COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1140-CR **Cir. Ct. No. 99-CF-284**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARK R. PETERSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Mark R. Petersen appeals pro se from a judgment convicting him after a jury trial of possession of tetrahydrocannabinols (marijuana) with intent to deliver within 1000 feet of a park. On appeal, he challenges the circuit court's refusal to suppress evidence found in his girlfriend's apartment after she consented to the search. We uphold the circuit court. Petersen

also seeks a new trial because he did not receive adequate notice of the charge against him when the circuit court amended the information after the jury was sworn to clarify that Petersen was alleged to have committed the drug offense within 1000 feet of a park, not a school. We conclude that Petersen had adequate notice that the State alleged his proximity to a park, and he was not prejudiced by the amendment of the information.[1]

¶2 The charges against Petersen arose after police responded to a call from the apartment of Petersen's girlfriend, Kimberly Huff. Petersen called police because he believed that Huff's cousin, Jeremy Voldsness, was on his way over to the apartment to confront and possibly attack Petersen over a fight Petersen had just had with Huff. Officer Mark Tilkens responded, talked with Huff, Petersen and Voldsness, and arrested Petersen for disorderly conduct.[2] Huff then consented to a search of the apartment for drugs. Petersen moved to suppress the drugs found during the search because Huff's consent was the product of coercion and therefore not voluntary.

¶3 At the suppression hearing, Tilkens testified that Voldsness told him that Huff knew Petersen had a large quantity of marijuana in the apartment. Huff told Tilkens that she saw marijuana on the couch when she arrived at the

[1] After filing his briefs, Petersen moved this court to take action regarding alleged perjury by Officer Mark Tilkens, the officer who procured Petersen's girlfriend's consent to search the apartment, and Officer Mark Mauthe, who was also involved. The State objects to the motions. We deny the motions on three grounds. First, this is not newly discovered evidence. Petersen is merely asserting inconsistencies in the testimony which he has located in the transcripts. Such arguments should have been included in his appellant's brief. Second, this court is not the proper forum in which to seek relief from alleged perjury. Third, neither motion provides a basis for reversing the judgment of conviction.

[2] The jury later acquitted Petersen of disorderly conduct.

apartment. Tilkens then asked for permission to search the apartment. Huff did not respond initially because she was still completing the domestic abuse work sheet, but Voldsness was urging Huff to let police search the apartment. Huff then reviewed and signed the consent form.

¶4 Tilkens believed that Huff understood the consent to search form, although she was upset at the time. Tilkens denied telling Huff something bad would happen if she did not sign the form and denied making any promises to Huff to obtain her consent. While Tilkens made clear to Huff that she did not have to consent to a search of the apartment, he also told her that in his experience, parties in domestic disturbances sometimes make unfounded accusations. Huff then reiterated that she had seen marijuana in the apartment. Huff was oriented and did not appear to be intoxicated even though she had been drinking.

¶5 Huff testified on direct examination that she was intoxicated when she returned home, and she and Petersen had a fight which led to the police being called. She gave permission for the search after the officer asked her numerous times to sign the consent form.

¶6 Aspects of Huff's testimony were contradictory. On direct examination Huff testified that the officer did not read the consent form to her; on cross-examination she testified that the officer read the form to her because she has poor vision.[3] While she contended that an officer specifically told her that police would return with a warrant which could lead to her daughter being taken away, she later stated that this was her impression rather than a statement made by

[3] This testimony is at odds with the testimony of Tilkens that Huff completed the domestic abuse work sheet without assistance.

the officer. Huff felt pressured and signed the consent form because she was angry with Petersen. Huff stated that she and Petersen have since reconciled.

¶7 The circuit court found that Petersen and Huff had a domestic disturbance, Huff was angry with Petersen, and Huff mentioned the presence of marijuana in the apartment. The court found that while Huff may have been pressured into giving consent, the pressure did not come from the police. The pressure came from either Huff's cousin or her own anger at Petersen. The court found that Huff wanted to get Petersen in trouble but had changed her mind by the time of the suppression hearing. All of this made her less credible. The court concluded that Huff voluntarily consented to the search and denied Petersen's motion to suppress.

¶8 The standard of review on appeal in consent cases was set forth in ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998):

> Voluntariness of consent is a question of constitutional fact, and we continue to review the circuit court's determination of this mixed issue of fact and law under the two-step analysis laid out in [***State v.***] ***Turner***. Employing this standard, we will not upset the circuit court's findings of evidentiary or historical fact unless those findings are contrary to the great weight and clear preponderance of the evidence. We will, however, independently apply the constitutional principles to the facts as found to determine whether the standard of voluntariness has been met. (Citations omitted.)

