COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP983-CR **Cir. Ct. No. 2009CF2455**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. COOPER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael R. Cooper appeals from a judgment of conviction entered upon his guilty plea to one count of possessing a firearm as a felon. He contends that the circuit court erred by denying his suppression motion.

Because the evidence supports the circuit court's finding that Cooper consented to the search he challenges, we affirm.

BACKGROUND

¶2 Milwaukee police officer John Hefley stopped a van that lacked a front license plate. A second police officer, Michael Lentz, assisted with the stop and subsequent investigation. Lentz searched the van and found a gun under the driver's seat. Cooper was the driver of the van, and the State charged him with possessing a firearm as a felon.[1]

¶3 Cooper moved to suppress the gun. The circuit court conducted a suppression hearing at which Hefley, Lentz, and Cooper testified. Hefley described stopping the van and conducting a routine inquiry that disclosed an outstanding warrant for Cooper's arrest. All three witnesses agreed that Hefley ordered Cooper out of the van and that Lentz then asked Cooper whether the vehicle contained drugs, guns, or other contraband. The police and Cooper did not agree, however, about Cooper's answer.

¶4 Cooper testified that he responded to Lentz's question about whether the van contained weapons or contraband by stating: "no, nothing. No." Hefley, by contrast, testified that his police report accurately memorialized Cooper's answer that "the vehicle is my cousin's, there is nothing in it, you can check it out." Additionally, Hefley and Lentz each restated Cooper's answer when they testified, and each reiteration varied slightly from the others, e.g.: (1) "[t]here is

[1] The van also contained a passenger. The interaction of the passenger with the police during the stop and search of the van is not relevant to the issues presented on appeal.

nothing in the vehicle. It's not mine. It's my cousin's. Go ahead and search;" (2) "[t]he vehicle's my cousin's. Go ahead and check;" and (3) "[i]t's my cousin's vehicle, go ahead and take a look."

¶5 The circuit court rejected Cooper's testimony as incredible and believed the testimony of the officers. The circuit court acknowledged that Hefley and Lentz recounted Cooper's words with some variations, but the circuit court found that the variations were "slight," and "did not have any significan[ce] .... They're all saying go ahead look. Go ahead, check it out. Go ahead it's not my car. It's my cousin's." Based on the credible evidence, the circuit court found that Cooper's statement meant: "[i]t's not my car. Go ahead and look in it." Accordingly, the circuit court found that Cooper gave consent to search the vehicle, and the circuit court denied the motion to suppress the gun found during the search. Cooper pled guilty, and this appeal followed.[2]

DISCUSSION

¶6 The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution generally require that law enforcement conduct searches pursuant to a warrant. ***State v. Krajewski***, 2002 WI 97, ¶24, 255 Wis. 2d 98, 648 N.W.2d 385. Consent to search is a well-established exception to that requirement. *See* ***id.***

[2] A circuit court's order denying a motion to suppress evidence may be reviewed on appeal from a judgment of conviction notwithstanding the defendant's guilty plea. *See* WIS. STAT. § 971.31(10) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶7 The consent exception is satisfied when consent is given in fact and the consent given is voluntary. ***State v. Artic***, 2010 WI 83, ¶30, 327 Wis. 2d 392, 786 N.W.2d 430. Whether the defendant gave actual consent is a question of historical fact. ***Id.*** We will sustain the circuit court's finding of actual consent unless the finding is "contrary to the great weight and clear preponderance of the evidence." ***Id.*** Whether consent is voluntary is a separate question that we need not address in this appeal because Cooper concedes the issue.

¶8 Cooper first complains because the circuit court found that he consented to the search of the van without making a finding as to the precise words that he used to consent. He contends that this is an error under ***State v. Johnson***, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182. We have examined ***Johnson*** and conclude that it offers no guidance here. In ***Johnson***, the supreme court accepted the State's concession that the defendant did not consent to a search because the undisputed testimony showed that the defendant did not consent. ***Id.***, ¶¶14, 19. Further, the ***Johnson*** court determined that the circuit court made "no findings of historical fact that are relevant to the question of consent." ***Id.***, ¶15 n.5. The supreme court illustrated that point by listing all of the circuit court's factual findings, none of which had anything to do with consent. *See* ***id.*** Here, of course, Hefley and Lentz testified that Cooper gave consent to search the van and the circuit court made relevant findings on that issue, specifically determining that Hefley and Lentz credibly described Cooper's consent.

