COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2008

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. 2008AP732-CR **Cir. Ct. No. 2007CT471**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEBORAH L. HERTEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Deborah Hertel appeals the judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, third offense, and operating a motor vehicle with a prohibited alcohol

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

concentration of .08 or more, third offense, contrary to WIS. STAT. § 346.63(1)(a) and (b). She contends the circuit court erred in denying her motion to suppress evidence obtained after what she contends was an unlawful entry into her home. We conclude the circuit court did not err and we affirm.

BACKGROUND

¶2 The criminal complaint alleged that Officer Dean Fleisner of the Wisconsin Rapids Police Department and other officers were dispatched to investigate a possible hit-and-run accident. The red bumper found at the scene matched the bumper of the vehicle parked at Hertel's residence. Officer Fleisner spoke to her at her home and, based on his observations, he arrested her for driving while under the influence of an intoxicant.

¶3 Hertel moved to suppress all evidence obtained as a result of the entry into her home, contending that the entry was a violation of her Fourth Amendment right to be free from unreasonable searches and seizures because there was no warrant and the entry was "without permission from any person with authority to allow entry…." The two witnesses at the hearing were Officer Fleisner and Megan Hertel, Hertel's thirteen-year-old daughter.

¶4 Officer Fleisner testified that when he arrived at Hertel's residence her daughter was outside. He thought she was at least twelve. She stated to him that her mother had been in an accident. He asked if her mother was all right and she said she was not sure and her mother was in the house. He asked if they could go in and speak with her mother and she said "yeah, come on in." He went into the kitchen and Megan went upstairs to talk to her mother. He heard Hertel tell her daughter she did not want to come down and talk to the police. He identified himself from the kitchen as a police officer and stated he needed to talk to her.

Hertel did not say she did not want him in the house, did not tell him to get out of the house, and did not ask if he had a warrant.

¶5 On cross-examination Officer Fleisner was asked "what about [Megan's] dad?" The officer responded that he "apparently was outside. I did not deal with her dad or talk with her dad." The next question was: "[w]ere you able to hear her dad yelling don't go in the house?" The officer began responding "I did not ---." At that point there was a hearsay objection, which the court initially sustained. However, the court added: "[i]f he heard it, he can testify. This isn't … meant as to whether it was said or not. So you can answer the question." Officer Fleisner then responded, "I didn't have any conversation with her dad at all. I didn't even know where he was until after -- I made contact with the defendant."

¶6 Megan testified for the defense. She stated that she was twelve at the time of the incident. When her mother came home, her mother told her that if the police came, she should let her dad handle it and not let them in the house. Megan went outside to find her dad. In response to the question whether she found him, she testified, "well, I did but then they took him across the street by a different squad car." When Megan testified that she "heard him yell to the cops don't go in my house …," the prosecutor objected on hearsay grounds and asked that her father's statement be stricken. The court sustained the objection and ordered the statement stricken. When defense counsel objected that it was not hearsay because it was "made in the presence of all these people, the officer himself," the court stated: "[t]he officer has already testified he didn't hear any comments. So sustained."

¶7 Megan's testimony on Officer Fleisner's entry into the home sharply contradicted his:

> ANSWER: And then a different police officer [Officer Fleisner] came and asked me where my mom was and I said she was upstairs. He asked me if she was hurt, I said I don't know. He asked me if I could go get her and I said yeah. And then I went inside to go get her and I was shutting the door and they took the door from my hands.
>
> QUESTION: Okay. So you were in the process of trying to shut the door –
>
> ANSWER: Yes.
>
> QUESTION: -- behind you?
>
> ANSWER: Yes.
>
> QUESTION: Why were you doing that?
>
> ANSWER: Because my mom told me not to let them in the house.
>
> QUESTION: And so as you were shutting the door behind you, describe what –
>
> ANSWER: They grabbed the door handle and opened it like I still had my hand on the door but they opened it and then my hand slipped off the door.
>
> QUESTION: And what did they do then?
>
> ANSWER: They followed me to the bottom of the stairs and then I went upstairs and I told my mom that the police were here and then she said well, I don't want to talk to them and I'm like but they're in the house and then she came downstairs.

Megan denied that she told the officer to come in; she testified that her parents told her not to let the police in.

