

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2007AP1377-CR

Cir. Ct. No. 2006CF18

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENDRICK JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, Judge. *Affirmed.*

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

¶1 WEDEMEYER, J. Kendrick Jackson appeals from a judgment of conviction on two counts of first-degree sexual assault while armed, contrary to

WIS. STAT. § 940.225(1)(b) (2005-06)¹ and two counts of kidnapping/seize or confine without consent, contrary to WIS. STAT. § 940.31(1)(b). He also appeals from orders denying his motion for post conviction relief.

¶2 Jackson raises four instances of error: (1) police entry into his residence was without voluntary consent; (2) probable cause to arrest him did not exist; (3) police lacked authority to search Angela Beckum's automobile; and (4) the trial court erroneously exercised its sentencing discretion. Because voluntary consent was given to the police to enter Jackson's residence, because probable cause existed to arrest Jackson, because the search of Beckum's automobile was proper under the automobile exception to the warrant requirement of the Fourth Amendment, and because the trial court properly exercised its sentencing discretion, we affirm.

BACKGROUND

¶3 On December 22, 2005, and December 24, 2005, two separate incidents of kidnapping and first-degree sexual assault occurred in the same general locality of the City of Milwaukee's north side. Z'Taj D. was the victim in the first incident while Tyeisha C. was the victim in the second incident. Both victims were accosted while walking on a public street. A black male threatened each victim with a weapon and forced them into a tan-described four-door automobile. In the instance of Z'Taj, she was taken to an unknown residence and was sexually assaulted in the basement there. In the instance of Tyeisha, the sexual assault occurred in the front seat of a tan automobile. As part of the assault,

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

Tyeisha was forced to perform oral sex upon the assailant. Upon completion of the act of oral sex, however, Tyeisha expectorated the ejaculate upon the floor of the automobile.

¶4 On December 27, 2005, Z'Taj informed police that she had seen an automobile similar to the one involved in her sexual assault near the area of 2nd and Locust Street. Later that same day, police on patrol in the same general area, observed a similarly-described automobile parked in front of the residence at 314 East Hadley Street.

¶5 On December 30, 2005, Z'Taj reported to police that she saw her assailant at a gas station located at West Locust Street and King Drive. She described the automobile that he was driving as a four-door, tan Pontiac Bonneville, with Wisconsin license plate number 364-JMR. Later in the morning, Police Detective Vicki Hall drove to the previously known Hadley Street address in an unmarked squad, for surveillance purposes. While there, she observed a light brown Pontiac parked in the same general location with the same license plate number given by Z'Taj. She also observed an individual who matched the description of the assailant provided by Z'Taj, leave the same automobile and enter the residence at 312 East Hadley Street. Detective Hall then called for backup assistance. In the meantime, police had learned that the Pontiac automobile belonged to one Angela Beckum. When back-up assistance arrived, Detective Hall gained entry to the 312 East Hadley Street residence, arrested Jackson, searched the bedroom occupied by Beckum and Jackson, searched the basement of the residence, and arranged to have the automobile owned by Beckum seized and searched.

¶6 After a series of suppression motions were denied, Jackson pled guilty to two counts of first-degree sexual assault while armed, and two counts of kidnapping. He was sentenced on each count of sexual assault to seventeen years to be served consecutively, with ten years of initial incarceration and seven years of extended supervision. On each count of kidnapping, he was sentenced to ten years concurrent with five years of initial incarceration and five years of extended supervision. Jackson now appeals.

ANALYSIS

A. *Voluntary Consent.*

¶7 Jackson first claims that Beckum did not voluntarily consent to the initial entry by Detective Hall into her residence located at 312 East Hadley Street.

STANDARD OF REVIEW AND APPLICABLE LAW

¶8 “[A] warrantless search conducted pursuant to consent which is ‘freely and voluntarily given’ does not violate the Fourth Amendment.” *State v. Phillips*, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998). Verbal consent is not required. *Id.* at 197. “[I]t may be in the form of words, gesture, or conduct.” *State v. Tomlinson*, 2002 WI 91, ¶37, 254 Wis. 2d 502, 648 N.W.2d 367 (consent found when a girl who opened a door turned to enter the house upon an officer’s request to enter, which could reasonably have been interpreted as an invitation to follow her inside.). Whether a defendant consents to a warrantless search is a fact determination which we shall uphold on appeal unless clearly erroneous. *Phillips*, 218 Wis. 2d at 196-97; *Tomlinson*, 254 Wis. 2d 502, ¶36.

