Williams to search the 3776 North 52nd Street residence, and that Williams's consent was voluntarily given. Accordingly, after our independent application of the law to the facts gleaned at the suppression hearing, we conclude that the circuit court appropriately denied Brown's motion to suppress.

¶27 Finally, Brown argues, for the first time on appeal, that Williams's arrest was without probable cause and "[t]hat alone invalidates the consent." To preserve the right to appeal a ruling on the admissibility of evidence, however, Brown was required to inform the circuit court of the specific ground upon which his objection was based. *See* ***State v. Peters***, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991). "General objections which do not indicate the grounds for inadmissibility will not suffice to preserve the objector's right to appeal." ***Id.*** Because Brown did not raise the issue of probable cause in his motion to suppress or in a postconviction motion, he is barred from raising it now on appeal. *See* ***id.*** Nevertheless, even considering the merits of Brown's probable cause argument, we are not persuaded.

¶28 Brown appears to argue that there was insufficient evidence at the suppression hearing to show police had probable cause to arrest Williams and, therefore, "the State failed to prove that the consent to search obtained from Mr. Williams was not tainted by an illegal arrest." We disagree.

¶29 "The probable cause standard is defined in terms of facts and circumstances sufficient to warrant a reasonable police officer in believing that the defendant committed or was committing a crime." ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). The Wisconsin Supreme Court has stated:

> Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility … and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case.

State v. Paszek, 50 Wis. 2d 619, 624-25, 184 N.W.2d 836 (1971) (internal citations omitted).

¶30 At the suppression hearing, Officer Gajevic testified that he spoke to Williams after he was pulled over and arrested. Officer Gajevic testified that he identified himself as a police officer and explained the nature of the investigation, specifically what happened with the heroin transactions over the past two days, and that Williams was under arrest "for party to the crime of dealing heroin on these two occasions." Officer Gajevic further testified that he told Williams that it was Officer Gajevic's understanding that Williams had been "involved in a

delivery of heroin on [June 19, 2012] in the parking lot of the Walgreens located at 51st and Capitol and that he was also involved in the delivery of heroin on [June 20, 2012]." Officer Gajevic's testimony describing the incident at the Walgreens parking lot on June 19, 2012 matches the events that transpired as described in the criminal complaint. This testimony is sufficient to lead a reasonable police officer to believe that the defendant probably committed a crime. *See* ***id.*** Accordingly, we conclude that sufficient evidence was presented at the suppression hearing to show that there was probable cause to arrest Williams.

¶31 For the foregoing reasons, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.