COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP919-CR **Cir. Ct. No. 2006CF3392**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. STOKES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 CURLEY, P.J. Robert L. Stokes appeals a judgment convicting him of possession with intent to deliver marijuana, contrary to WIS. STAT.

§ 961.41(1m)(h)2. (2005-06).[1] Stokes contends that because the police did not have valid consent to search his residence without a warrant, the trial court erred in denying his motion to suppress the 275 grams of marijuana found in his basement. Specifically, he argues that the consent given by his mother, Deborah Stokes,[2] to search their residence was involuntary because: (1) police tricked her into thinking they had authority to search the residence for evidence of dog fighting when they had no such authority; (2) she was intimidated by the large number of police officers requesting entry into her home; (3) she initially refused consent to enter the residence; and (4) she was "seized" when she gave consent. Stokes additionally argues that regardless of whether Deborah's consent was valid, the trial court erred in denying his suppression motion because police unlawfully entered the yard and front porch of the residence before gaining consent to enter.[3] We affirm.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Because Robert Stokes and his mother, Deborah, share the same last name, we refer to them hereafter primarily by their first names for clarity's sake.

[3] Stokes also presents an additional basis for appeal which we do not consider in this opinion; namely, that the trial court erroneously denied his motion to dismiss based on vindictive prosecution. We do not consider this argument because it is waived. After Stokes filed his appeal, he filed a motion seeking to waive his vindictive prosecution claim. In this motion, Stokes requested that this court "decide his appeal based solely on the first issue regarding the search of his residence." Pursuant to an order of this court, the trial court conducted a hearing at which Stokes testified that he wanted to waive the vindictive prosecution clam. Finding that Stokes, "freely, voluntarily," and "knowingly" waived his right to pursue the vindictive prosecution issue, the trial court accepted Stokes' waiver. While we owe no deference to the trial court on this issue, *see* ***State v. Kelty***, 2006 WI 101, ¶13, 294 Wis. 2d 62, 716 N.W.2d 886 (questions involving waiver are questions of law reviewed *de novo*), we agree that Stokes waived his right to appeal on the basis of vindictive prosecution, and we therefore do not consider this argument, *see* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶15, 273 Wis. 2d 76, 681 N.W.2d 190.

I. BACKGROUND.

¶2 Approximately eight Milwaukee police officers were conducting a "Safe Street Initiative"[4] patrol on North 34th Street the afternoon of June 28, 2006, when an unknown man bolted across the street, through an open gate, and into the backyard of 2857 North 34th Street. Suspicious of the man's behavior, some of the officers set out to apprehend the man. Others stopped to conduct field interviews of three onlookers who were standing in the front yard of the property. One of the interviewed onlookers was Robert Stokes.

¶3 What occurred after police apprehended the suspicious sprinter and began interviewing Robert is in dispute.

Police Sergeant's Version of Events

¶4 According to a sergeant who was on the scene, he noticed what appeared to be a marijuana cigarette lying on a pillar in the front yard. He and other officers also noticed a number of unchained pit bull puppies in the yard at 2857 North 34th Street. The sergeant verified that Robert lived there, and asked Robert to contain the dogs. The sergeant also heard what sounded like several additional dogs barking near the garage area. Suspecting dog fighting, he went to the front door with another officer to investigate.

¶5 Robert's mother, Deborah, who also lived at 2857 North 34th Street, answered the door, and the sergeant explained what had happened outside. He

[4] Milwaukee's "Safe Streets Initiative" is a program in which groups of police officers go out into areas with high levels of drug and gang-related crimes, and, via proactive policing techniques, work to reduce neighborhood violence. *See* MILWAUKEE SAFE STREETS INITIATIVE COMMUNITY COORDINATION.

asked her permission to enter the residence to determine whether any dog fighting was going on inside. Deborah stated that there was no dog fighting going on, but she nevertheless allowed the officers to enter her home, saying "sure, come on in." The sergeant and accompanying officer were the first to enter. Soon thereafter, another officer and an assistant district attorney, who was also part of the Safe Street Initiative, also came inside.

