

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 11, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1770-CR

Cir. Ct. No. 2004CF2202

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN WURM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY WAGNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. John Wurm appeals from the judgment of conviction entered against him, and the order denying his motion for postconviction relief. He argues that the circuit court erred when it denied his

motion to suppress evidence. Because we conclude that the circuit court properly denied his motion, we affirm.

¶2 In May 2005, Wurm pled guilty to one count of possession of more than 200 grams of marijuana. Prior to entering the plea, Wurm moved to suppress the evidence. The court held an evidentiary hearing and denied the motion. In May 2006, Wurm filed a motion for postconviction relief that again argued that the evidence should have been suppressed. The circuit court once again denied the motion.

¶3 The testimony at the suppression hearing established that Wurm's mother, Evelyn Wurm, called police officers to come to the house where she lived with Wurm because he had locked her out. She told the officers that Wurm had threatened her, and that she needed help getting back into her home. The officers further testified that Evelyn was shaking and upset. An officer entered the home through a window, and then let Evelyn and the other officer into the house. The officers offered to do a cursory search of the house to be sure that it was safe, and Evelyn said that she would appreciate it. She told the officers that her son had guns in the house and she was afraid he might use them. She also told them that when her son gets upset, he point guns at people.

¶4 The officers found several guns in the house. The officers asked Evelyn if she owned the home and asked for permission to search the entire house. The door to the upstairs was locked and Evelyn did not have a key. She said that she did not go upstairs and that her son did not want her up there. She gave the officers permission to remove the door from its hinges. When the officers did this, they saw marijuana in plain view. Based on this evidence, the court ruled that

Evelyn Wurm had consented to the search and had the authority to consent to the search of the upstairs of the home.

¶5 Wurm argues on appeal that the circuit court erred when it denied his motion to suppress. He does not contest that Evelyn consented to the search, but instead argues that she did not have the authority to consent to the search. We disagree.

¶6 In reviewing a circuit court's order granting or denying a motion to suppress evidence, we uphold the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous. *State v. Matejka*, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891. However, whether the circuit court's findings of fact pass statutory or constitutional muster is a question of law that we review independently. *Id.*

¶7 In this case, the circuit court found that Evelyn owned the home and allowed her son to live in it. The mother-son relationship is a factor that supports a finding that a mother has the authority to use and occupy the home, and thereby give consent to search. *See Mears v. State*, 52 Wis. 2d 435, 440, 190 N.W.2d 184 (1971). Wurm argues, however, that under *State v. Kieffer*, 217 Wis. 2d 531, 577 N.W.2d 352 (1998), the facts here did not establish that Evelyn had actual authority to consent to the search.

¶8 In *Kieffer*, the Supreme Court held that a father-in-law did not have actual authority to consent to the search of a detached garage loft in which the defendant lived with his wife, and for which they paid rent. *Id.* at 545-47. The court there distinguished the case from previous cases that had found consent based on ownership. *Id.* One fact that the court noted as a distinguishing factor was that *Kieffer* was not the child of the owner. *Id.* at 545. The facts here are

distinguishable from the facts in *Kieffer*. Evelyn is Wurm's mother and the owner of the home. The room searched was the upstairs of the home in which Evelyn lived, and not a detached apartment. While Evelyn stated that Wurm did not like her to go upstairs, she also testified that she stored pictures there. Further, Wurm did not pay rent but paid some of the bills. Based on these facts, we conclude that the circuit court properly found that Evelyn had the authority to consent to the search of the upstairs of her home. The circuit court correctly denied Wurm's motion to suppress, and Wurm's motion for postconviction relief asking the court to reconsider that decision. For the reasons stated, we affirm the judgment and order of the trial court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

