COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2976-CR **Cir. Ct. No. 2002CF909**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH W. GROTHMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for WAUKESHA County: MICHAEL O. BOHREN, Judge. *Affirmed*.

¶1 NETTESHEIM, J.[1] Kenneth Grothmann appeals from a judgment of conviction for three counts of misdemeanor possession of cocaine and one count of misdemeanor possession of drug paraphernalia. Grothmann contends that (1) the Waukesha County Metro Drug Unit did not have probable cause to arrest him, (2) the warrantless search of his vehicle was not consensual, (3) the warrantless search of his home was not consensual, and (4) his written statement was not voluntary. We conclude that the drug unit did have probable cause to arrest Grothmann. We further conclude that the facts, as found by the trial court, do not support Grothmann's contention that the warrantless searches were not consensual or that his written statement was not voluntary. Accordingly, we affirm the judgment.

BACKGROUND

¶2 On September 10, 2002, the State filed a criminal complaint against Grothmann alleging five drug-related offenses. The offenses stemmed from incidents occurring on July 30, 2002, and August 21, 2002. Grothmann waived his right to a preliminary hearing and subsequently filed a motion to suppress on grounds of illegal arrest and illegal search and seizure.

¶3 At the hearings on Grothmann's motion to suppress, the arresting officer, Andrew Kraus of the Waukesha County Metro Drug Unit, testified that on July 30, 2002, he was contacted by City of Muskego Police Officer John Mesich, who had obtained a package recovered from Mail Boxes Etc., a retail shipping and postal center. The package contents eventually were tested and found to contain

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

methamphetamine. Mesich provided Kraus with the name of the employees at Mail Boxes Etc. who had contact with the package.

¶4 Kraus contacted an employee, Charyl Barnes, and obtained from her a physical description of the person who had brought the package to the store and attempted to mail it. During a surveillance operation at Mail Boxes Etc. on August 21, 2002, Kraus observed an individual enter the store matching the physical description given by Barnes. Kraus was monitoring the store that day because he had been contacted by store employees with information that Grothmann had telephoned them inquiring about the whereabouts of a package he tried to mail on a previous occasion.

¶5 Kraus entered the store and obtained confirmation that the individual was the person who had raised Barnes' suspicions. Kraus approached the individual, who gave his name as Ken Grothmann. Kraus then placed Grothmann under arrest inside the store. Grothmann was handcuffed, searched and led outside the store. At the time of the arrest, Grothmann was a fifty-two year old who had owned and operated his own entertainment game business for the past twenty years. He also was an ex-Marine who had received the Purple Heart.

¶6 Kraus was met outside of the store by officers of the Muskego police department, who asked Grothmann for permission to search his vehicle parked in the Mail Boxes Etc. lot. Kraus and Detective Robert Wavra testified that Grothmann gave the officers permission to search his vehicle at that time. According to Wavra, Grothmann did not exhibit any concern or hesitation in having his vehicle searched. Wavra and Kraus found some controlled substances and two locked boxes during the search.

¶7 Grothmann then was taken to the Muskego police department. Wavra read Grothmann his ***Miranda***[2] rights, obtained a statement from him, and witnessed Grothmann signing his statement. The locked boxes were then opened using keys Grothmann provided. One of the boxes contained a gun; the other, cocaine. Grothmann was not handcuffed while in the interview room and he, Wavra and Kraus drank sodas and talked. The officers were in plain clothes and their guns were locked up outside the interview room.

¶8 Wavra testified that after the interview and completion of the written statement, he brought up the topic of Grothmann cooperating with the police. Wavra informed Grothmann that any cooperation he gave to the police would be made known to the district attorney's office and that it would be up to that office to determine what consideration, if any, would be granted. Wavra and Kraus then asked Grothmann if they could search his residence and, according to Wavra, Grothmann agreed, asking only that the search be done quickly so that the employee that likely would be there when they arrived "wouldn't find out [Grothmann] was cooperating with us." Grothmann, still not handcuffed, then was driven back to his vehicle and allowed to drive his vehicle alone to his residence as police followed.

