

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 29, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1038-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BENJAMIN L. STEWART,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

SULLIVAN, J. Benjamin L. Stewart appeals from a judgment of conviction, upon a guilty plea, for one count of possession of a controlled substance—marijuana, and one count of possession of a controlled substance—cocaine. Stewart pleaded guilty after the trial court denied his motion to suppress evidence that the police obtained in a warrantless search of his apartment and padlocked bedroom. Stewart presents essentially one issue for our consideration—whether the State met its burden in showing that he consented to the search of his apartment and locked bedroom. The trial court concluded that Stewart did consent to both searches and, thus, the court declared that the evidence, including marijuana and cocaine, was admissible.

After reviewing the record and applicable law, this court affirms the judgment of conviction.¹

The following evidence was presented at the suppression hearing. On February 17, 1994, at approximately 12:10 a.m., City of Milwaukee Police Officers Christopher Bruns and Ronald Fohr were dispatched to an apartment building on Milwaukee's north side. The officers responded to a report of a man wielding a gun in Apartment #6 of that building. Officer Bruns and Officer Gregory Marr, who had arrived in a "backup" squad car, entered the building and were met on the stairway by two residents who told the officers that earlier in the evening an armed individual from Apartment #6 had confronted them after they asked the occupants of the apartment to turn down their stereo. Officers Bruns, Marr, and Fohr then proceeded to Apartment #6 where they knocked on the door. The evidence as to what occurred next is conflicting.

¹ This appeal is decided by one judge, pursuant to § 752.31(2), STATS.

1. *Officer Bruns testimony.*

Officer Bruns testified that the door opened and that the officers spoke with Stewart and another individual, and that the officers asked to be “let in” to the apartment. Bruns also testified that Stewart originally indicated that he was not going to let the officers into the apartment without a warrant. Eventually, however, they were allowed into the apartment. Officer Bruns could not recall who gave the officers consent to enter the apartment, but he testified that he thought “Charles Stewart was there.” Officer Bruns then testified that after explaining why the officers were at the building, he asked Stewart if he could search the apartment and that Stewart said yes. He testified that he did not find anything in the apartment, but discovered a bedroom locked with a padlock. He further testified that he asked to whom the room belonged and that Stewart said the room was his. He then asked if Stewart “could unlock the lock” so the officers could search the room. Officer Bruns testified that Stewart made no verbal response or other indication that he did not want to open the padlock, but proceeded to unlock the padlock, whereupon he and Officer Bruns entered the room. Officer Bruns testified that if Stewart would have refused to open the door, the officers could have attempted to get a search warrant, but that he did not believe they had enough evidence to obtain a search warrant.

While searching the room, Bruns found two guns under the bed in the room and then arrested Stewart. The officer then searched the room and, when he lifted the mattress off the bed to recover the guns, he saw a yellow glove with a plastic bag containing what he believed to be marijuana and cocaine.

2. *Officer Fohr's testimony.*

Officer Fohr testified that when they knocked on the door to Apartment #6 someone opened the door, and that after the police asked if they could enter, someone let them into the apartment. He could not recall anyone in the apartment either mentioning the need for a search warrant, or refusing to let them enter the apartment. Further, he could not recall which officer asked to be let into the apartment or which person in the apartment allowed the officers to enter. Nor could he recall if any of the officers asked the apartment's

occupants whether the police could search the apartment. He testified that the police searched the apartment and did not find anything. He also testified that while he was guarding two of the apartment's occupants he saw Officer Bruns and Stewart standing in front of the padlocked bedroom door and that Officer Bruns asked if he could look in the room. Stewart unlocked the door, although Officer Fohr testified that he could not recall if Stewart made any verbal response to Officer Bruns before he opened the padlock.

3. *Officer Marr's testimony.*

Officer Marr testified that after either Officer Bruns or Officer Fohr knocked, someone opened the door—although he could not remember who it was. He testified that one of the officers spoke to someone inside and that the door opened even though the occupants were “hesitant” to open the door, and the police walked into the apartment “under no objection.” He testified that although he could not remember which officer asked if they could search the apartment, or which of the apartment's occupants responded, the officers eventually began the search and uncovered nothing. He testified that he then saw Officer Bruns standing outside the padlocked door with Officer Fohr and Stewart. Officer Marr further testified that he heard Officer Bruns ask Stewart, who lived in the locked bedroom; that Stewart said the room was his, and that Officer Bruns asked if he could search the room. Although he could not recall if Stewart told the officers that they could not enter the bedroom without a warrant, he testified that Stewart produced a key and that he then “voluntarily” unlocked the door.