¶9 The voluntariness of a consent, however, is a question of constitutional fact, the determination of which we review independently, applying

constitutional principles to the facts as found by the trial court. *Phillips*, 218 Wis. 2d at 194-95. The test for voluntariness is whether the consent to search was given in the absence of duress or coercion, either expressed or implied. *Id.* at 197. In determining voluntariness, we look to the totality of the circumstances, considering both the events surrounding the consent and the characteristics of the individual whose consent is sought. *Id.* at 198. No single criterion controls the analysis. *State v. Wallace*, 2002 WI App 61, ¶17, 251 Wis. 2d 625, 642 N.W.2d 549.

¶10 Among the factors to be considered in determining the voluntariness of consent are:

[W]hether any misrepresentation, deception or trickery was used to entice the defendant to give consent; whether the defendant was threatened or physically intimidated; the conditions at the time the request to search was made; the defendant's response to the agents' request; the defendant's general characteristics, including age, intelligence, education, physical and emotional condition, and prior experience with the police; and whether the agents informed the individual that consent to search could be withheld.

State v. Bermudez, 221 Wis. 2d 338, 349, 585 N.W.2d 628 (Ct. App. 1998). The State, however, is not required to demonstrate that the defendant knew he could refuse consent. *Phillips*, 218 Wis. 2d at 203.

¶11 Jackson argues that verbal consent was not established and that consent cannot be inferred by body language and acquiescence. He asserts that voluntary consent cannot be based upon intimidation. The record refutes his claim.

¶12 Here, there is no dispute that Beckum and Jackson were joint lessees of the lower duplex residence at 312 East Hadley Street. When Detective Hall

knocked on the front door of the 312 East Hadley Street address, it was Beckum who responded by opening the front door. In assessing the circumstances of Beckum's response to Detective Hall's request to enter, the trial court found:

There are credibility issues here with regards to the testimony that has been adduced. There is no question that Detective Hall went to the door. That there was a knock. That there was a ... discussion, involving, I believe it's Miss Beckum; is that correct, and [Detective] Hall at the doorway.

Miss Beckum concedes that based on that original discussion that she had initially opened the door, that she, in fact ... opened it further. That initially it was about halfway open. That at some point in time Mr. Jackson, at least from her recollection, became engaged in this conversation. She opened the door further. By her own acknowledgment, she opened the door further. And it would appear that she was providing for some kind of permissive entry.

¶13 These factual findings of non-verbal consent were further supported by evidence that Beckum completely opened the front door while backing up and never objecting to Detective Hall's entry to the premises. Furthermore Beckum conceded she let Detective Hall in because she thought she "just had some questions for us."

¶14 In addition to the foregoing, the trial court took the opportunity to review its earlier ruling on the consent issue. In doing so, it ruled as follows:

The Court did find [yesterday] that based on the totality of the circumstances and everything that the Court looked at with regards to this matter as well as weighing certain credibility issues with regards to what transpired that permission was, in fact, given to enter by Miss Beckum, that it wasn't a mere acquiescence; that is, opening the door at one point to about halfway open and then opening it even further at some point, but also involved by Detective Hall's representation an oral exchange wherein she indicated that she could not remember exactly what was said but based on

what was said interpreted it to be permission both physically and verbally to enter.

¶15 Thus, consistent with *Phillips*, 218 Wis. 2d at 197, and *Tomlinson*, 254 Wis. 2d 502, ¶37, Beckum’s actions gave Detective Hall reasonably-based, implicit consent to enter the residence. The trial court’s factual determination of non-verbal consent is not clearly erroneous, particularly because the court found that Detective Hall was more credible than Beckum.²

¶16 In reviewing the voluntariness of the consent issue, the record reflects that although Beckum was “upset” and felt “slightly intimidated” by Detective Hall’s presence, she admitted Detective Hall never threatened her to gain entry. She never objected to Detective Hall’s entry or attempted to prevent her entry. Nor is there any evidence of “any misrepresentation, deception or trickery” that was used to entice Beckum to give consent. Further, there is no evidence that police deprived her of necessities, prolonged the encounter to wear down her resistance, or employed any other coercive means before Beckum consented to the entry. *Phillips*, 218 Wis. 2d 199-200. Thus, the non-verbal consent was given voluntarily.

B. Probable Cause to Arrest.

¶17 Jackson claims there was no probable cause to arrest him and therefore his motions to suppress should have been granted. We disagree.

² Applying *State v. Johnson*, 177 Wis. 2d 224, 501 N.W.2d 876 (Ct. App. 1993), Jackson argues that mere acquiescence is not sufficient to imply consent. We reject this parallelism because the cases can be clearly factually distinguished. Detective Hall requested permission to enter for the purpose of seeking some information. In *Johnson*, a prior request, before entry, was not made.

