COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP587-CR **Cir. Ct. No. 2015CF2778**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY S. TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] Anthony Taylor appeals a judgment of conviction for possession of marijuana as a second or subsequent offense and the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

denial of his motion to suppress evidence obtained during a search of an apartment unit where Taylor was staying. The search was conducted after police obtained consent to search from a resident, following a police dog alert to the presence of drugs in the unit. Taylor argues that the dog sniff was unlawful, and that the consent was not sufficiently attenuated to purge the taint of the unlawful dog sniff. Taylor also argues that consent was not voluntarily given. I assume without deciding that use of the drug-sniffing dog was unlawful, and reject Taylor's remaining arguments. Accordingly, I affirm.

¶2 The following pertinent facts come from testimony at the suppression hearing by witnesses whom the court found to be credible and from the circuit court's factual findings. Taylor was a temporary resident in the apartment of his girlfriend, S.M., when S.M. had an altercation with another woman, J.C., at S.M.'s apartment building. This altercation resulted in injury to one of S.M.'s fingers and hair was pulled from her scalp. S.M. called 911. Police on the scene offered S.M. medical treatment, which she refused.

¶3 During the course of investigation that followed, J.C. alleged to police that she had driven to Chicago and participated in picking up marijuana with Taylor, that Taylor had brought marijuana into S.M.'s apartment that day, and that he was storing it in the apartment unit. J.C. also told police that Taylor was possibly in possession of a firearm. One officer who was at the scene testified that he had been aware at the time police responded to the 911 call that Taylor had recently been a victim of a robbery and also that he was a felon and therefore prohibited from possessing a firearm. Police decided to temporarily secure the apartment unit, meaning that they would not permit anyone to enter or leave without police permission.

¶4 Standing in the hallway outside the unit, the officers believed that they could detect the odor of marijuana coming from within the unit. The officers asked S.M., who was outside the unit, if she would consent to their entry. S.M. declined to give consent. The officers then explained to S.M. that they were going to continue investigating and were prepared to seek a search warrant. Police subsequently summoned a drug-sniffing K-9 unit, which alerted to S.M.'s door. After the dog alerted, one of the detectives left the area to begin the process of applying for a search warrant. S.M.'s mother and brother arrived at the scene, either during the dog sniff or shortly thereafter.

¶5 While waiting outside the unit for the detective to return with the warrant, S.M. told an officer that she wanted to go inside to check on her 4-year-old son, who she said was alone inside the unit. The officer told S.M. that she would be permitted to enter her apartment to check on her son so long as an officer accompanied her. Eventually, S.M. entered the apartment with an officer, and while in the apartment retrieved some clothes. Police also allowed S.M.'s brother to enter the apartment, also accompanied by police. While inside the apartment, the officer noticed a strong odor of marijuana.

¶6 Back outside the unit, S.M.'s mother encouraged her to consent to a search, asking S.M. why she was not giving consent, telling her that police were going to obtain a warrant, and asking why she was "protecting" Taylor. An officer who overheard at least a part of that conversation testified that the mother "expressed her dissatisfaction with ... the fact that Mr. Taylor was selling drugs out of the apartment where her grandchild was" and that the mother was "more or less demanding to know why [S.M.] was not providing consent." S.M. testified that she ultimately decided to follow her mother's advice that it was "a better idea" for S.M. to consent than to refuse to consent.

¶7 Separately, an officer told S.M. that police might have to wait up to three hours in order to obtain the warrant. During this conversation, the officer talked with S.M. about how police had obtained "substantial" statements from J.C. about marijuana possession and the fact that police smelled marijuana.

¶8 After all of the above events had occurred, and about one hour after police arrived on scene, S.M. consented to a search of her apartment, signing a consent-to-search form. S.M. testified that her decision to consent was partially based on her desire to speed up the search process; she did not want to wait up to three hours for the search to occur.

¶9 During the hour after officers arrived to the time S.M. consented, S.M. was never in handcuffs, never placed under arrest, and never threatened by police. Further, during this time, police told S.M. that she was free to leave and never tried to talk her out of refusing consent. The court found that there is "nothing about the conduct of the police officers" that "would in my view constitute undue pressure or coercion."

¶10 After S.M. consented to the search, police entered the unit and discovered marijuana, resulting in Taylor being charged. Taylor moved to suppress the evidence obtained in the search on two grounds: that S.M.'s eventual consent was involuntary and that it was "fruit of the poisonous tree," given the allegedly illegal dog sniff. After the circuit court denied Taylor's suppression motion, Taylor entered a guilty plea to the possession charge.

¶11 On appeal, Taylor renews his suppression arguments. I assume without deciding that the dog sniff was unlawful, and conclude that S.M.'s consent was voluntary and that S.M.'s consent was sufficiently attenuated from the dog sniff to be valid.

¶12 I rely on the circuit court's findings of fact unless they are contrary to the great weight and clear preponderance of the evidence and independently apply constitutional principles to the facts. ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998).