4. *Stewart's testimony.*

Finally, Stewart testified that he was in the apartment bathroom when he heard the knock on the door, that his brother asked who was outside, and that the police announced their presence. Stewart said he cracked the door open, that the police explained that they were looking for a gun and asked if they could enter the apartment. Stewart testified that he and his brother asked the police five times if they had a search warrant, and that one officer said, “We don't need a search warrant.” Stewart testified that he asked, “Why?” and the officer responded, “We don't have to have a search warrant on cases like this.” He then testified that he said “I am not going to let you in.” Then one officer

pushed him and his brother out of the doorway and entered. He testified that the officers began searching the apartment. He testified that while he was in the living room the officers found the locked bedroom and asked whose room it was, Stewart said it was his and that he had "no choice" but to open it. He testified that when he told the officers that they needed a search warrant, they responded that they did not need one, and that he felt he was "forced" to open the door by the way the officers were speaking. He testified that after the door was opened, the officers looked under the bed and that he told the officers that a man who was moving upstairs had asked him to store several guns for him in the bedroom. He was arrested and the officers then found the controlled substances.

The trial court denied Stewart's suppression motion, concluding that Stewart consented to the search of the apartment and the locked room. In reaching this conclusion, the court found that Stewart's "opening of the door indicated consent to come in;" that the officers' version of the events were more believable than Stewart's; i.e., that he was not pushed out of the way by the officers; that there was "no showing" that Stewart was coerced into opening the padlocked door, but that it was voluntary because "he provided the key to open the padlock." Further, the trial court found that, based upon the "totality of the circumstances," the police entry was "with permission" and the search was voluntary. After the trial court denied the suppression motion, Stewart pleaded guilty and now appeals his judgment of conviction.

Generally, evidence seized by the police in a warrantless search is inadmissible "absent a well-delineated, judicially-recognized exception." *State v. Johnson*, 177 Wis.2d 224, 231, 501 N.W.2d 876, 879 (Ct. App. 1993). Consent to a warrantless search is a recognized exception. *Id.* at 233, 501 N.W.2d at 879. "When asserting the consent exception, the State bears the burden of proving by clear and positive evidence the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied." *Id.* (citation omitted). Further, the "test for voluntariness of consent ... is whether under the totality of the circumstances it was coerced." *Id.* (citation omitted).

When this court reviews a trial court's denial of a suppression motion, we will not disturb the trial court's findings of "historical" fact unless they are clearly erroneous; however, this court's application of such facts to the

constitutional requirement of consent is a question of law which we review *de novo*. *Id.* at 230-31, 233, 501 N.W.2d at 232-33. Further, in determining the voluntariness of the consent, we can look at whether the consenter assisted the police in the search. *State v. Nehls*, 111 Wis.2d 594, 599, 331 N.W.2d 603, 605-06 (Ct. App. 1983) (wife led police to hidden marijuana located in basement).

Although the trial court made few specific factual findings, it did find that the officers' testimonies were more credible than Stewart's version of the events. *See State v. Poellinger*, 153 Wis.2d 493, 506, 451 N.W.2d 752, 756 (1990) (credibility determinations are left to the fact finder). This court can locate nothing in the record that makes these findings clearly erroneous. Accordingly, this court independently reviews the officers' versions of the events to determine if the consent exception properly applies in this case. Based upon the officers' testimonies, both the entry to the apartment and the entry to the locked bedroom were consensual and voluntary. The officers independently testified that the occupants of the apartment allowed the officers into the apartment, and that they were given permission to search the apartment. Further, although the bedroom was originally locked, the officers testified that Stewart produced a key, opened the lock, and allowed the officers to search his bedroom. *Cf. Nehls*, 111 Wis.2d at 599, 331 N.W.2d at 605-06 (assistance is evidence of consent).

Based upon the trial court's factual findings, we conclude the State met its burden in showing that Stewart consented to both searches. The trial court properly denied the suppression motion.

By the Court. – Judgment affirmed.

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