

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 12, 2011**

A. John Voelker  
Acting 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. 2010AP1431-CR**

**Cir. Ct. No. 2009CT501**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CHAD W. EBERT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

¶1 REILLY, J.<sup>1</sup> Chad Ebert appeals from a judgment of the circuit court convicting him of operating a motor vehicle with a prohibited alcohol concentration (third offense). The issue in this appeal is whether the police had consent to enter Ebert’s residence while they were conducting their investigation of a possible hit-and-run accident. As we defer to the circuit court’s factual conclusion that Ebert’s uncle (who is also his landlord) consented to a search of Ebert’s residence, we affirm Ebert’s conviction.

### FACTUAL BACKGROUND

¶2 Early in the morning on May 3, 2009, Fond du Lac County Deputies Anthony Barr and Laura Halfmann were investigating a possible hit-and-run accident. Their investigation led them to Ebert’s residence after they noticed “gouge” marks along the road leading to Ebert’s residence and in his driveway. They also found a damaged truck parked in Ebert’s driveway.

¶3 After arriving at Ebert’s residence, the deputies were met by Ebert’s uncle, who is also Ebert’s landlord. Ebert’s uncle arrived at the residence about ten to fifteen minutes before the deputies did after his wife received a call from Ebert’s wife stating that Ebert had gotten into an accident and that she needed help. Deputy Barr testified that Ebert’s uncle identified himself as the owner of the property and told Deputy Barr that the driver the deputies were looking for was inside the residence and that the deputies could go inside. Similarly, Deputy

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Halfmann testified that Ebert's uncle stated that he was the owner of the property, and that he directed the deputies to go inside the residence.

¶4 Conversely, Ebert's uncle claims that he never gave the deputies permission to enter the residence. The uncle testified that "[the deputies] asked me if I was the driver of the vehicle and I said no, he's upstairs sleeping and his wife is trying to wake him up." Ebert's uncle stated that at his point the deputies entered the residence without consent.

¶5 Ebert was subsequently charged with operating a motor vehicle with a prohibited alcohol concentration (third offense) and operating a motor vehicle while intoxicated (third offense). Ebert filed a motion to suppress the evidence obtained by the deputies because the deputies did not have consent to conduct a warrantless search of Ebert's residence. The circuit court denied the motion after finding that the deputies were given permission to enter the residence. The court noted that the deputies' description of the events was "essentially the same" and that their testimony was credible. Ebert subsequently pled no contest to the operating with a prohibited alcohol concentration charge (the operating while intoxicated charge was dismissed). He appeals the denial of his motion to suppress.

### **STANDARD OF REVIEW**

¶6 Whether Ebert's uncle consented to the search of Ebert's residence is a question of fact. We will not set aside the circuit court's factual findings unless they are "clearly erroneous." WIS. STAT. § 805.17(2).

## DISCUSSION

¶7 The Fourth Amendment’s warrant requirement does not apply when police have consent to enter a dwelling. *State v. Douglas*, 123 Wis. 2d 13, 18, 365 N.W.2d 580 (1985). The issue in this appeal is whether Ebert’s uncle consented to the search of Ebert’s residence, or as the State succinctly put the issue to the circuit court, “[i]f [the uncle’s] story is correct, then [the deputies] had no authority to go in. If the [deputies] are telling the truth, they had consent to go in.” As the circuit court in its fact-finding capacity is the ultimate arbiter of witness credibility and the weight to be given to each witness’ testimony, we affirm the circuit court decision that Ebert’s uncle consented to the search of Ebert’s residence. *See Pindel v. Czerniejewski*, 185 Wis. 2d 892, 898, 519 N.W.2d 702 (Ct. App. 1994).

¶8 Ebert argues that the circuit court abused its fact-finding role in numerous ways. First, he argues that the circuit court violated “the long held proposition that the preponderance of the proof may be with one witness and that preponderance may not go with numbers.” Ebert argues that just because two witnesses (the deputies) testify to something does not make it true. Ebert’s argument fails as there is nothing requiring the fact finder to accept one witness’ testimony over another’s. It is the fact finder’s job to determine who to believe and in this case the circuit court found the deputies’ testimony more credible than Ebert’s uncle’s testimony. *See id.*

¶9 Second, Ebert argues that the circuit court’s decision was capricious because it referred to Ebert’s uncle as a “so-called corrections officer, who isn’t a police officer.” Ebert argues that this comment shows a bias against Ebert’s uncle. Ebert takes the circuit court’s comments out of context. At the motion hearing,

Ebert's attorney argued that it would make little sense for Ebert's uncle—a correctional officer—to consent to a search of Ebert's residence. The State responded that Ebert's uncle may have let the deputies in to prevent Ebert from getting a criminal conviction, and that regardless the circuit court should not make an inference that a correctional officer would never want to comply with a police investigation.

¶10 The circuit court's full explanation provides better context:

I mean, Mr. Melowski [Ebert's trial attorney], your presumption is that the so-called corrections officer, who isn't a police officer, should "know better" and the presumption is that he shouldn't cooperate with the police and should demand a warrant or what have you. I don't know that I should make that presumption anymore than I should make [the State's] presumption that members of the public who are approached by the police are cooperative and they should let the police in. I think neither of those presumptions is supported by the evidence in any of the testimony here.

The record reveals that the circuit court was not disparaging Ebert's uncle; rather, the court was making clear that the uncle's profession did not affect the court's credibility determinations.

¶11 Finally, Ebert argues that the circuit court "ma[de] excuses for the deputies regarding their poor memory." In addition to his uncle's testimony that he did not consent to the search, Ebert cites to two more examples of the deputies' faulty memories. First, Ebert points out that Deputy Halfmann could not remember if Ebert's uncle said "I permit you to enter the residence." Second, Deputy Barr thought there was a porch with four to five steps leading up to Ebert's residence while Deputy Halfmann remembered a porch. Ebert's residence has neither a porch nor stairs leading to its entryway.

¶12 The circuit court was entitled to consider the deputies' testimony more credible and persuasive than Ebert's uncle's testimony. The court appropriately exercised its fact-finding capacities when it decided that the deputies were telling the truth despite their inability to remember if Ebert's residence had a porch or steps in its entryway. As witness credibility is the province of the fact finder, we decline to reverse the circuit court's determination that Ebert's uncle consented to a search of Ebert's residence.

### CONCLUSION

¶13 We hold that the circuit court acted appropriately when it found that the deputies had consent to search Ebert's residence. The circuit court's denial of Ebert's motion to suppress is affirmed.

*By the Court.*—Judgment affirmed.

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