¶9 Grothmann let the officers into his residence and unlocked a lock on his bedroom door. According to Wavra, Grothmann did not hesitate to open a safe found inside the bedroom when asked, but cautioned the officers to "be careful" of the gun that probably was inside. Additional controlled substances were found. Wavra testified that at no time during the search of the residence did Grothmann

[2] ***Miranda v. Arizona,*** 384 U.S. 436 (1966).

ever indicate to the officers that he wanted them to limit the search to looking for a methamphetamine lab. Grothmann was allowed to remain at his residence following the search of the premises. The next day, on August 22, 2002, Grothmann signed the forms to become a confidential informant.

¶10 During his testimony, Grothmann contended that he permitted the officers to search his vehicle only under threat that the vehicle would be removed at his expense. Grothmann also contended that he did not give permission to the officers to open the locked boxes found in his vehicle, but that he was told to open them. Grothmann further contended that he allowed the officers to search his residence only for a methamphetamine lab since the officers had told him there would be "no deal if we can't look for a meth lab." Finally, Grothmann contended that he gave a statement only so that he would be released and in return for the opportunity to cooperate. He asserted that, from the beginning, the police had told him that if he "would cooperate with them that this whole thing could go away."

¶11 At the conclusion of the suppression hearings, the trial court found that Grothmann voluntarily consented to the search of his vehicle and residence, and voluntarily gave a written statement to the police. The trial court found Wavra's and Kraus' testimony to be credible and Grothmann's to be "evasive and manipulative." The trial court stated that Grothmann showed himself to be "savvy and streetwise" and that the circumstances indicated that no intimidation had occurred. With respect to any quid pro quo, the trial court found that Grothmann's version represented "what he wanted, but that's not what he was told." The trial court concluded that there was no evidence of duress or coercion by the police officers during any of their contact with Grothmann.

DISCUSSION

Probable Cause to Arrest

¶12 Grothmann first contends that the Waukesha County Metro Drug Unit lacked probable cause to arrest him on August 21, 2002, because the police did not have an arrest warrant, search warrant or line-up identification when the arrest was made.

¶13 "Whether probable cause to arrest exists based on the facts of a given case is a question of law we review independently of the trial court." ***State v. Cash***, 2004 WI App 63, ¶24, 271 Wis. 2d 451, 677 N.W.2d 709, *review denied*, 2004 WI 114, 273 Wis. 2d 657, 684 N.W.2d 138 (No. 2003AP1614-CR). There is probable cause to arrest "when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime…. The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility." ***Id***. (citations omitted).

¶14 We conclude that Kraus had probable cause to arrest Grothmann on August 21, 2002, because, based on the totality of the circumstances within his knowledge at the time of the arrest, Kraus reasonably could have believed that Grothmann had probably committed a crime. *See* ***id***. Mesich obtained the package containing what later was determined to be methamphetamine that was recovered from Mail Boxes Etc. Kraus contacted Barnes, the employee who had contact with the package, and obtained from her the physical description of the person who had brought the package to the store. During the surveillance operation, Kraus identified an individual enter the store matching that description. Store employees had reported that Grothmann had telephoned the store earlier that

day inquiring about a package he earlier had tried to mail. Kraus confirmed that this individual was the one who had raised Barnes' suspicions. The individual gave his name as Ken Grothmann.

¶15 Based on Kraus' knowledge of these facts at the time of Grothmann's arrest, a reasonable officer could believe that Grothmann's guilt was more than a possibility. We conclude that there was probable cause to arrest Grothmann on August 21, 2002.

Warrantless Search of Grothmann's Vehicle

¶16 Grothmann next argues that the warrantless search of his vehicle was not consensual. The sole reason for this argument is that the police did not advise him that he had the right to withhold consent.

¶17 In reviewing the denial of a motion to suppress evidence, we will uphold a trial court's findings of historical fact unless they are clearly erroneous. ***State v. Vorburger***, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829. However, we will review de novo the trial court's application of constitutional principles to those facts. ***Id***.

