COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP819-CR **Cir. Ct. No. 2005CF314**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JUAN NUNEZ-RODRIGUEZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Reversed and cause remanded*.

Before Curley, P.J., Wedemeyer and Fine, JJ.

¶1 PER CURIAM. The State appeals an order suppressing evidence found during a search of defendant's home. *See* WIS. STAT. § 974.05(1) (2005-

06).[1] Because law enforcement officers entered and searched the home with consent, we reverse.

Background

¶2 The criminal complaint reflects that on January 12, 2005, Milwaukee police officers searched the home of Juan Nunez-Rodriguez and found what turned out to be a quantity of cocaine. Nunez-Rodriguez was charged with one count of possessing with intent to deliver a controlled substance, cocaine, in excess of forty grams. *See* WIS. STAT. §§ 961.16(2)(b)1., 961.41(1m)(cm)4. He moved to suppress the evidence, contending that officers entered his home without a warrant and without exigent circumstances in violation of his constitutional right to be free from unreasonable searches and seizures.

¶3 Milwaukee Police Officer Richard Sandoval was the only witness at the suppression hearing. Sandoval testified that he, along with other officers, went to 910 S. 22nd Street in Milwaukee for the purpose of arresting a wanted subject who had delivered cocaine to an undercover Waukesha officer. A young man answered their knock and identified himself as Jose Flores, Nunez-Rodriguez's son. Flores gave officers permission to enter the home and waved them towards the stairway indicating where his father could be found.

¶4 Sandoval testified that in an open bedroom at the top of the stairs he found Nunez-Rodriguez with his wife, identified in police reports as Juanita Torres-Nunez. A Waukesha officer took Nunez-Rodriguez into custody.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Sandoval then asked Ms. Torres-Nunez for permission to search the room and the house for illegal drugs. She consented. Officers found cocaine in a dresser drawer and on a closet shelf.

¶5 On January 12, 2006, at the close of the suppression hearing, the circuit court ruled from the bench, finding that the defendant's teenage son gave officers consent to enter the defendant's home. The court found that the entry was improper, however, because the officers had no arrest warrant nor were there exigent circumstances. The court suppressed all of the evidence retrieved when the officers entered the home.

¶6 The circuit court subsequently signed a written-order suppressing evidence on which it wrote "2-20-06 *nunc pro tunc* to 1-12-06." On February 20, 2006, this order was filed with the clerk of courts and it is from this order that the State appealed on April 3, 2006.

Discussion

¶7 We begin by addressing the procedural hurdles that Nunez-Rodriguez asserts as impediments to the State's appeal. Whether a party has properly appealed is a question of law that we review independently. *See* ***State v. Scaccio***, 2000 WI App 265, ¶4, 240 Wis. 2d 95, 100, 622 N.W.2d 449, 452–453.

¶8 We first reject the suggestion that the defendant's possible deportation bars appellate review. The record on appeal does not contain facts to support the claim.

¶9 On August 16, 2006, we granted Nunez-Rodriguez's motion to extend the time in which to file a response brief. Although he sought the extension in part to pursue the possibility of moving to supplement the record with

deportation information, he never made such a motion.[2] Nonetheless, in his response brief the defendant argues that he has apparently been removed from the jurisdiction.

¶10 Generally we do not consider arguments based on facts that are not part of the record on appeal. *See* ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214, 217 (Ct. App. 1991). We adhere to that policy in this case.

¶11 We further reject the defendant's contention that the circuit court's written order, issued on February 20, 2006 with the notation "*nunc pro tunc* to 1-12-06" shortened the State's time for appeal. The court did not have the authority to enter the order *nunc pro tunc*.