¶8 On cross-examination, Megan acknowledged that the officer she spoke to did not threaten her or raise his voice or promise her anything. Megan

denied that her mother was upset that she let the officer into the house, responding that her mother knew that she had "tried to shut the door but he just opened it from my hands. She knows that there was nothing I could do about it because he was already in the house." She acknowledged that both her parents asked her if she let the officer into the house. She also acknowledged that she understood that if her mother was convicted of the charged crime, she had to go to jail and she did not want her mother to go to jail.

¶9 After the close of evidence the State argued that there was a valid exception to the warrant requirement because Megan had given consent to enter the home. The State referred to the case law on third-party consent by a child to enter a home and contended that the standard was met here. The State argued that the testimony showed that Megan was twelve years old, she was able to communicate effectively with the officer, she made a clear statement that he could come in, and there were no threats or promises.

¶10 Defense counsel's argument focused on the evidence that showed Megan did not consent.

¶11 In its oral ruling the court began by stating that the first issue was whether Megan had actual authority to consent to entry into the house and that this issue "was not really contested." The court described the second contested issue as whether Megan gave consent to the officer to enter the home. After recounting the contradictory testimony on this issue, the court determined that the officer's testimony was more credible than Megan's, explaining its reasoning. Because the court found Megan consented, it denied the motion to suppress.

¶12 Hertel subsequently entered a plea of guilty to both charges.

DISCUSSION

¶13 On appeal Hertel asserts the court erred in concluding that there was no dispute over whether Megan had the lawful authority to consent to entry into the home and erred in concluding that Megan consented. Hertel also contends that, if Megan did consent, her consent was not voluntary.

¶14 The State concedes that the officers entered the home without a warrant. Searches conducted without a warrant are "per se" unreasonable, subject to a few limited exceptions. ***State v. Kieffer***, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998). The exception potentially applicable in this case is consent. *See* ***id.*** The State has the burden of proving consent by clear and convincing evidence. ***State v. Tomlinson***, 2002 WI 91, ¶21, 254 Wis. 2d 502, 648 N.W.2d 367. Under certain circumstances, consent may be given by someone other than the subject of the search. ***Id.***, ¶22. Such a third person must have either actual authority to consent or apparent authority on which the officer reasonably relied. *See* ***id.***, ¶25. Depending on the circumstances, a minor child might reasonably be viewed as having apparent authority to consent to entry into a home shared with his or her parents. *See* ***id.***, ¶31.

¶15 In reviewing a circuit court's order on a motion to suppress evidence, we accept the circuit court's findings of fact unless they are clearly erroneous. ***Kieffer***, 217 Wis. 2d at 541. However, if the basis for the suppression motion is an asserted violation of the Fourth Amendment, we decide de novo whether there has been a violation. ***Id.***

¶16 We first address Hertel's argument that the circuit court erred in concluding there was no dispute over whether Megan had the lawful authority to consent to entry. To show that Hertel contested Megan's lawful authority in the

circuit court, Hertel refers us to this sentence in her motion: "Entry into the Hertel home was made without a warrant and without permission from any person with authority to allow entry thereto." Hertel contends that Megan's testimony that both her parents told her not to let the officer into the house requires the conclusion that she did not have authority.

¶17 The State responds that it is not necessary that Megan have actual authority because the officer reasonably relied on her apparent authority. The State points out correctly that in ***Tomlinson***, 254 Wis. 2d 502, ¶26, the court stated that it did not need to reach the issue of actual authority to consent because it concluded the officer reasonably relied on the apparent authority of that high-school-aged child. .

¶18 Hertel replies that the circuit court did not determine there was apparent authority upon which the officer reasonably relied. Hertel also argues that the evidence shows the police officers at the scene collectively knew Megan did not have authority, and that, under the "collective knowledge" doctrine, the officers did not reasonably rely on Megan's apparent authority.

¶19 Our review of the record persuades us that, despite the sentence in Hertel's motion, she waived the right to challenge on appeal the circuit court's conclusion that there was no dispute on the issue of Megan's actual authority. In response to the prosecutor's argument that Megan gave consent, defense counsel argued that the evidence showed she did not give consent. More specifically, in response to the prosecutor's reference to the case law on a child giving consent, defense counsel stated:

> The cases [the prosecutor] alludes to are cases about whether the person who allows someone in the house has the authority to allow it. That's when you get into age, you

> get into the various levels of ability and so on as far as whether the child had—who allowed somebody in the house actually had—had the ability to give such permission. In this case the child has made it very clear that permission was not given.