¶18 The Fourth Amendment to the United States Constitution and Article I, section 11 of the Wisconsin Constitution provide protection from unreasonable searches and seizures. ***State v. Pallone***, 2000 WI 77, ¶28, 236 Wis. 2d 162, 613 N.W.2d 568. The standards and principles surrounding the Fourth Amendment are generally applicable to the construction of article I, section 11. ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). The Fourth Amendment is not violated by a warrantless search where consent to search is freely and voluntarily given. ***Id***. at 196. The State bears the burden of proving by clear and

positive evidence that the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied. ***State v. Johnson***, 177 Wis. 2d 224, 233, 501 N.W.2d 876 (Ct. App. 1993). However, whether an individual has given consent is a question of fact, so we will uphold the trial court's finding unless it is against the great weight and clear preponderance of the evidence. ***State v. Tomlinson***, 2002 WI 91, ¶36, 254 Wis. 2d 502, 648 N.W.2d 367.

¶19 In determining whether consent was voluntary, no single factor is dispositive. ***State v. Hughes***, 2000 WI 24, ¶41, 233 Wis. 2d 280, 607 N.W.2d 621. Although not being informed of the right to refuse consent often weighs against a determination of voluntariness, it is not the only factor in the analysis and does not mandate a finding of involuntariness. ***Id***., ¶47; *see also* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 227 (1973) (holding that "[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.") Instead, we examine the totality of the circumstances. ***Hughes***, 233 Wis. 2d 280, ¶41. When assessing voluntariness, courts generally focus on characteristics such as the defendant's age, intelligence, education, physical and emotional condition, and prior experience with the police. ***Phillips***, 218 Wis. 2d at 202.

¶20 The trial court found credible Kraus' and Wavra's testimony that they first asked Grothmann for permission to search his vehicle, that he granted it, and that Grothmann did not act as though he was concerned or hesitant about having his vehicle searched. The trial court noted that, except for Grothmann being under arrest, the environment lacked any indicia of duress or undue influence on the part of the police, and there was no evidence of any police

conduct that undercut Grothmann's ability to make a "free and unrestrained decision as to what he was doing."

¶21 The trial court also was persuaded that, under ***State v. Stankus,*** 220 Wis. 2d 232, 582 N.W.2d 468 (Ct. App. 1998), the officers' failure to inform Grothmann that he had a right to refuse to consent to the search of his vehicle did not impermissibly taint that search. *See* ***id***. at 243. We agree. Grothmann was a "savvy and street-wise" fifty-two-year-old ex-Marine whose livelihood gave him access to locations with potential for drug activity. We conclude that the State met its burden by clear and positive evidence that the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied. *See* ***Johnson***, 177 Wis. 2d at 233. Given the totality of circumstances, Grothmann's consent to the search of his vehicle was voluntary and not the product of unfair police tactics. *See* ***Stankus***, 220 Wis. 2d at 243-44.

Warrantless Search of Grothmann's Residence

¶22 Grothmann next argues that his consent to the warrantless search of his residence was both limited in scope and not truly voluntary. He asserts that his consent was limited to a search for a methamphetamine lab because the officers had told him there would be "no deal if we can't look for a meth lab," and not truly voluntary because, had he not consented, he would have been refused the opportunity to cooperate with the police in return for consideration.

¶23 As already stated, the Fourth Amendment is not violated by a warrantless search where consent to search is freely and voluntarily given, meaning that the consent is free, intelligent, unequivocal and specific, without any duress or coercion, actual or implied. ***Phillips***, 218 Wis. 2d at 196-97. It is the State's burden to show that the consent was voluntary and the circumstances free

of duress. *See* ***Johnson***, 177 Wis. 2d at 233. Whether consent is voluntary is determined by examining the totality of the circumstances. ***Hughes***, 233 Wis. 2d 280, ¶41.

¶24 The trial court heard evidence that although Grothmann was arrested and taken to the Muskego police department to be interviewed, he was not wearing handcuffs during the interview nor when he was driven back to his vehicle and he was allowed to drive alone to his residence. Grothmann himself allowed the officers into his residence, unlocked the door to his bedroom, showed no hesitation in complying with the officers' request to open the safe located in the bedroom, and never indicated to the officers that he wanted them to limit the search to looking for a methamphetamine lab. The trial court found less credible Grothmann's testimony that he unlocked the bedroom and the safe only because he was instructed, not asked, to do so and because he believed cooperation with the police was the only way to gain favorable treatment for himself.

