COURT OF APPEALS
DECISION
DATED AND RELEASED

May 21, 1996

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. 95-2000-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RUDOLFO BRISENO,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed*.

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

PER CURIAM. Rudolfo Briseno appeals from a judgment of conviction, upon a guilty plea, for failure to pay a controlled substance tax and possession of a controlled substance (marijuana). He challenges the trial court's denial of his motion to suppress evidence. His argument is two-fold: first, he challenges the trial court's factual finding that he "voluntarily" consented to the officers' search of his apartment; and second, he argues that the State failed to

prove he "voluntarily" consented to the search in question. We reject his arguments and affirm.

I. BACKGROUND.

The following facts were presented at the suppression hearing. On January 24, 1995, three law enforcement officers, Wisconsin Department of Justice Special Agents Cathy Willeford and Gary Smith, and Wisconsin State Patrol Officer Brian Turner, went to Briseno's apartment to investigate a report that his vehicle may have been involved in drug trafficking.

According to Special Agent Smith, upon the officers' arrival at the apartment, Briseno agreed to talk with them. Special Agent Smith testified that when the drug trafficking allegation was mentioned, Briseno "seemed somewhat ... nervous." Nevertheless, the police continued their conversation with Briseno—according to Special Agent Smith, first, by telling him that they believed there were drugs in the apartment; and second, asking for his consent to search the apartment. Special Agent Smith testified that Briseno declined to consent, stating: "You have to respect my privacy. There is nothing here."

Special Agent Smith also testified that he then told Briseno that he believed there were drugs in the apartment, and asked him if he wanted the officers to leave. According to Smith, Briseno told the officers that they did not have to leave and he was willing to talk to them. Special Agent Smith stated that he asked Briseno twice more if they could search the apartment, and again Briseno declined. Special Agent Smith stated that he then told Briseno that he would exercise other options, at which point Briseno took the officers to the kitchen and surrendered two to three ounces of marijuana. The officers did not place Briseno under arrest, but asked him to provide the police with information on Briseno's drug suppliers. Special Agent Smith testified that he never threatened Briseno, nor did he tell Briseno that if Briseno did not consent to the search, the officers would get a search warrant.

Briseno testified that he told the officers several times to get a search warrant. He also testified that the officers told him that he if he did not consent to the search, they would get a search warrant and that they would

handcuff him and his wife while they procured the warrant. Briseno's wife's testimony was for the most part consistent with her husband's.

Briseno was later charged with the two counts and originally entered pleas of not guilty to both charges. He also filed a pretrial motion to suppress the marijuana seized during the search. The trial court denied Briseno's motion, finding that the officers' account of the encounter with Briseno was more credible and that Briseno's consent to the search was voluntary. Briseno then pleaded guilty.

II. ANALYSIS.

Briseno first challenges the trial court's factual finding that he was not coerced into surrendering the marijuana. Briseno contends that the trial court's finding regarding this fact was "clearly erroneous." Briseno maintains the police threatened to exercise "other options" and to handcuff both Briseno and his wife if they needed to procure a warrant before searching the apartment. Briseno contends that he felt he had little choice but to show the police the marijuana which he had in his kitchen cupboard.

When presented with conflicting testimony, findings of fact are required to assess the credibility of the witnesses to determine which version of the event is more credible. Thus, the trial court's credibility determination must be upheld by the court unless such a determination goes against the great weight and clear preponderance of the evidence; in other words, is "clearly erroneous." Section 805.17(2), STATS.; *see* ***State v. Johnson***, 177 Wis.2d 224, 230-31, 501 N.W.2d 876, 878 (Ct. App. 1993). Further, we are prohibited from substituting our judgment for the trier of fact unless the fact finder relied on evidence which was inherently or patently incredible, the kind of evidence which conflicts with nature or fully established or conceded facts. *See* ***State v. Daniels***, 117 Wis.2d 9, 17, 343 N.W.2d 411, 415-16 (Ct. App. 1983).

With this standard in mind, we reject Briseno's argument. The trial court was presented with two different versions of the encounter and was thus required to reach its findings based on the credibility of the witnesses' testimony. The trial court found that the officers' testimony was more credible.

Briseno provides this court with nothing that undermines the trial court's credibility determination. Hence, we will not conclude that the trial court's factual findings were clearly erroneous.

Briseno further argues even if we accept the trial court's factual findings, such findings fail to show that he voluntarily consented to the search. We reject this argument as well.

Our review of the trial court's application of its historical facts to a constitutional standard is *de novo*. *See* ***State v. Clappes,*** 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987). The test for voluntariness is whether consent to search was given in the absence of actual coercive, improper police practices designed to overcome the resistance of a defendant. *See* ***State v. Xiong***, 178 Wis.2d 525, 531-32, 504 N.W.2d 428, 430 (Ct. App. 1993). We make this determination after looking at the "totality of the circumstances." *See* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 226 (1973).

We agree with the trial court that the facts as found do not establish coercion. Special Agent Smith did not improperly coerce Briseno by informing him that if he did not consent to the search the officers would exercise other options. This is not coercion under the totality of the circumstances. Consequently, the trial court did not err in determining that Briseno voluntarily consented to the search of his apartment.

By the Court.—Judgment affirmed.

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