¶6 Once inside the residence, one of the officers observed what appeared to be a small amount of marijuana on top of a bedroom dresser in plain view. Upon learning about the marijuana, the sergeant asked Deborah for written consent to further search the residence. He handed Deborah a notebook on which he had drawn a signature line with an "X" next to it; below the signature line was writing that read, "consent to search residence." (Capitalization omitted.) He explained that her signature in the notebook was to confirm that police would be doing a further search of the residence. Deborah signed the notebook and allowed the officers to search her home.

¶7 While searching the basement, one of the officers discovered approximately 275 grams of marijuana, along with a digital scale and traffic printouts for "Robert Stokes." Robert was consequently arrested and charged.

Stokes' Version of Events

¶8 According to Robert, his mother did not give police consent to enter their residence. When police first spoke to him in the front yard, they noticed his electronic monitoring bracelet and demanded to see identification. Robert explained that it was in the house. The officers made him knock on the door and ask his mother for his identification card. She went inside to get the ID, and when she came back to the door, the officers barged inside without permission. Robert

did not see or hear what went on in the residence after that point because he remained outside the house.

¶9 Deborah also denied giving police consent to enter her home. According to her, she told police that there were no dogs in the house—that she does not like dogs—and said that they could *not* come in. But according to Deborah, the officers "paid no attention." As she went to hand Robert his ID, they "snatched the screen door open" and "just came on in" without permission.

¶10 According to Deborah, once the officers were in her home they did not ask for her consent to search, either. She acknowledged that an officer asked her to sign his notebook before the basement was searched and the 275 grams of marijuana were discovered, but according to her, there were no words indicating that she gave "consent to search residence." Deborah explained that an officer had asked her to sign the notebook and provide her contact information as a precaution to prevent her from filing a lawsuit against the police department claiming police had stolen personal property.

Motion to Suppress and Appeal

¶11 After Robert was arrested and charged, he filed a motion to suppress the marijuana that was discovered during the June 28, 2006 search of his mother's home based on the fact that the officers did not have a warrant and there was no consent for the search. The trial court denied the motion, and Robert pled guilty. He now appeals.

II. ANALYSIS.

¶12 Robert bases his appeal primarily on one issue: whether his mother, Deborah, gave voluntary consent for police to search their residence without a warrant.

¶13 Although searches inside a home without a warrant are presumptively unreasonable, *see, e.g.*, ***State v. Phillips***, 218 Wis. 2d 180, 195-96, 577 N.W.2d 794 (1998), they are lawful if a resident gives consent, *see* WIS. STAT. § 968.10(2) (2007-08) (A search of a person, object or place may be made, and things may be seized when the search is made with consent.).

¶14 Consent must be voluntary; in other words, it must be given in the "'absence of actual coercive, improper police practices designed to overcome the resistance of a defendant.'" ***State v. Giebel***, 2006 WI App 239, ¶12, 297 Wis. 2d 446, 724 N.W.2d 402 (citation omitted). In determining whether consent was voluntary, no single factor is dispositive. ***State v. Hughes***, 2000 WI 24, ¶41, 233 Wis. 2d 280, 607 N.W.2d 621. Rather, the reviewing court examines the totality of the circumstances and places special emphasis on the circumstances surrounding the consent and the characteristics of the defendant. *See* ***id.*** "The State has the initial burden to show that the defendant's consent was voluntary." ***Id.***, ¶42. "To do so, the State must demonstrate by clear and convincing evidence that the defendant gave consent, without any duress or coercion, express or implied." ***Giebel***, 297 Wis. 2d 446, ¶12. "Once the State has shown that the defendant gave consent, was willing to give it, and that he or she did not give it as a result of duress, threats, coercion or promises, the burden shifts to the defendant to show that the police used improper means to obtain his or her consent." ***Hughes***, 233 Wis. 2d 280, ¶42.