¶13 Taylor argues that S.M. did not give voluntary consent for the search. Voluntariness of consent for a warrantless search relies on a multi-factor, totality of circumstances test: (1) whether the police used deception, trickery, or misrepresentation to obtain consent; (2) whether the police used coercion, threats or physical intimidation, or punishment such as deprivation of food or sleep; (3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative; (4) the existence of prior refusals of consent; (5) pertinent characteristics of the person giving consent such as age, intelligence, physical and emotional condition, and any prior experience with police; and (6) whether the police informed the person that she could refuse consent. *See* ***State v. Artic***, 2010 WI 83, ¶33, 327 Wis. 2d 392, 786 N.W.2d 430.

¶14 I conclude that two of the six factors weigh slightly, but not strongly, in favor of involuntariness, but the balance each weigh either somewhat or strongly in favor of voluntariness. Based on the totality of the circumstances, I conclude that S.M.'s eventual consent was voluntary.

¶15 **Deception**. I conclude that this factor weighs strongly in favor of voluntariness, because there is no evidence of deception. Taylor acknowledges that the officers clearly identified themselves, and told S.M. that they believed that they had smelled marijuana coming from the unit and that they wanted to search the unit. Police also explained to S.M. that, based on the information they had at

that point, they intended to obtain a search warrant, if necessary, and explained "the process that would unfold from that point."

¶16 Taylor argues that the officers misrepresented that they had sufficient evidence to obtain a search warrant. However, I conclude that police had probable cause for a warrant based on the fresh allegations made by J.C. summarized above, which were corroborated by multiple pieces of information, such as identifying information regarding Taylor and the officers' personal detection of the smell of marijuana emanating from the unit. In addition, our supreme court has held that it weighs in favor of voluntariness that officers disclose to the person whose consent is requested nearly all of the information that police have concerning their interest in the place to be searched, as occurred here. *See* ***Phillips***, 218 Wis. 2d at 198-99.

¶17 **Threats/coercion/punishment**. I conclude that there is little evidence of threats, coercion, or punishment that could matter to the analysis, and therefore this factor weighs at least somewhat in favor of voluntariness. Police secured the apartment and, for a time, would not allow S.M. to enter without police accompaniment, where her 4-year-old was by himself, which are facts that inherently had some coercive potential. However, Taylor does not suggest that the decision to secure the apartment was itself pretextual or otherwise improper, and in any case I see no room for such an argument. The police had just been given a plausible account, which was at least partially corroborated, of marijuana possession on a non-trivial scale and of the possible unlawful possession of a firearm. And, as the circuit court found, there is no evidence of deprivation of necessities, coercive interrogation, arrest, or detention.

¶18 Taylor argues that the officer's statement that, in the absence of consent, police intended to obtain a search warrant was necessarily a coercive tactic. This is incorrect. When police provide someone who has authority to give consent for a search with a truthful, good-faith explanation that police have the option of obtaining a warrant and plan to pursue this option absent consent, this does not necessarily render subsequent consent involuntary. *See* ***Artic***, 327 Wis. 2d 392, ¶41. This is what appears to have occurred here.

¶19 **Congenial conditions**. For many of the reasons already mentioned, the third factor weighs in favor of voluntariness. *See* ***id.***, ¶43. Taylor does not point to any evidence that police engaged in unnecessary or gratuitous shows of force. In addition, the officers offered her medical treatment, which she refused. Further, police informed S.M. that she was free to leave at any time. Moreover, S.M.'s mother and brother were present to provide support to S.M. and police did not interfere with this support.

¶20 Taylor points to S.M.'s testimony that she was upset throughout her interactions with officers as evidence that the conditions were not congenial or cooperative. It is true that the circumstances S.M. was experiencing—including temporarily not being able to enter her apartment without a police escort while her young son was inside—would be upsetting to the average person. However, it appears from the evidence that S.M. was primarily shaken by her original altercation at the apartment building, resulting in at least minor injuries, and by the fact that she had to interact with police in the wake of this significant altercation, and not by any unnecessarily hostile or intimidating act by police.

¶21 **Prior refusal of consent**. An initial refusal of consent, as occurred here, weighs against voluntariness.[2] *See* ***Artic***, 327 Wis. 2d 392, ¶56.

¶22 **Personal characteristics**. This factor weighs in favor of voluntariness. A person need not possess "exceptional intelligence, legal knowledge, or experience with law enforcement" to voluntarily consent. ***Id.***, ¶59. Instead, the issue is whether there was evidence "suggesting that the defendant was particularly susceptible to improper influence, duress, intimidation or trickery." ***Phillips***, 218 Wis. 2d at 202-03. There is nothing in the record that would suggest that S.M., an adult woman who was not apparently suffering from any obvious cognitive or emotional disability, was particularly susceptible. Taylor asserts that S.M. was particularly susceptible to improper influence because she was both distressed as a result of the physical altercation and worried about her son. However, S.M. was able to successfully summon police with a 911 call, and was then able to communicate seemingly effectively with officers during multiple conversations.