¶9 A search after an individual voluntarily consents is a well-established exception to the warrant requirement of the Fourth Amendment. ***Phillips***, 218 Wis. 2d at 196. The issue here is whether Huff voluntarily consented to the warrantless search of the apartment. We review the circuit court's factual finding of consent and independently determine whether that consent was voluntary. ***Id.*** at 198. "The test for voluntariness is whether consent to search was

given in the absence of duress or coercion, either express or implied." ***Id.*** at 197. In assessing voluntariness, we consider the totality of the circumstances. ***Id.*** at 197-98. The State must prove by clear and convincing evidence that Huff voluntarily consented. ***Id.*** at 197.

¶10 The circuit court's finding that Huff consented to the search is not contrary to the great weight and clear preponderance of the evidence. Huff's anger at Petersen played an important part in her decision to consent to the search. Moreover, Huff's testimony was contradictory, and the circuit court found that Huff was less credible because of these contradictions. The circuit court apparently accepted Tilkens's version of the circumstances surrounding Huff's consent. This credibility evaluation was for the circuit court, as the fact finder, to make. ***Patrickus v. Patrickus***, 2000 WI App 255, ¶26, 239 Wis. 2d 340, 620 N.W.2d 205, *review denied*, 2001 WI 1, 239 Wis. 2d 774, 621 N.W.2d 630 (Wis. Dec. 12, 2000) (No. 99-3315).

¶11 We agree with the circuit court that Huff voluntarily consented to the search. The court found that while Huff may have been pressured to consent, that pressure came from her own motivations and her cousin, not from the police. In the absence of police coercion, Huff's consent was voluntary. *See* ***State v. Stevens***, 123 Wis. 2d 303, 315, 367 N.W.2d 788 (1985) (in determining voluntariness of consent, "account must be taken of subtly coercive police activities").

¶12 Petersen argues that Huff was intoxicated and unable to voluntarily consent. Huff testified that she was intoxicated; Tilkens testified that Huff did not appear to be intoxicated or unable to understand him. While there was evidence before the circuit court of Huff's degree of upset and possible intoxication, the

court did not find that this was a factor in Huff's ability to give consent. Rather, the court focused on her diminished credibility. We are bound by the circuit court's weighing of the evidence. ***Micro-Managers, Inc. v. Gregory***, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988); ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) (if more than one reasonable inference can be drawn from evidence, we must accept the inference drawn by circuit court).

¶13 Petersen next argues that he should have a new trial because he did not have adequate notice of the charge against him when the circuit court amended the information after the jury was sworn. The amended complaint alleged that Petersen possessed and intended to deliver marijuana within 1000 feet of a park contrary to WIS. STAT. § 961.49(1)(b)1 (1999-2000).[4] While the text of the information alleged a penalty enhancer owing to the proximity of the park, the statute cited in the information refers to conduct within 1000 feet of a school, § 961.49(1)(b)6.

¶14 In his opening statement, the prosecutor stated that Petersen was charged with possession with intent to deliver marijuana within 1000 feet of a park and discussed the forthcoming evidence of Petersen's proximity to the park. Defense counsel responded that the State had charged Petersen with conduct within 1000 feet of a school, but there was no school within that distance. Defense counsel argued that "Whitman Park does not fit the definition of school."

¶15 After opening statements concluded, the court and counsel addressed the confusion regarding the penalty enhancer. The State sought to amend the information because the facts alleged in the amended complaint and the information

[4] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

all referred to a park and the information's statutory reference to a school was a typographical error. Defense counsel objected to amending the information. The court found that every document in the case referred to Whitman Park and that the only reference to a school was the typographical error in the information. The court found no surprise to Petersen and granted the amendment.

¶16 A circuit court has discretion to amend the information so long as the amendment does not prejudice the defendant. ***State v. Flakes***, 140 Wis. 2d 411, 416, 410 N.W.2d 614 (Ct. App. 1987). We uphold the circuit court's findings that the language in the amended complaint and the information referred to Whitman Park. The information contained a typographical error relating to the applicable statute. There is no question that Petersen was informed of the actual allegations against him, and he was not prejudiced by the amendment of the information. ***Id.*** at 419.

By the Court.—Judgment affirmed.

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