STANDARD OF REVIEW AND APPLICABLE LAW

¶18 Our review of a suppression order is a two-step process. We shall uphold the trial court’s factual findings of fact unless they are clearly erroneous, but the question of whether the facts constitute probable cause is a question of constitutional fact that we review independently. *State v. Sykes*, 2005 WI 48, ¶12, 279 Wis. 2d 742, 695 N.W.2d 277.

¶19 Probable cause to arrest exists when the totality of the circumstances within an officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed, or is committing a crime. *Id.*, ¶18. The objective facts before the police officer must only lead to the conclusion that guilt is more than a possibility; “but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.” *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). “Whether probable cause exists in a particular case must be judged by the facts of that case.” *Id.* Probable cause is a “flexible, common-sense measure of the plausibility of particular conclusions about human behavior.” *Id.* at 215 (citation omitted). Moreover, “[t]he court is to consider the information available to the officer from the standpoint of one versed in law enforcement, taking the officer’s training and experience into account.” *State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660.

¶20 An officer’s belief that the defendant probably committed a crime may be predicated upon hearsay information emanating from a reliable and credible source. *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). A citizen who purports to be a victim of, or to have witnessed a crime is a reliable informant even though his reliability has not theretofore been proved or tested.

State v. Williams, 2001 WI 21, ¶36, 241 Wis. 2d 631, 623 N.W.2d 106. Moreover, in determining probable cause, police officers can rely on the collective information possessed by the police agency prior to the arrest. *State v. McAttee*, 2001 WI App 262, ¶11, 248 Wis. 2d 865, 637 N.W.2d 774. In determining whether probable cause exists, however, the trial court applies an objective standard, and is not bound by the officer's subjective assessment of probable cause or motivation for making the arrest. *Kutz*, 267 Wis. 2d 531, ¶12. Even if probable cause to arrest exists, a warrantless entry into a home violates the Fourth Amendment, absent exigent circumstances or consent. *State v. Smith*, 131 Wis. 2d 220, 226-27, 388 N.W.2d 601 (1986).

¶21 Within days after her kidnapping and sexual assault, Z'Taj informed police that she had observed the man who assaulted her, driving in his vehicle. She provided police with a description of the vehicle; i.e., a light brown, older model Pontiac with license plate number 364-JMR. Through official police sources Detective Hall had learned that a similarly-described vehicle with the same license plate number had been observed parked at 314 East Hadley Street. Upon investigating the site in an unmarked squad car, Detective Hall observed the same vehicle. She also observed an individual leaving the vehicle and entering 312 East Hadley Street. He was wearing a dark sweat suit and a "doo-rag," the same type of clothing that Z'Taj reported her assailant was wearing a short time before. Z'taj had on another occasion informed police that her assailant had "bug eyes." After Beckum allowed Detective Hall into the residence, Detective Hall saw the male individual whom she had seen enter the premises minutes before and also noticed that this person's eyes were a prominent feature of his face. Armed with this information, she placed Jackson under arrest.

¶22 With the state of this record, the trial court found probable cause existed to arrest Jackson based upon all the information that Detective Hall had received and sequentially what she had observed at the 312 East Hadley Street address. Based on our review, we independently conclude that this information together with Detective Hall's personal observations were objectively sufficient to convince a reasonable police officer that Jackson probably committed the sexual assaults under investigation.³ Thus, we reject Jackson's claim that the trial court erred in ruling that probable cause to arrest him did not exist.

C. Automobile Search.

¶23 Next, Jackson claims that police lacked authority to search Beckum's vehicle because they lacked probable cause. We reject this claim.

STANDARD OF REVIEW AND APPLICABLE LAW

¶24 Our standard of review for the search of motor vehicles is a mixed question of law and fact, affording deference to the findings of fact of the trial court but determining the question of constitutional fact independently. We accept the trial court's underlying findings of fact unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, we independently determine whether a search or seizure passes constitutional muster. *See Id.*

³ Because we have concluded that probable cause to arrest existed and that voluntary consent allowed Detective Hall to enter the premises we find it unnecessary to examine the issues of exigent circumstances and attenuation.

¶25 Under the automobile exception to the warrant requirement of the Fourth Amendment, there is no separate exigency requirement and there is no need to demonstrate that acquiring a warrant would be impractical. Issues concerning whether the police could have obtained a warrant prior to a search are not relevant to the analysis. *State v. Marquardt*, 2001 WI App 219, ¶¶29-31, 247 Wis. 2d 765, 635 N.W.2d 188. The automobile exception permits warrantless searches of a vehicle if there is probable cause to believe that evidence of a crime will be found inside. *State v. Pallone*, 2000 WI 77, ¶¶58-60, 236 Wis. 2d 162, 613 N.W.2d 568.