¶23 **Notice of right to refuse**. This factor may tip in favor of involuntariness, but only slightly. The officers here did not explicitly inform S.M. of her right to refuse consent. However, they did so implicitly. S.M. refused consent initially and the officers respected this refusal, without suggesting that

[2] It is unclear from the record the number of times that S.M. refused consent. S.M. testified that it was "a few times," although she did not provide details about what she said and when. The officer's testimony is unclear on the number of times she refused consent. The circuit court referred to a single refusal, but did not make a specific finding about the number of times she refused. In any case, whether it was one or "a few" refusals, this counts against voluntariness.

refusal was improper or had to be justified. This conveyed to her implicitly but clearly that a refusal would be honored.

¶24 Turning to the attenuation topic, starting from the assumption that the dog sniff constituted an illegal search, I conclude that S.M.'s consent was sufficiently attenuated to purge the taint.

¶25 An attenuating circumstance breaks the causal chain between a possible illegality and the seizure of evidence. ***Phillips***, 218 Wis. 2d at 204-05. When considering whether the causal chain has been broken, courts consider whether the evidence was obtained through an exploitation of prior police illegality or instead by means "sufficiently attenuated" to be purged of the illegality. ***Id.*** at 205. Courts look to three factors: (1) the temporal proximity of the misconduct and the seizure of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. ***Id.*** (citing ***Brown v. Illinois***, 422 U.S. 590, 603-04 (1975)). If S.M.'s consent was sufficiently attenuated, then I may conclude that the search of S.M.'s apartment was legal. *See* ***Phillips***, 218 Wis. 2d at 204-05. I conclude that all three factors weigh in favor of attenuation on the facts here.

¶26 **Temporal proximity**. The temporal proximity here supports a finding of attenuation. It is true that S.M.'s consent came shortly after the dog sniff occurred. However, this factor involves not only the literal passage of time, but also "the conditions existing at the time of the consent." ***State v. Richter***, 2000 WI 58, 235 Wis. 2d 524, ¶46, 612 N.W.2d 29. For example, in ***Phillips***, the court found that, even though mere minutes separated the illegality from the search, "the non-threatening, non-custodial conditions surrounding the search … lean toward a finding that any taint created by the agents' [illegality] … dissipated when the

defendant consented to the search." ***Phillips***, 218 Wis. 2d at 207; *see also* ***Richter***, 235 Wis. 2d 524, ¶¶46-47 (a brief period of time, without aggravating conditions, weighs in favor of attenuation). Taylor argues that the tense atmosphere and the short time between the dog sniff and S.M.'s consent are significant. However, I agree with the circuit court that it is more significant that there was sufficient time after the dog sniff for S.M. to speak to her mother and to enter her apartment with an officer to check on her son and retrieve clothing before consenting to the search, all under generally non-threatening and non-custodial conditions.

¶27 **Intervening circumstances**. Taylor argues that there were no intervening circumstances between the dog sniff and S.M.'s consent. However, the conversation between S.M. and the officer, as well as the conversation between S.M. and her mother, constitute intervening circumstances. An intervening circumstance is a "'discontinuity between the [illegality] and the consent such that the original illegality is weakened and attenuated.'" ***Artic***, 397 Wis. 2d 392, ¶85 (quoted source omitted). In ***Phillips***, the court concluded that a conversation between the officer and the subject was a significant intervening circumstance because "it provided the defendant with sufficient information with which he could decide whether to freely consent" to a search. ***Phillips***, 218 Wis. 2d at 208-09. And, like the officer in ***Phillips***, the officer here answered S.M.'s questions and provided S.M. with sufficient information regarding the circumstances surrounding the desired search, and the mother effectively "demanded" that S.M. consent.

¶28 **Purpose and flagrancy of police conduct**. This weighs heavily in favor of attenuation. The third factor is "particularly" important because it is most closely tied to the rationale of the exclusionary rule. ***Richter***, 235 Wis. 2d at 551. Conduct may be "flagrant" if the impropriety of the conduct was obvious or the

official intentionally engaged in conduct he or she knew to be unconstitutional. ***Artic***, 327 Wis. 2d 392, ¶91. Inherent in the flagrancy or purposefulness evaluation is an inquiry into "whether there is evidence of some degree of bad faith exploitation of the situation" by the police. ***Id.*** As suggested above, there is no such evidence here. Taylor argues that the police used the dog sniff to pressure S.M. to consent to the search. However, there is no evidence that the police used the dog sniff in bad faith. First, Wisconsin law is apparently not settled on the question of whether a dog sniff in a common area of an apartment building, such as in a common hallway at the door of one unit, is an illegal search under the Fourth Amendment. Second, the only evidence is that the officers did *not* try to talk S.M. out of her initial refusal of consent. Simply put, it appears that S.M.'s mother, not the police, convinced S.M. to consent. And, there is no suggestion that police used the mother as a cat's paw, that is, as an unwitting tool to gain consent from her daughter.

By the Court.—Judgment affirmed.

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