COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1117-CR **Cir. Ct. No. 00-CF-949**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARGORIE M. VEESER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Marjorie Veeser appeals the trial court's order denying her motion to suppress evidence. Veeser contends the court should have suppressed what officers obtained regarding the living conditions in her home

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

because she claims the first officer's entrance violated her Fourth Amendment protection against unreasonable searches. However, we agree with the trial court that the first officer to arrive at Veeser's residence received consent to enter the house and we therefore affirm the order denying suppression and the judgment of conviction.

Background

¶2 On December 29, 1999, around 11:30 a.m., fire and emergency personnel responded to a 911 call at Veeser's home regarding an infant who was not breathing and who did not have a pulse. Green Bay police officer Bradley Florence also responded, arriving in time to see the baby's mother—Veeser's daughter, Sara Veeser-Gilson—hand the infant to a firefighter.[2] As Florence passed one of firefighters, the fireman told Florence "to take note of the living conditions inside the house."

¶3 Florence approached Sara, who was standing just inside a porch holding the screen door open. Sara was visibly upset. Florence testified that his purpose was both to investigate the circumstances and to try to calm Sara. He stopped on a cement platform or step outside the porch and took over holding the door. He asked Sara what had happened and she asked questions about her son. While they were still talking to each other, Sara turned and began walking from the porch door to the door leading into the home. Florence followed her. They continued talking, and Florence followed Sara as she moved around the home. From the time Florence reached the door leading into the home, he noticed a very

[2] The infant died from pneumonia caused by a bacterial infection.

foul odor coming from inside. He identified the odors as animal feces and urine and summoned his supervisor to the scene.

¶4 Approximately fifteen or twenty minutes into Florence's conversation with Sara, Veeser arrived at the residence. Veeser remained quiet initially, but as more officers arrived to investigate the scene she became irate and told them to leave.[3] Florence and other officers observed animal feces and flies throughout the home. Although they eventually requested and received a search warrant, much of the evidence used by the State was obtained before receiving the warrant. Several months later, Veeser, Sara, and Sara's husband, Corey, were arrested and charged as parties to the crime of felony child neglect resulting in a death contrary to WIS. STAT. § 948.21 and for misdemeanor failure to provide proper shelter for animals contrary to WIS. STAT. §§ 951.14(4) and 951.18(1).

¶5 Veeser moved to suppress evidence obtained at her home before authorization of the search warrant, claiming that Florence's warrantless entry violated her Fourth Amendment rights. The trial court denied the motion. Veeser ultimately pled to one count of misdemeanor child neglect and one count of

[3] Veeser's brief challenges Florence's entry with only tangential references to subsequent officers' entries. We note that while Florence was inside the home, he observed (1) that the home was extremely messy; (2) that the strong animal odor came from the home; (3) that the "junk everywhere" created only a narrow walkway within the home; and (4) a birdcage over a couch was so caked with bird waste that the waste spilled from the cage onto the couch. It is undisputed that at the point Florence was told to leave the house, he had already made the plain view observations that would become evidence in the ensuing prosecution.

The infant's cause of death was not released until well after the police had visited the home. Even assuming that no other officer entered the home after Florence and that Florence did not go any farther into the home, Florence had already observed sufficient evidence to form the basis for a search warrant and the criminal complaints. The suspicion was that the unsanitary conditions of the home may have harbored the bacteria that ultimately caused the infant's fatal pneumonia. Thus, we are satisfied that we need only determine whether Florence's entry was lawful, not whether other officers' entries were lawful.

misdemeanor failure to provide appropriate shelter to an animal. Veeser now appeals the denial of the suppression motion.

Discussion

¶6 Veeser advances two arguments why Florence's entry into her home violated the Fourth Amendment. First, she argues that the entry does not fall under any exception to the warrant requirement. She also argues that the police did not fall under the "community caretakers" exception once the infant was transported to the hospital. The State argues that Florence had Sara's permission to enter the home and that the entry was covered by the consent exception to the warrant requirement. Alternatively, the State contends there were exigent circumstances necessitating Florence's entrance into the home. Because we agree with the trial court that Florence had permission to enter, we need not address whether other exceptions apply.[4]

> The Fourth Amendment to the U. S. Constitution and article I, section 11, of the Wisconsin Constitution each state that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated …." Whether police conduct has violated the constitutional guarantees against unreasonable searches is a question of constitutional fact.

State v. Tomlinson, 2002 WI 91, ¶19, 254 Wis. 2d 502, 648 N.W.2d 367 (citation omitted). Thus, we give deference to the circuit court's findings of evidentiary and historical facts but we independently apply those historical facts to the constitutional standard. ***Id.***

[4] Cases should be decided on the narrowest possible ground. ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

¶7 Searches conducted without a warrant are presumptively unreasonable. ***Id.*** However, consent is one of the recognized exceptions to the Fourth Amendment warrant requirement. ***State v. Johnson***, 177 Wis. 2d 224, 233, 501 N.W.2d 876 (Ct. App. 1993). The State must prove consent by clear and positive evidence, and it must prove that the consent was voluntary. *See* ***id.***

