COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 01-0329-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSEPH VAN BEEK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Joseph Van Beek appeals a judgment of conviction for receiving stolen property, contrary to WIS. STAT. § 943.34(1).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Van Beek claims the trial court erred by denying his motion to suppress evidence. We disagree and affirm.

BACKGROUND

¶2 Van Beek was taken into custody on a probation hold. Concerned that his probation officer might search his apartment and discover stolen property, Van Beek called a friend, Kerry Schreiter, to remove the property from the apartment. Schreiter went to the apartment and gathered property. Van Beek's seventeen-year-old daughter became upset about Schreiter removing the property. Schreiter left without the property.

¶3 Schreiter contacted Van Beek's probation officer and stated that stolen property was in the apartment. The probation officer contacted the sheriff's department and met Schreiter at the apartment. A sheriff's deputy waited in a squad car parked on the street while Schreiter entered the apartment. Schreiter removed stolen property and turned it over to the deputy.

¶4 A search warrant was then issued based on the property Schreiter turned over. The warrant was executed and further evidence was gathered.

¶5 Van Beek moved to suppress the evidence. He claimed that the initial search was an illegal government search, and the search based on the warrant was a fruit of the illegal initial search. The trial court concluded that the initial search was based on Van Beek's consent and was therefore legal.

¶6 On appeal, Van Beek argues that the initial search was a government search, that there was no consent, and that the search warrant was based on illegally seized evidence in the first search. The State disagrees and also argues that the initial search can be upheld as a probation search. Since the consent issue

is essentially resolved by findings of fact, we decide the case on that basis and affirm.

STANDARD OF REVIEW

¶7 The lawfulness of searches and seizures of property is governed by the Fourth Amendment to the United States Constitution and art. I, § 11 of the Wisconsin Constitution, which have been construed congruently. ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). On review, we give substantial deference to the trial court's findings of fact. WIS. STAT. RULE 805.17(2). Nevertheless, the legality of a search by law-enforcement personnel, including whether a person's "consent" for a warrantless search is voluntary, are matters that we review independently. ***Phillips***, 218 Wis. 2d at 191-95.

DISCUSSION

¶8 Van Beek basically takes issue with the trial court's findings. He contends that he conditioned his request to Schreiter on his daughter's consent. He further argues that his daughter revoked that consent by demanding that Schreiter leave the apartment and return the key.

¶9 The problem with Van Beek's analysis is that it depends on testimony that the trial court rejected. The weight to be given testimony as well as the credibility of witnesses is for the trial court acting as the trier of fact to decide. ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 533, 485 N.W.2d 442 (Ct. App. 1992). We do not set aside the trial court's findings of fact unless they are clearly erroneous, and we give due regard to the opportunity of the trial court to judge the credibility of the witnesses. WIS. STAT. RULE 805.17(2). In addition, the question

before us on appeal is limited to the trial court's findings, and whether those findings are clearly erroneous. ***Id.***

¶10 The trial court specifically found that Van Beek was not credible when he claimed to have conditioned his request on his daughter's consent. It further found that there was no evidence that Van Beek withdrew his consent and that, in fact, such an argument was contrary to Schreiter's testimony.

¶11 The trial court did not determine whether the initial search was a government search. The court apparently assumed it was unnecessary to make that determination because it was so clear from the credible testimony that Schreiter searched the apartment with Van Beek's consent. We agree.

By the Court.—Judgment and order affirmed.

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