¶15 Whether consent is voluntary is a mixed question of fact and law. ***State v. Vorburger***, 2002 WI 105, ¶88, 255 Wis. 2d 537, 648 N.W.2d 829. We review the trial court's determination regarding the voluntariness of consent to search in two steps, examining the trial court's findings of fact under the clearly erroneous standard, but applying constitutional standards to those facts *de novo*. *See* ***id.*** Credibility determinations are the province of the trial court. *See* ***State v. McCallum***, 208 Wis. 2d 463, 488, 561 N.W.2d 707 (1997) (The trial court is in a much better position than an appellate court to resolve whether a witness is inherently incredible.).

¶16 As the trial court correctly noted, whether Deborah's consent was voluntary in this case was ultimately a credibility issue. Under the police sergeant's version of events, Deborah gave oral consent to enter her home—saying "sure, come on in"—and written consent to search her home. There was no duress or coercion of any kind. *See* ***Giebel***, 297 Wis. 2d 446, ¶12. Under Stokes' versions, Deborah gave no consent for police to enter the residence; she specifically told police they could *not* come in. Furthermore, under Deborah's version she did not voluntarily consent to the search because the paper she signed made no indication about consent when she signed it, and her understanding was that her signature was needed for an unrelated purpose. Any purported consent was the product of dishonest practices and therefore invalid. *See* ***id.***

¶17 The trial court listened to and analyzed the testimony given at the suppression hearing and found the police sergeant's version of events more credible. *See* ***McCallum***, 208 Wis. 2d at 488. Determining that there was voluntary, valid consent to search, it denied Robert's motion to suppress the evidence against him. Given the facts of this case, we cannot say that the trial court erred in doing so. *See* ***Vorburger***, 255 Wis. 2d 537, ¶88.

¶18 Moreover, we are not persuaded by Robert's arguments on appeal that even if Deborah did consent to the entry and/or search, that her consent was not voluntary. Of those four arguments—(1) that police tricked Deborah into thinking they had authority to search the residence for evidence of dog fighting when they had no such authority; (2) that she was intimidated by the allegedly large number of police officers requesting entry into her home; (3) that Deborah initially refused consent to enter the residence; and (4) that she was "seized" when she gave consent—three, namely, the first, second, and fourth arguments, are unpersuasive and not sufficiently developed, and we will not consider them. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56. As for the third argument, that Deborah's consent was invalid because she initially refused to allow police to enter the residence, we again note that whether Deborah gave valid consent to enter the residence (or whether she instead told police they could not enter before they barged in) was a credibility determination that the trial court found in favor of the State. *See* ***McCallum***, 208 Wis. 2d at 488.

¶19 Finally, we are not convinced by Robert's argument that the trial court erred in denying his suppression motion regardless of whether Deborah's consent was valid because police had no lawful reason to be in the Stokes' yard and on their porch. Robert's argument ignores the fact that police initially came into the yard in pursuit of a suspicious subject, saw what appeared to be an illegal substance (a marijuana blunt) in the yard, and went to the porch to ask permission to search for evidence of illegal activity—dog fighting—that they had reason to believe was going on given their observations in the yard. Furthermore, Robert's citation to ***State v. Wilson***, 229 Wis. 2d 256, 263-66, 600 N.W.2d 14, which held that the area near the back of an arrestee's house was protected curtilage under the

Fourth Amendment, does not persuade us that the *front* yard and porch in this case constituted protected curtilage under the Fourth Amendment. In ***Wilson***, several factors convinced us that the area near the back of the defendant's house enjoyed a reasonable expectation of privacy and thus protection under the Fourth Amendment, including: the nature and use of the area as a place for family activities; the fact that the area was not viewable from the front of the house, nor from the street or sidewalk; and the fact that the defendant took steps to protect the area from observation. *See* ***id.*** Robert does not explain how the factors we found persuasive in ***Wilson*** demonstrate a reasonable expectation of privacy for his *front* porch area, and we decline to develop such arguments for him. *See* ***Brown***, 258 Wis. 2d 915, ¶4 n.3.

By the Court.—Judgment affirmed.

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