COURT OF APPEALS
DECISION
DATED AND RELEASED

August 1, 1995

No. 94-2641-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PHILLIP T. LITZLER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER and JEFFREY A. KREMERS, Judges. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Phillip T. Litzler appeals from the judgment of conviction, following his guilty plea, for possession with intent to deliver marijuana, and failure to pay controlled substance tax.[1] He argues that the trial

[1] According to his notice of appeal, Litzler also appeals from the order signed by Judge Jeffrey

court erred in denying his motion to suppress evidence seized from his home and to suppress his confession. We affirm.

According to undisputed testimony at the evidentiary hearing, on February 11, 1993, police executed a search warrant for a storage locker in West Allis. They found an empty plastic cooler with "a smell of marijuana," and identification connecting the locker to Litzler. They then went to the duplex where Litzler lived. The downstairs neighbor responded to the police knock at the door and got Litzler to come downstairs and answer.

According to the police testimony at the hearing, the police then told Litzler about the search warrant they had just executed at the storage locker and asked if they could enter his residence. Litzler agreed, and he and the police entered his residence and sat down in the kitchen. West Allis Police Detective Thomas Baker then read the search warrant "verbatim" to Litzler, and told him that the warrant was for the storage locker and not for the residence. Detective Baker told Litzler that the police were investigating a complaint that he was involved in marijuana sales, and asked whether he would allow them to search his home. Litzler agreed. Before the police searched his home, Litzler also signed a consent form allowing the search. As soon as Litzler consented to the search, one of the officers advised him of his ***Miranda*** rights. Litzler acknowledged his understanding of his rights and agreed to make a statement. While the police were searching the residence, Litzler told the police where marijuana was stored in his home and garage. The police located more than seventy pounds of marijuana as well as drug-related paraphernalia in the residence.

Litzler argues that the police deceived him by leading him to believe that they had a search warrant for his home. He testified that "one of them was waiving [sic] a piece of paper in front of me and they said they had searched my locker and found a cooler and that they [sic] had marijuana smell in it and this gave them a justifiable reason to search my house." He also

(..continued)
A. Kremers that denied his sentence modification motion. That issue, however, has not been briefed or argued on appeal. We deem that issue abandoned and, therefore, we do not discuss that order. *See* ***Reiman Assocs. v. R/A Advertising, Inc.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981).

testified that "[w]hen they showed me the paper, they said they had probable cause because of the cooler they found out there in my warehouse." He said he did not recall signing a consent form at his house. A neighbor testified that she saw a police officer at Litzler's doorway holding a piece of paper and saying that "he had probable cause to come into [Litzler's] house." Litzler also argues that although the police advised him of his ***Miranda*** rights, his statement should have been suppressed because it "was obtained by exploitation of the contemporaneous illegal search."

The trial court stated that "[i]t's a matter of credibility," and found the police credible. Specifically, the trial court accepted the police testimony "that they asked for permission to enter having had a warrant to search a different location," and that based on the search "the officer tells him in some form or fashion that they believe they have probable cause to search ... his home." The trial court found that the police "were given consent by the defendant to enter the premises and to proceed at a search." The trial court further explained:

> He did give consent for the search and [sic] was a voluntary consent. Whether he was a bit confused with the warrant or not, I don't know, but I'm not satisfied it was intentionally the officer's desire to mislead him but rather they were explaining how they came to be there, and he very well may have misunderstood that, but I don't find anything in the testimony that supports that to mislead him in that regard.

The trial court also concluded that Litzler's statements "were given freely and voluntarily."

On appeal, Litzler's arguments are confusing. He contends that the trial court's "factual findings are accepted, except to the extent they are against the great weight and clear preponderance of the evidence." Then, without specifying which factual findings he accepts and which he rejects, Litzler fires a shotgun argument at undefined targets:

The facts herein, unlike when police are faced with the difficult, split-second decisions made while investigating possible crime, reflect the trial court's error in finding that the credible historical events were those related by the officers. There was an approximate one-hour time lapse between the conclusion of the search of the locker and the officers arrival at Litzler's home. The officers testified that they found nothing but the scent of marijuana in a cooler, and an address tag. Thus, any discussion of "probable cause" directed to Litzler in his home, to obtain consent to enter, based upon the evidence found at the locker, was unreasonable and deceptive.

Surely, the lack of suspicious evidence at the locker should cause officers to question the basis for the application for the warrant itself, not to take the time to formulate a plan to gain a warrantless entry into the home of a 58 year old man for whom it could be said the officers had no articulable suspicion of criminal activity. Likewise, the police failed to articulate or demonstrate the presence of exigent circumstances at Litzler's residence....

Indeed, the officers' employment of a timely warrant in their scheme to gain entry to Litzler's home (conceding that they had no probable cause to enter), becomes an especially suspect technique where their prior search revealed scant evidence of criminal behavior. The entire plan evinces an intent to confuse, intimidate and frighten the consent out of the defendant. The officers' denial that they mentioned "probable cause" at the defendant's home, apparently accepted by the trial court, is disingenuous because the warrant, which they concededly presented to the defendant, is prima facie evidence, even to lay people, of probable cause.

(Citations omitted.) Thus, Litzler concludes, "the police actions were designed to be and were coercive and deceptive" rendering his consent to search involuntary.

As we have explained, the standard of review of a challenge to the voluntariness of a consensual search first involves our consideration of the trial court's factual findings:

> Voluntariness of a consent search is a factual question that must be determined from the totality of the circumstances. Furthermore, the burden is on the state to show the consent was voluntary. Thus, the question is whether there was sufficient credible evidence presented to support the trial court's determination that the consent was voluntary.

State v. Nehls, 111 Wis.2d 594, 598, 331 N.W.2d 603, 605 (Ct. App. 1983) (citations omitted). In evaluating conflicting testimony, it is for the trial court to determine the credibility of witnesses and the weight to be given to the testimony. *See* ***id.*** at 598-599, 331 N.W.2d at 605. In reviewing the voluntariness of a defendant's consent to search, we accept the trial court's factual findings unless they are clearly erroneous. ***State v. Turner***, 136 Wis.2d 333, 343-344, 401 N.W.2d 827, 832 (1987). We independently review whether the facts satisfy the constitutional standard. ***Id.*** at 344, 401 N.W.2d at 833.

Litzler has failed to point to anything to persuade us that the trial court erred in accepting the police version of the events leading to his consent to search. Indeed, much of Litzler's testimony corroborates the police account of their communications, both at the door and inside his residence. As the trial court noted, it is possible that Litzler "may have misunderstood" whether the search warrant was for the storage locker or his residence. Nothing in the record, however, suggests anything clearly erroneous in the trial court's finding that the police specifically drew that distinction in explaining to Litzler exactly why they were at his residence and why they wanted permission to search. Thus, the evidence supports the trial court's conclusion that Litzler's consent to search was voluntary.

Litzler's challenge to the admissibility of his confession is premised on his theory that the search was illegal. He offers no separate argument that his confession was unknowing or involuntary. Therefore, having rejected his challenge to the search, we also reject his challenge to the trial court's determination that the police lawfully obtained his statement.

By the Court. – Judgment and order affirmed.

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