¶26 Jackson argues that the automobile exception should not apply in the absence of the State not demonstrating that it would be difficult to obtain a warrant. The record reflects that in each instance of sexual assault, the identified car was used to perpetrate the alleged crime. In the instance of Z'Taj, the identified car was used to forcibly convey her to the residence where she was assaulted. Subsequently, she observed her assailant driving the same vehicle in which she was forcibly transported. Z'Taj knew it was the same car because she had supplied police with a detailed description, which included its color, make, model, and license plate number. In the instance of Tyeisha, after she was forced to have oral sex with her assailant, she spat his semen onto the floor of the identified vehicle. Police tracked the location of the vehicle to the East Hadley Street address.

¶27 Under the calls set forth in *Marquardt*, 247 Wis. 2d 765, ¶¶32-42, and *Pallone*, 236 Wis. 2d 162, ¶¶28-30, this elucidation of facts inexorably forces two conclusions: the necessary probable cause existed to search the identified vehicle as the car used not only to commit the crimes but also to contain evidence of the crimes. As the trial court astutely noted, the identified vehicle “was [not

only] used ... to transport [the victims] to and from the location of the ... crime, [but it was also] the scene of the crime.” Under our law the need to obtain a warrant did not exist and the facts more than adequately provided probable cause.

D. Sentencing.

¶28 Last, Jackson claims the trial court erroneously exercised its sentencing discretion in three respects: (1) it failed to consider mitigating factors; (2) it failed to consider his drug treatment needs; and (3) the consecutive sentences were excessive. For reasons to be stated, we reject this final claim of error.

STANDARD OF REVIEW AND APPLICABLE LAW

¶29 When reviewing a trial court’s sentencing determination, we apply an erroneous exercise of discretion standard. We commence our review with the presumption that the trial court acted reasonably when imposing its sentence. In contrast, a defendant challenging a sentence has the heavy burden to demonstrate that the sentencing court relied on some unreasonable or unjustified basis in imposing the sentence. *State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). A sentence well within limits of a maximum sentence is unlikely to be unduly harsh or unconscionable. *State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449.

¶30 There are three primary factors that the trial court must consider at sentencing: the gravity of the offense, the character of the offender, and the need to protect the public. *State v. Smith*, 207 Wis. 2d 258, 281-82 n.14, 558 N.W.2d 379 (1997). The sentencing court may consider other factors but it is not required to specifically address all of the other factors of record, *State v. Echols*, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993), and may base the sentence on any one of the

three primary factors. Furthermore, the sentencing court has wide discretion in assigning various values to each of the relevant factors. *State v. Larsen*, 141 Wis. 2d 412, 428, 415 N.W.2d 535 (Ct. App. 1987). Should the sentencing court fail to explicate its reasons for the sentence imposed, we are obliged by the rubric of independent review to examine the record to ascertain whether in the exercise of proper discretion, the sentence imposed can be sustained. *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

¶31 In the sentencing process, the sentencing court is not bound to any recommendations including those in the pre-sentence report. *State v. Johnson*, 158 Wis. 2d 458, 464-65, 463 N.W.2d 352 (Ct. App. 1990). Consecutive sentences are reasonable if the count involved different victims or when each crime was a distinct instance of criminal behavior. The legislature has specifically permitted trial courts to “stack” sentences by authorizing the court to impose as many sentences as there are convictions. WIS. STAT. § 973.15(2)(a); *State v. Ramuta*, 2003 WI App 80, ¶24, 261 Wis. 2d 784, 661 N.W.2d 483. “[W]hether to impose consecutive, as opposed to concurrent, sentences is, like all other sentencing decisions, committed to the trial court’s discretion.” *State v. Johnson*, 178 Wis. 2d 42, 52, 503 N.W.2d 575 (Ct. App. 1993).

¶32 To support his first proffered basis for erroneous sentence discretion, Jackson asserts that mitigating factors were not factored into the court’s sentencing formulation. Specifically, he claims the court did not consider in its oral decision the factors of family support and that he resides with children. We shall address this specific claim of error after examining the sentencing methodology used by the trial court in this case.

