COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2323-CR **Cir. Ct. No. 2002CF146**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL J. GRAMZA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Daniel J. Gramza appeals from the judgment of conviction entered against him. He argues on appeal that the trial court erred when it denied his motion to suppress certain evidence. Because we conclude that the trial court properly denied the motion, we affirm.

¶2 Gramza pled no contest to one count of delivery of marijuana and one count of delivery of cocaine. Prior to entering his plea, Gramza moved to suppress evidence and statements obtained from him by the police. The motion alleged that the search of Gramza and his residence was without probable cause. Specifically, Gramza argued that his consent to search was coerced under the circumstances, and therefore was not voluntary. The trial court denied the motion.

¶3 The trial court found the underlying facts to be that three officers, one in uniform, came to Gramza's residence to talk about delivery of controlled substance charges that were pending against him. Gramza was there with some friends. One of the friends ran when the police arrived and one of the officers went after him and caught him. The officers explained to Gramza why they were there and then read him his ***Miranda***[1] rights. Gramza testified that the officers then asked him if they could search his residence, that he said no twice and then changed his mind when they threatened to get a search warrant. One of the officers testified that Gramza consented to the entry and search immediately. The trial court believed the officer's testimony, finding that it strained credibility that the officers would come to the house, go to the trouble of reading Gramza his rights, and then coerce him into consenting to the search. The court found that Gramza allowed the officers to come in and search his bedroom. The court concluded that based on those facts, the consent was voluntary. On appeal, Gramza renews his argument that his statement to the police and the evidence obtained as a result of the search of his room should be suppressed.

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

¶4 The State argues that we need not consider the merits of Gramza's argument for two reasons. First, the State argues that the evidence Gramza sought to suppress was not linked to the crimes of which he was convicted. The State asserts that he was charged with possession of marijuana and cocaine on two dates prior to the search. The evidence found during the search resulted in a drug paraphernalia charge that was subsequently dismissed. The statement Gramza made on the day of the search discussed delivery of small amounts of cocaine and marijuana but not on the specific dates stated in the charges. We conclude that there is a sufficient link between the statements from the search and the crimes charged. Even if Gramza's statements did not directly relate to the drugs delivered on the specific dates charged, the statements would have been admissible as relevant evidence had the case gone to trial.

¶5 The second reason the State asserts that we should not address the merits of this appeal is that Gramza did not challenge the police entry in the trial court, but rather what happened after the police entered. We disagree. The crux of Gramza's argument both before the trial court and on appeal is that the police lured him into believing they wanted information about others, when in fact, they were seeking more incriminating evidence against him. Consequently, we will discuss the merits of Gramza's argument that he did not consent to the search of his residence.

¶6 In his brief, Gramza correctly states the standard of review we apply when reviewing a determination of the "voluntariness" of a defendant's consent to search. Voluntariness of consent is a question of constitutional fact and we review it under a two-step analysis. ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). "[W]e will not upset the circuit court's findings of evidentiary or historical fact unless those findings are contrary to the great weight and clear

preponderance of the evidence. We will, however, independently apply the constitutional principles to the facts as found to determine whether the standard of voluntariness has been met." ***Id.*** (citations omitted). To determine whether a consent to search was voluntary, we must consider the totality of the circumstances. ***State v. Hughes***, 2000 WI 24, ¶41, 233 Wis. 2d 280, 607 N.W.2d 621. "The test for voluntariness is whether consent to search was given in the 'absence of actual coercive improper police practices designed to overcome the resistance of a defendant.'" ***Id.*** (citation omitted). "When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony." ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (citation omitted).

¶7 In his argument to this court, Gramza in essence asks us to review the facts de novo. The trial court denied the motion to suppress primarily on the grounds of credibility. The court found that the officer's testimony was corroborated to a certain extent by the testimony of Gramza's mother. The court also found that there were internal inconsistencies in Gramza's testimony and that his recollections were unclear on a lot of things but very clear on the fact that his initial response to the police was "no." The court also noted the irony of Gramza's testimony that the police read him his ***Miranda*** rights even though he was not under arrest, and then trampled on his constitutional rights when conducting the search. The court ultimately concluded that the officer's testimony was more credible than Gramza's testimony.

¶8 We review these findings of fact under a clearly erroneous standard and we conclude that the trial court's finding that the officer's testimony was more credible than Gramza's testimony was not clearly erroneous. Based on these facts,

we agree with the trial court's conclusion that Gramza's consent was voluntary. Consequently, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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