¶9 Cooper's complaints about the circuit court's allegedly inadequate findings of fact are properly assessed using the normal rules applicable to credibility challenges. Questions of credibility rest with the circuit court. ***State v. Mercer***, 2010 WI App 47, ¶42, 324 Wis. 2d 506, 782 N.W.2d 125. Here, Cooper faults the circuit court for accepting the officers' descriptions of his consent

despite discrepancies in the officers' testimony, but the circuit court was entitled to conclude that the testimony of the officers was credible notwithstanding insignificant differences in the officers' accounts. *See* ***State v. Phillips***, 218 Wis. 2d 180, 186 n.4, 577 N.W.2d 794 (1998) (noting discrepancies among individual drug agents' accounts of when and where they obtained the defendant's consent to search but upholding the circuit court's finding that the agents were credible witnesses).

¶10 Further, the circuit court has the task of determining the proper way to resolve conflicts in the testimony. *See* ***Rivera v. Eisenberg***, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980). The question for this court is only "'whether a judicial mind could, on due consideration of the evidence as a whole, reasonably have reached the same conclusions.'" ***Id.*** (citation omitted). Here, the circuit court concluded that the variations in Hefley's and Lentz's accounts of Cooper's consent were *de minimis*. The court found that the two officers described exactly the same essential content of Cooper's statement to Lentz and that the statement meant: "[i]t's not my car. Go ahead and look in it." Because this factual determination is reasonable, we will not disturb it.

¶11 Cooper contends, however, that the evidence of his consent to the search was inadequate in light of ***State v. McCarty***, 47 Wis. 2d 781, 785, 177 N.W.2d 819 (1970). Pursuant to ***McCarty***, consent "must be expressed in 'clear and unequivocal terms.'" ***Id.*** (citation omitted). Cooper argues that "a statement cannot be 'clear and unequivocal' if it is subject to different reasonable interpretations," and that his response to Lentz is subject to more than one reasonable interpretation. Cooper asserts that the words, "you can check" could "refer to [his] statement that the van belonged to his cousin," and thus his response to Lentz could have directed the officers to examine "the vehicle's ownership, not

... its contents." Cooper believes that, because he now posits an alternative interpretation of his statement to the police, the evidence does not show consent in fact under ***McCarty***. We are not persuaded.

¶12 First, we note that Cooper did not offer the circuit court an alternative meaning for his answer to Lentz at the time of the postconviction hearing.[3] Only on appeal does Cooper suggest that he responded to Lentz's inquiry about the contents of the van by directing the officers to investigate who owned the vehicle. The belatedness of Cooper's suggestion alone warrants rejecting it.[4] *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2007 WI 98, ¶23, 303 Wis. 2d 258, 735 N.W.2d 93 ("Generally, arguments raised for the first time on appeal are deemed waived.").

¶13 Second, as Cooper himself points out, "'unequivocally' means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances." *See* WIS JI—CRIMINAL 550; WIS JI—CRIMINAL 580. The fact finder determines whether the evidence proves an unequivocal act under the circumstances of the case. *See* ***id.***; *see also* ***Bethards v.***

[3] Cooper suggested in his suppression motion that the circuit court should view his statement to Lentz as a vocal spasm. He asserted: "[t]he reports indicate that, in an unsolicited fashion, Mr. Cooper blurted, 'you can check it out.' This is not the unequivocal and specific consent required." At the close of the suppression hearing, Cooper argued that the police offered too many versions of his response for the court to find his consent "unequivocal," and he argued in the alternative that Cooper's testimony "may be the most credible."

[4] Cooper does not direct our attention to any point in the record, and we have found none, where he argued to the circuit court that his answer to Lentz was a suggestion that the officers should investigate the van's ownership. This court generally will not comb the record to find support for a litigant's contentions. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463.

State, 45 Wis. 2d 606, 614, 173 N.W.2d 634 (1970) (jury decides whether evidence shows an unequivocal act).

¶14 Here, the circuit court properly considered the circumstances and context of Cooper's statement when deciding whether Cooper consented to a search of the van. The circuit court determined that Lentz posed a question to Cooper that "was not a vague question. It was very specific, '[a]re there guns or drugs in that van?'" Indeed, the circuit court expressly emphasized that "the question is very important" before finding that Cooper's answer meant: "[i]t's not my car. Go ahead and look in it." The circuit court did not find that any other meaning could reasonably be assigned to Cooper's response, given the context of the conversation.

¶15 No basis exists to disturb the circuit court's conclusions. The circuit court's finding that Cooper's response constituted actual consent to search is not contrary to the great weight and clear preponderance of the evidence. *See* ***Artic***, 327 Wis. 2d 392, ¶30. We affirm.

By the Court.—Judgment affirmed.

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