¶12 "[*N]unc pro tunc* means 'now for then ....' '[A] thing is done now, which shall have [the] same legal force and effect as if done at [the] time when it ought to have been done.'" ***Strawser v. Strawser***, 126 Wis. 2d 485, 489, 377 N.W.2d 196, 198 (Ct. App. 1985) (alterations in original, citation omitted). The authority to order a judgment *nunc pro tunc* is limited to rectifying mechanical errors. ***Id.***, 126 Wis. 2d at 490, 377 N.W.2d at 199. "'The rule is that in any case where the court did actually render a formal judgment, but the same has not been entered on the record in consequence of any *accident* or *mistake*, or through the *neglect or misprision of the clerk,*'" the court may order a judgment *nunc pro tunc*. ***Id.***, 126 Wis. 2d at 489, 377 N.W. 2d at 198–199 (emphasis in original; citation

[2] In granting defendant's motion for an extension of time, we noted our concern as to the propriety of adding immigration documents to the record on appeal and observed that "unless [defense counsel] can satisfy the court that these documents properly belong in the record, a request to supplement the appellate record will be denied."

omitted). The written order here does not fit within the rule. It did not correct an error, but rather reflected the routine process of memorializing the court's oral pronouncement.

¶13 Moreover, absent its own error or other compelling considerations, the circuit court may not manipulate entry dates of orders and judgments in order to affect the time for appeal. ***Edland v. Wisconsin Physicians Serv. Ins. Corp.***, 210 Wis. 2d 638, 647–648, 563 N.W.2d 519, 522–523 (1997). "The orderly administration of justice is enhanced by a definite starting and ending point for litigation. The time limitations on appeal provide such conclusiveness." ***Id.***, 210 Wis. 2d at 647–648, 563 N.W.2d at 522.

¶14 The State must initiate an appeal within forty-five days of entry of the order appealed from pursuant to WIS. STAT. §§ 974.05(1) and 808.04(4). An order is "entered" pursuant to WIS. STAT. § 807.11(2) when it is filed in the office of the clerk of court. ***Ramsthal Adver. Agency v. Energy Miser, Inc.***, 90 Wis. 2d 74, 75, 279 N.W.2d 491, 492 (Ct. App. 1979). The statutory language defining "entry" is clear. *See* ***Hamilton v. Hamilton***, 2003 WI 50, ¶34, 261 Wis. 2d 458, 475, 661 N.W.2d 832, 840 (legislature is clear in providing that a judgment is entered when it is filed in the office of the clerk of court).

¶15 The circuit court could not, by writing "*nunc pro tunc* 1-12-06" on its order, manipulate the date of entry for purposes of appeal or create an ambiguity as to the import of "entry" in § 807.11(2). Were we to discern the creation of any such ambiguity, we would be obligated to liberally construe the statutory language to preserve the right to appeal where possible. *See* ***Wambolt v.***

West Bend Mut. Ins. Co., 2007 WI 35, ¶46, ___ Wis. 2d ___, ___, 728 N.W.2d 670, 683.[3]

¶16 The State has timely appealed from the written order entered on February 20, 2006. We therefore turn to the merits of that appeal.

¶17 "Whether police conduct has violated the constitutional guarantees against unreasonable searches and seizures is a question of constitutional fact." ***State v. Tomlinson***, 2002 WI 91, ¶19, 254 Wis. 2d 502, 516, 648 N.W.2d 367, 374. We give deference to the circuit court's findings of evidentiary and historical fact, while independently applying those historical facts to the constitutional standard. ***Id.***, 2002 WI 91, ¶19, 254 Wis. 2d at 516–517, 648 N.W.2d at 374.

¶18 The circuit court found that officers entered defendant's home with consent. Whether an individual gives consent is a question of historical fact. ***Id.***, 2002 WI 91, ¶36, 254 Wis. 2d at 523, 648 N.W.2d at 377. Therefore, we will uphold that finding, unless it is contrary to the great weight and clear preponderance of the evidence. ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794, 801 (1998).

¶19 Officer Sandoval testified that police spoke with a young man[4] at the threshold of defendant's home, who indicated that he lived in the home and gave

[3] Various jurisdictions expressly hold that a *nunc pro tunc* order cannot be used to reduce the time or defeat the right to take an appeal. *See, e.g.*, ***Law Offices of Andrew L. Quiat, P.C. v. Ellithorpe***, 917 P.2d 300, 303 (Colo. Ct. App. 1995); *see also* ***Fitzgerald v. Cummings***, 792 N.E.2d 611, 616 (Ind. Ct. App. 2003) (collecting cases). Such a holding comports with the remedy of *nunc pro tunc* as a means of correcting the record without prejudicing the parties. *See* ***Fitzgerald***, 792 N.E.2d at 616 (citation omitted).

