COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP888-CR **Cir. Ct. No. 2003CF287**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER S. VNUK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Christopher Vnuk appeals from the judgment of conviction entered against him. The issue on appeal is whether Vnuk's parents, with whom he lived, had actual authority to consent to the search of the basement

area of their home. Because we conclude that the circuit court properly found that his parents had actual authority to consent to the search, we affirm.

¶2 Vnuk was convicted of one count of possession with intent to deliver more than 2500 grams but less than 10,000 grams of marijuana. Prior to entering a plea of no contest to the charge, Vnuk moved to suppress all the evidence obtained at a search of his residence. Vnuk lived in the basement of his parents' home. After hearings on the motion, the court granted the motion as to the evidence obtained in Vnuk's bedroom and bathroom, but denied it as to the evidence obtained in the rest of the residence, specifically, the common areas of the basement. The court found that Vnuk's parents had actual authority to consent to the search of those areas.

¶3 The court made the following findings of fact. While questioning Vnuk after he had been arrested for a felony drug-related offense, the police asked for his address. Vnuk eventually gave them a Brookfield address. The police asked for, and received, Vnuk's consent to search his Brookfield residence. The police went to the Brookfield address, but Vnuk apparently had given them an old address because the Vnuks did not live at that address at that time. The police eventually obtained a Pewaukee address for the Vnuks. The police then went to this address, knocked on the door, and Vnuk's father, Stephen, answered. The court specifically found that Stephen consented and willingly allowed the police to enter the house. The police immediately noticed a very strong odor of "unburnt marijuana." Vnuk's mother, Sharon, then "arose from her nighttime slumber" and came to speak to the officers. The police asked for permission to search the residence, and Stephen denied it. The Vnuks testified that the police then stated that Christopher had given his consent to search the residence. The police denied this, and the court found the police to be more credible.

¶4 The court further found that the police then told the Vnuks that, based on the strong odor of marijuana coming from the home, they would obtain a search warrant, and the Vnuks' consent to search would not be necessary. One of the officers then began to contact the various authorities to obtain a warrant. At this point, Stephen asked to be allowed to consult with his wife, and the police allowed this. The court specifically found that the police did not "ever attempt to convince or coerce or threaten Stephen or Sharon to change their minds after the initial consent was denied by the Vnuks." After this conversation, Stephen consented to the police search of the residence. The court found that the time period between when the Vnuks initially denied consent and then changed their minds was "very brief." The court found that the reason the Vnuks changed their mind was "to avoid undue publicity with the City of Pewaukee Police Department."

¶5 The court also found that Vnuk had been living in his parents' residence in what was essentially a finished basement. The basement area was, in essence, a large recreation room with a bedroom, bathroom, and storage areas. The court further found that Vnuk was unemployed, and was emancipated from his parents "to a certain extent," because Vnuk paid a minimal amount of rent "if he paid it at all."

¶6 The court found that the basement area was accessible to Stephen and Sharon from the main living area, and that there was no door closing off the recreation room, either at the top of the stairs or the bottom. While Stephen and Sharon did not go down into this area very often, "this area was clearly accessible to and jointly used by Stephen and Sharon … as well as Christopher." The storage areas were used both by Vnuk and his parents.

¶7 When the police went down into the basement area, they asked Stephen and Sharon if Vnuk paid rent, and received contradictory answers. When searching the area, the police found small amounts of marijuana in the bathroom, and a large amount in the storage area. At this point, Stephen signed a consent to search. While he stated that the police coerced him to sign this, the court found that his testimony on that issue was not credible.

¶8 The court found that the State had met its burden of proving that Stephen and Sharon gave their consent to search the residence, and that there was no coercion, actual or implied. The court granted the motion as to the evidence found in the bedroom and bathroom, and denied it as to the other areas of the house. The State did not appeal from the portion of the order that suppressed the evidence found in Vnuk's bedroom and bathroom. Vnuk then entered a no contest plea, and the court sentenced him to four years of initial confinement and three years and six months of extended supervision.

¶9 Vnuk argues before this court that the circuit court erred when it found that his parents had actual authority to consent to the search; when it found that he and his parents had mutual use and enjoyment of the basement area of the residence; when it inferred that he did not have an expectation of privacy outside of his bedroom and bathroom; and when it did not consider whether his parents had apparent authority to consent to the search. We conclude, however, that the circuit court did not erroneously exercise its discretion when it denied that portion of Vnuk's motion to suppress.

¶10 Vnuk first argues that the court erred when it found that his parents had actual authority to consent to the search of the basement area. "The question of whether a search or seizure is reasonable under the Fourth Amendment is a

question of constitutional fact." ***State v. Kieffer***, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998). We review these questions independently but benefiting from the circuit court's analysis. ***Id.*** In reviewing an order deciding a motion to suppress evidence, we uphold the circuit court's findings of evidentiary or historical facts unless those findings are clearly erroneous. ***Id.***

¶11 Searches without a search warrant are presumptively unreasonable. ***State v. Matejka***, 2001 WI 5, ¶7, 241 Wis. 2d 52, 621 N.W.2d 891. If the State can show by clear and convincing evidence that they had consent to conduct the warrantless search, the search is not invalid. *See* ***State v. Tomlinson***, 2002 WI 91, ¶20, 254 Wis. 2d 502, 648 N.W.2d 367. Permission to search a premises may be obtained from a third person who has common authority of the premises. ***State v. Knupp***, 2003 WI 121, ¶137, 265 Wis. 2d 278, 666 N.W.2d 881, *vacated and remanded by* 542 U.S. 952 (2004), *reinstated in part by* 2005 WI 127, ¶2, 285 Wis. 2d 86, 700 N.W.2d 899. The determination of common authority is based on practical considerations. ***Id.***, ¶138. The target of the search "assumed the risk" that the person with whom he or she shares the property might permit searches of the common areas. ***Id.*** (citation omitted). Moreover, Wisconsin does not recognize a presumption of authority to consent simply because the defendant lives with his or her parents. *See* ***Kieffer***, 217 Wis. 2d at 552-53.

¶12 Based on the evidence presented, the circuit court found that the area of the basement, other than Vnuk's bedroom and bathroom, was a common area that Vnuk's parents also used. This is a finding of evidentiary fact, supported by the evidence presented, and is not clearly erroneous.

¶13 Vnuk argues that the police should have obtained more facts about the living arrangements before conducting the search. For example, he makes

much of the fact that he paid a nominal rent to his parents, and that his parents made limited use of the basement area. Neither one of these facts, however, affects the court's determination that the Vnuks also had access to and used the common areas of the basement, and therefore had authority to consent to the search of those common areas. In short, Vnuk and his parents had common control over the areas of the basement other than his bedroom and bathroom. The evidence supports this finding.

¶14 Further, Vnuk argues that the police told his parents that he had given his consent to search the premises, and this is why his parents consented to the search. The court, however, found the police's version of these events to be more credible: that they did not say that Vnuk had consented to the search of the Pewaukee home, and that the Vnuks consented to the search because the police were going to get a warrant in any event. We agree again that the evidence supports these findings. We conclude, therefore, that the circuit court properly determined that Vnuk's parents had actual authority to consent to the search of the common areas of the basement. Because we conclude that they had actual authority, we need not reach the additional issues that Vnuk raises in his brief. For the reasons stated, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).