¶25 Based on the totality of the circumstances, we conclude that the State met its burden by clear and positive evidence that the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied. ***Johnson***, 177 Wis. 2d at 233. The trial court, therefore, properly denied Grothmann's motion to suppress the evidence found in his residence.

Voluntariness of Grothmann's Written Statement

¶26 Finally, Grothmann argues that his written statement to the police was not voluntary because it was made under the premise that he would receive consideration from the police in return for his cooperation as a confidential informant.

¶27 In reviewing the trial court's determination on the voluntariness of a defendant's confession, we will uphold the trial court's findings of historical fact unless they are clearly erroneous. ***State v. Agnello***, 2004 WI App 2, ¶8, 269 Wis. 2d 260, 674 N.W.2d 594, *review denied*, 269 Wis. 2d 198, 675 N.W.2d 804 (No. 2000AP2599-CR). However, we will review de novo the trial court's application of constitutional principles to those facts. ***Id***.

¶28 In determining whether a written statement is voluntary, we inquire whether the confession was procured by coercive means or was the product of improper pressures exercised by the police. *See* ***id***., ¶9. As part of the inquiry, we must determine whether the defendant was the victim of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant exceeded the defendant's ability to resist. ***Id***. Again, we make this determination by examining the totality of the circumstances surrounding the confession and by balancing the personal characteristics of the defendant against the pressures imposed and tactics used by the police. ***Id***. "Personal characteristics" include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with the police. ***Id***. Police pressures and tactics include such things as the duration of the questioning; the general conditions under which the confession took place; any excessive physical or psychological pressure brought to bear on the defendant; any inducements, threats, or other methods used to compel a response; and whether the defendant was informed of his or her rights to counsel and against self-incrimination. ***Id***.

¶29 The trial court concluded that Grothmann's statement to police was voluntary. The court heard testimony that, after being taken to the Muskego police department, Grothmann was read his ***Miranda*** rights and was not handcuffed during the time he was in the interview room. It heard the testimony

from Grothmann that talk of cooperating with the police came up while still at Mail Boxes Etc. and the competing testimony from the police officers that the matter of possible cooperation first arose after the interview and the completion of the written statement. The trial court also heard conflicting testimony regarding the "deal" Grothmann allegedly struck. Grothmann testified that he understood that, if he cooperated, no charges would be issued and his drug activity would not be disclosed to the district attorney, a political acquaintance. The officers acknowledged that cooperation was discussed but testified that the level and success of the cooperation would be communicated to the district attorney, who would make the final decision as to disposition.

¶30 Overall, the trial court found Wavra's and Kraus' testimony to be the more credible evidence, and Grothmann's to be less credible, evasive and manipulative. The court noted that the statement was taken only after Grothmann was read his ***Miranda*** rights, and "without any coercion, duress, force or any other undue activity meant to undermine [his] ability to make an independent and informed decision." Grothmann's "savvy and streetwise" nature and the absence of any intimidating circumstances led the trial court to doubt Grothmann's testimony that his statement was part of a quid pro quo. The trial court found Grothmann's testimony represented "what [Grothmann] wanted, but … not what he was told."

¶31 After looking at the totality of the circumstances and balancing Grothmann's personal characteristics with the tactics the police used to obtain his statement, we, too, conclude that Grothmann's statement to the police was voluntary. The evidence shows it was not procured by coercive means, nor was it the product of improper pressures exercised by the police. The trial court, therefore, properly denied Grothmann's motion to suppress his statement to police.

CONCLUSION

¶32 We conclude that the officer had probable cause to arrest Grothmann. We further conclude that the facts, as found by the trial court, support the conclusion that the warrantless searches of Grothmann's vehicle and residence were consensual and that his written statement was voluntary. Accordingly, we affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.