¶33 We first examine the application of the three required primary sentencing factors. The obvious serious nature of these assaultive incidents needs little explication. In reference to the sentencing matrix, the court found that the very nature of the offenses were aggravating factors. The charged conduct took place in circumstances evidencing threats, abduction, and restraints. It is not difficult to surmise from the record that the emotionally terrorizing effects of these two incidents are incalculable. Of particular note, is the “at random” selection process of each assault. To make matters worse, in reference to the December 24th incident is Jackson’s admission, as characterized by the court, that he “wanted to do it again. And ... did it.”

¶34 When examining Jackson’s character, the trial court quite naturally had to consider his criminal record. Although the record is not altogether clear, the court took into account one misdemeanor and three felony convictions (battery, receiving stolen property and theft). The court characterized his record as “not stellar” but “at the same time not the worst record he had ever seen.” Common sense dictates that this character information could not be used as a mitigating factor.

¶35 As part of the character evaluation, the court reviewed his work record and noted that during 2003 and 2004, Jackson was employed at Quad Graphics, and for part of 2005 he was working through temporary-help agencies. He was however, unemployed at the time of these events. What value the trial court assigned to his work ethic is uncertain, but it is obvious the court took it into consideration.

¶36 Of some significance to the trial court was the sexual abuse Jackson experienced as a youth, which reasonably led to his severe drug-abuse problem.

The court did not equate his drug problem as an excuse for his conduct, but did view his condition as a mitigating factor.

¶37 Jackson chides the trial court for failing to consider two mitigating factors: family support and that he resides with children. Jackson has fathered three children: two with Tenisha Bell and one with Keisha Ellis. He has never lived with either woman. Regardless, by his own admission, Jackson believes he is behind in child support payments in the amount of \$40,000 to \$50,000. Reasonably, the court cannot be faulted for giving little or no consideration to this alleged mitigating factor.

¶38 The trial court commented on the glowing reports and letters it received from Jackson's family members and friends, but based upon the nature of these offenses and the reasons Jackson gave for his conduct, concluded that "something else was going on" that precipitated this type of conduct which required corrective attention. Jackson himself admitted he needed sex-offender treatment, mental health counseling, and AODA assistance.

¶39 Thus, when reaching the point of considering the factor of protecting the public, by reason of the circumstances and nature of these criminal acts, the court concluded this factor to be the most important in the sentencing equation. Because of his impulsive behavior, as enhanced by drugs, the court reasoned that probation would unduly depreciate the severity of the offenses. Furthermore, because of the several admitted health problems that may have precipitated these, random, impulsive assaults, an institutional setting was the most appropriate place to constructively address these issues and thereby better protect the public. Moreover to accomplish this goal, the trial court set specific terms and conditions of extended supervision.

¶40 The punishment and rehabilitative deterrent components were clearly part and parcel of the trial court’s sentencing calculation. The trial court considered all of the primary sentencing factors, and, having done so, was free to place emphasis on any of the relevant factors. Because the record amply supports the sentencing discretion exercised by the trial court, we reject this claim of error.

¶41 Finally, Jackson claims the trial court imposed an excessive sentence because it did not explain why it rejected the pre-sentence investigative report recommending *concurrent* sentencing as applied to the two counts of first-degree sexual assault, but instead imposed *consecutive* sentencing. Citing *State v. Hall*, 2002 WI App 108, 255 Wis. 2d 662, 648 N.W.2d 41, Jackson argues, “[i]t is neither a sufficient nor a sustained act of discretion for a trial court to acknowledge the PSI but not to explain its departure from the recommendation or address its conclusion.” We are not convinced.

¶42 The *Hall* decision can be easily differentiated from the sentencing factors of this case. *Hall* involved a 304-year sentence, which exceeded the PSI recommendation by 200 years. Here, Jackson’s thirty-four-year sentence was far less than the 200 year statutory maximum. Thus, it was not unduly harsh or disproportionate to the offense as to shock the public sentiment. In addition, the *Hall* decision was primarily based on the fact that the trial court failed to explain its reasons for the term of sentence. As described by our court, it utilized “fill-in-the-blank” type of explanations for its sentence. Here, as we distinguished *Hall* in *Ramuta*, 261 Wis. 2d 784, ¶25, the trial court “explained its rationale at great length and with full and careful exposition.” It acknowledged the PSI recommendation for total concurrent sentencing. Nevertheless, because of Jackson’s repetitive, impulsive acts of aggression as set forth earlier in its oral sentencing decision, the trial court concluded that “consecutive time is necessary

to protect the public from further criminal activity.” Succinctly put and in global terms, Jackson has not sustained his burden to demonstrate that the trial court’s sentence was unreasonable. Thus, we conclude the trial court has not erroneously exercised its sentencing discretion.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.

