COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3067-CR **Cir. Ct. No. 2004CF2422**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEVIN L. GOLDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Devin Golden appeals a judgment of conviction and an order denying his postconviction motion. We affirm.

¶2 Golden was charged with controlled substance violations. He filed a motion to suppress seized evidence, which the court denied after an evidentiary hearing. Golden then pled no contest to one count of manufacturing THC. After sentencing, he filed a postconviction motion for suppression of seized evidence on the ground that he was not warned of his right to refuse a request that he consent to a search. The court denied that motion without a hearing on the ground that Golden waived the issue by not raising it sooner, in the original suppression motion.

¶3 On appeal, Golden first argues that police officers exceeded the permitted scope of a consensual search of his residence by opening a door that led to the basement. The pertinent facts are as follows. Golden gave consent to the police to search his residence, including his bedroom and any common areas, but not the basement. There was no discussion between Golden and the police as to which door led to the basement; the police did not ask, and Golden did not tell them. As the search proceeded, police opened closed doors. The first closed door police opened led to a bathroom, the second to a bedroom, the third to a closet, and the fourth to the basement. Behind another closed door that police did not open, they heard a dog barking. The officer who opened the basement door did not know where it led. When the officer opened the basement door, he detected a strong odor of marijuana.[1]

[1] The testimony of a police officer, found credible by the circuit court, states that Golden informed police that the basement contained Golden's roommate's bedroom and "D.J. studio." Golden's appellate brief, and part of the circuit court's decision, can be read as suggesting that the roommate's bedroom and studio were not in the basement. We conclude that it does not matter whether Golden conveyed to police that the roommate's bedroom and studio were in the basement. Regardless, the question remains whether police acted within the scope of consent when opening the basement door, a door leading to an area that was plainly outside the scope of consent.

¶4 We are unable to discern a developed argument supporting Golden's assertion that police exceeded the scope of consent. Golden also asserts that police were obligated to obtain clarification from him as to which doors they could open.

¶5 Golden first asserts that, once the police had opened the bathroom and bedroom doors, "without further guidance, the officers had reached the limit of the consent they were given to search." Golden seemingly reasons that at this point in time the police should have realized they were in danger of opening a door leading to the basement. But, so far as this record shows, the police risked opening the basement door each time they opened a door. Is Golden suggesting that it would have been permissible to open the basement door if that had been the first door opened? And, why should police have thought they had exhausted all possible non-basement doors once they located a bathroom, a bedroom, and a possible bedroom? Golden does not explain. Accordingly, this argument lacks factual development.

¶6 Golden's second argument lacks legal development. Golden argues that the police were obligated to obtain clarification from Golden as to which doors they could open. The proposition is not self-evident, and Golden provides no legal support. When officers searching a residence know that searching the basement is off limits, why is it unreasonable for officers to open a door to see whether it leads to the basement or instead to a room that may be searched? Furthermore, the circuit court's decision notes that the stairway to the basement is not the basement itself. Why would an officer believe that he or she was exceeding the scope of consent by merely opening a door that might reveal a basement stairwell? Finally, Golden does not address the circuit court's observation that the United States Supreme Court has recognized the need to allow

some latitude for honest mistakes by officers executing searches. *See* ***Maryland v. Garrison***, 480 U.S. 79, 87 n.11 (1987) ("'Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.'" (quoting ***Brinegar v. United States***, 338 U.S. 160, 176 (1949))).

¶7 In sum, Golden presents no argument showing that the officers in this case acted unreasonably. Accordingly, we affirm the circuit court's conclusion that the scope of the consent to search "authorized the officers to at least open the unknown door to ascertain whether it led to a common area."

¶8 Golden's second argument is that the "protective sweep" of the basement by officers after they smelled marijuana was improper in this case. The circuit court found that during that sweep police found marijuana plants. The court stated that the protective-sweep justification for entering the basement was "highly questionable under the circumstances," but the court declined to decide that issue. Instead, the court further concluded that the question was "ultimately irrelevant," if the search warrant that police later obtained for the basement was based on probable cause derived from evidence other than what was found during the protective sweep. The court concluded that the smell of marijuana plants that officers perceived upon opening the basement door, together with other evidence they had already obtained from Golden and in the residence, was sufficient to provide probable cause to obtain the warrant for a search of the basement.

¶9 On appeal, Golden argues that the protective sweep was improper. However, as discussed above, the court did not decide that issue, and its decision was based on another ground, namely, the fact that the evidence in the basement

would have been found in a search pursuant to the warrant. Golden does not address this issue on appeal, and therefore he has not demonstrated that the court erred.

¶10 Finally, Golden argues that the court erred by denying his postconviction motion without a hearing on the issue of a "consent warning." That phrase refers to an advisory statement by police, when requesting permission to search from a person in custody, informing the person that he or she may refuse to give consent. The circuit court denied the motion on the ground that Golden waived this issue by not raising it in his original suppression motion, before his plea.

¶11 On appeal, Golden argues that the issue of a consent warning is one of constitutional dimension that cannot be waived. His argument is inconsistent with the guilty plea waiver rule, which holds that a guilty or no contest plea waives most issues, including constitutional issues. ***State v. Oakley***, 2001 WI 103, ¶23, 245 Wis. 2d 447, 629 N.W.2d 200. Golden presents no reason why the guilty plea waiver rule does not apply to his "consent warning" issue, and we are not aware of any reason why it should not apply. Accordingly, we affirm the circuit court's conclusion that the issue was waived.

By the Court.—Judgment and order affirmed.

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