[4] Police reports filed by the State with its circuit court brief reflect that the young man was sixteen years old.

officers consent to enter. Teenaged cohabitants may consent to police entry and search of homes in which they appear to reside. ***Tomlinson***, 2002 WI 91, 254 Wis. 2d at 521–523, ¶¶30–33, 648 N.W.2d at 376–377. Although a teenager's authority may not be co–extensive with a parent's, police may reasonably conclude that a young person has some authority to allow entry, where the teenager appears to have sufficient intelligence or maturity. ***Id.***, 2002 WI 91, ¶33, 254 Wis. 2d at 522–523, 648 N.W.2d at 377. Officers were greeted by just such an individual in this case.

¶20 Consent may be by gesture or conduct. ***Id.***, 2002 WI 91, ¶37, 254 Wis. 2d at 524, 648 N.W.2d at 378. Here, the young man who answered the door gave both oral permission for entry and gestured for the officers to go up the stairs to find his father, Nunez-Rodriguez. A door stood open at the top of the stairs leading into a bedroom. This room was not a restricted or enclosed area barred to the young man. Thus, the officers entered common areas of the home to which they could reasonably assume that the teenaged occupant could allow access. *See* ***ibid.*** The circuit court's finding that the defendant's teenaged son gave the officers consent to enter is not against the great weight of the evidence and accordingly, we uphold that conclusion.

¶21 The circuit court erred, however, in holding that the consensual entry by police into the defendant's home was rendered unlawful by the absence of a warrant. The Fourth Amendment does not require even reasonable suspicion as a prerequisite to seeking consent for entry into a dwelling. ***State v. Stout***, 2002 WI App 41, ¶17, 250 Wis. 2d 768, 782, 641 N.W.2d 474, 479. Officers may ask permission to enter without reasonable suspicion, and if they receive valid permission, they have a right to enter. ***Id.***, 2002 WI App 41, ¶18, 250 Wis. 2d at 782–783, 641 N.W.2d at 480.

¶22 We turn next to the search. The factual record of Torres–Nunez's consent to a search of the home is undisputed; the lawfulness of the search is therefore a question of law. ***State v. Williams***, 104 Wis. 2d 15, 21–22, 310 N.W.2d 601, 604–605 (1981). Accordingly, we decide that issue without deference to the trial court's opinion. ***Ball v. District No. 4, Area Bd.***, 117 Wis. 2d 529, 537, 345 N.W.2d 389, 394 (1984).

¶23 As with permission to enter, permission to search the premises of a target individual may be obtained from a third party who possesses common authority over that premises. ***Tomlinson***, 2002 WI 91, ¶¶22–23, 254 Wis. 2d at 518, 648 N.W.2d at 375. Reliance on third-party consent must be reasonable under the circumstances. *See* ***id.***

¶24 Here, the undisputed evidence reflected that the police requested Torres-Nunez's consent to search using a normal tone of voice and without displaying a weapon. Although Torres-Nunez was in bed when police entered the room, she was fully clothed. Her presence in the bedroom suggested the "mutual use" and "joint access" to the area that tends to show actual authority. *See* ***United States v. Matlock***, 415 U.S. 164, 171 & n.7 (1974). She indicated that she was the defendant's wife and that she lived on the premises. Joint access and control of the premises, coupled with a marital relationship between the occupants, supports finding third-party consent to search here. *See* ***State v. Kieffer***, 217 Wis. 2d 531, 545, 577 N.W.2d 352, 358 (1998).

¶25 Officers were inside the premises lawfully, having obtained entry pursuant to valid consent. They obtained the requisite permission for a search of the premises from a co-inhabitant and joint user of the home. The evidence found

was therefore lawfully obtained. The circuit court erred in ruling that the evidence recovered from the defendant's home, as well as any derivative evidence, should be suppressed.

By the Court.—Order reversed and cause remanded.

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