The defense attorney then referred to the hearsay objections to his questions about Megan's father yelling not to go into the house, and contended for the first time that the father's statement came within the exception to the hearsay rule for an excited utterance. Defense counsel made the point that the officers intentionally avoided asking the father for permission and instead asked Megan. Defense counsel then went on to discuss Megan's testimony that she did not give the officer permission to enter the house. Defense counsel identified the issue as "a simple question of whether the … prosecution has sustained the burden of proving consent was given" and asked the court to determine that there was not consent.

¶20 Given defense counsel's very clear statement that the law on authority to consent was not relevant because Megan did not give consent and his identification of the issue as the adequacy of proof of consent, it was not error for the circuit court to conclude in its oral decision that the issue of actual authority "was not really contested." Defense counsel's discussion of Megan's father's statement and why it should have been admissible might be relevant to the issue of actual authority. However, defense counsel did not identify it in that way, and, in context, it appears to relate to the point that Megan's testimony that she did not give consent was credible because her father was yelling at her not to.[2] "A litigant

[2] We do not resolve the issue whether the circuit court correctly sustained the objections on hearsay, which Hertel raises on appeal, because it is unnecessary to do so. To the extent it is relevant to the issues of actual or apparent authority, we conclude those issues were waived. *See* ¶¶21, 22, *infra*. Finally, to the extent her father's yelling not to let them in is relevant to the issue of whether she gave consent, Megan testified without objection that "my parents told me not to let them in" and so she did not. Therefore, the circuit court was well aware that, according to Megan, both her parents told her not to let the officers in.

must raise an issue with sufficient prominence such that the trial court understands that it is being called upon to make a ruling." ***Bishop v. City of Burlington***, 2001 WI App 154, ¶8, 246 Wis. 2d 879, 631 N.W.2d 656. The single general sentence in Hertel's motion did not fulfill that function, given defense counsel's oral argument to the court. Moreover, at no point in the entire proceeding did defense counsel explain that Hertel had intended to dispute actual authority, even when the court made its oral ruling that the issue of actual authority "was not really contested."

¶21 We recognize that waiver is a matter of administration and we may choose to decide a waived issue when it presents a question of law and there are no factual issues that need to be resolved. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980) *superseded on other grounds by statute,* WIS. STAT. § 895.52 *as recognized in* ***Wilson v. Waukesha County***, 157 Wis. 2d 790, 460 N.W.2d 830 (Ct. App. 1990). In this case, because the court believed actual authority was not disputed, it did not make the factual findings necessary to that issue: its findings were directed to the issue of consent. We conclude it is appropriate to apply waiver to the issue of actual authority.

¶22 As for the issue of apparent authority, we conclude this issue is also waived. Hertel did not argue lack of apparent authority in the circuit court and the court did not make findings on what the officers knew collectively, although it apparently did accept Officer Fleisner's testimony that he did not hear Megan's father.

¶23 We next turn to Hertel's contention that the record establishes that Megan did not consent to entry. Hertel, in essence, is asserting that we should believe Megan, not Officer Fleisner, and that we should draw from the evidence

reasonable inferences that support Megan's testimony that she did not give consent. However, that is not the role of this court. *See* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). The circuit court explained why it believed the officer rather than Megan. Accepting that credibility determination as we must, as well as the reasonable inferences the court drew from the evidence, we conclude the court's findings of fact are not clearly erroneous. We also conclude that, based on the facts as found by the circuit court, the State met its burden to prove consent.

¶24 With respect to the voluntariness of Megan's consent, Hertel presents this as a separate argument from that of consent in that it has a separate heading. However, the argument under this third heading is a repetition of the argument that Megan did not consent. Hertel does not identify any evidence that shows Megan's consent was not voluntary, nor did she make this argument in the circuit court. We therefore do not address this issue.

CONCLUSION

¶25 We affirm the court's order denying the motion to suppress and affirm the judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.