¶8 Whether an individual actually gives consent is a question of historical fact. ***Tomlinson***, 2002 WI 91 at ¶36. Thus, we will uphold the trial court's finding unless it is against the great weight and clear preponderance of the evidence. ***Id.*** "The test for voluntariness is whether consent to search was given in the absence of duress or coercion, either express or implied." ***State v. Phillips***, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998). We make this determination after considering the totality of the circumstances and the character of the individual giving consent. *See* ***id.*** at 198. However, this is a question of constitutional fact subject to two-part review. *See* ***id.*** at 189-190. Thus, we will uphold the trial court's findings of historical fact regarding the circumstances if they are supported by the evidence, but we will independently apply these facts to the constitutional standard. ***Id.***

¶9 Veeser contends that Sara did not consent to Florence's entry but rather that she acquiesced in or submitted to his authority.[5] Neither acquiescence nor submission is sufficient for finding consent. *See* ***State v. Munroe***, 2001 WI App 104, ¶8, 244 Wis. 2d 1, 630 N.W.2d 223; ***Johnson***, 177 Wis. 2d at 234. The

[5] We note that Veeser does not challenge Sara's capacity to give consent, only whether Sara actually consented. Sara, Corey and Veeser lived in the home together.

trial court, however, found that Sara implicitly consented to Florence's entry.[6] This finding is not contrary to the preponderance of evidence and we must therefore uphold it.

¶10 Consent need not be verbal; it may be given as words, gestures, or conduct. ***Phillips***, 218 Wis. 2d at 197. When Florence first arrived, Sara was standing at the porch's screen door, holding it open. When Florence approached her, Sara did not close the door, retreat into the porch, or otherwise indicate she did not want to speak to Florence. He asked her a few questions, and she asked some of him. During their colloquy, Sara moved farther into the house. Florence was both investigating and trying to calm a frightened and hysterical mother whose infant had stopped breathing. Nothing supports a scenario that at the time the two entered the house Florence was asserting authority that suggested the mandatory response was submission. Rather, Sara chose to move the dialogue into her house, impliedly giving consent to the other participant to follow. She did not indicate she wished to stop speaking to Florence. Florence could only infer that he should follow her to continue their conversation.

¶11 Veeser argues that even if Sara did implicitly consent, the consent could not be voluntary because Florence never asked to enter, Sara was too distraught, and there was "police trickery." We disagree.

---

[6] Florence testified that he believed he entered the house with Sara's permission. When the trial court accepted this testimony it essentially found that Sara had given the consent, making a finding of historical fact that we must uphold if supported by adequate evidence. *See* ¶9, *supra*. Veeser cites several cases to suggest that Sara was merely submitting to authority. The record, however, does not demonstrate the same type of display of authority as in the cases Veeser cites; that is, Florence made no bold assertion of a privilege to engage in the targeted police conduct. Given the record of Sara's conduct, the cases cited are insufficient to show the trial court's finding of consent is contrary to the great weight of the evidence presented.

¶12 We note first that we have never held that there must be an explicit request by the police to enter. The remainder of the voluntariness analysis must examine the facts as a whole, given our "totality of the circumstances" standard.

¶13 We have no doubt that Sara was upset by the circumstances. She had sufficient presence, however, to answer the officer's questions as well as form her own to ask him. Also, the record suggests she calmed down and was able to recount the events up to the point the infant stopped breathing. Further, the "absence of duress" language in our test appears to refer to the actions of people trying to influence consent, *not* the duress of the events surrounding the search.[7]

¶14 Veeser suggests Florence had ulterior motives for getting into the home. Florence admits that the fireman's suggestion to note the interior conditions piqued his curiosity. The fireman's notice was not, however, the only reason Florence entered the home. He testified that he was attempting to calm Sara. As he was doing this, he also noticed blood around Sara's mouth and was concerned that she was injured.

¶15 In any event, Florence's motives for wanting to enter are irrelevant to the voluntariness of Sara's consent. Unlike other cases where police have outright lied about why they wanted to enter a location, such as ***Munroe***, 2001 WI App 104 at ¶6,[8] there was no "police trickery" here. Florence never gave any

[7] *See*, *e.g.,* ***State v. Xiong***, 178 Wis. 2d 525, 532, 504 N.W.2d 428 (Ct. App. 1993) ("The test for voluntariness is whether consent to search was given in the 'absence of actual coercive, improper *police practices* designed to overcome the resistance of a defendant.'" (Emphasis added; citation omitted.))

[8] Officers performing a hotel interdiction to search for drugs and prostitution told Munroe they only wanted to verify his identification, but instead ended up searching for and finding contraband leading to Munroe's arrest. *See* ***State v. Munroe***, 2000 WI App 104, ¶¶5-6, 244 Wis. 2d 1, 630 N.W.2d 223.

reason for wanting to enter the residence because the subject never came up. Florence's motives could not coerce Sara if she did not know what they were. We understand the stress of the situation for Sara, but she was still capable of voluntarily consenting to Florence's entry into her home.

¶16 Because we agree with the trial court that Sara implicitly consented to Florence's entry into the home, and because our review of the facts indicates Sara gave this consent freely, the trial court was correct in denying the motion to suppress evidence arising from Florence's entry and search. The order, and therefore the judgment of conviction, will be affirmed.

By the Court.—Judgment and order affirmed.

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