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DISTRICT III

February 8, 2022

To:

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Circuit Court Judge
Electronic Notice

Kristi Severson
Clerk of Circuit Court
St. Croix County
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1648-CR State of Wisconsin v. Michael Aloysius Huston
(L. C. No. 2018CF586)

Before Stark, P.J., Hruz and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Michael Huston appeals a judgment convicting him of eight counts of possession of child pornography. He claims the circuit court wrongly denied his suppression motion. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).[1] We reject Huston's arguments and summarily affirm.

According to the complaint, Kasondra Moll, a Department of Corrections (DOC) probation and parole agent, searched Huston's cell phone for child pornography based on a tip

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

that was relayed to her by the Baldwin Police Department.[2] After finding child pornography on Huston's phone, Moll contacted the police, who obtained warrants to search Huston's cell phone and his residence. A forensic analysis subsequently revealed a number of images containing child pornography on Huston's cell phone and one image on a tablet that was in his home.

After he was charged with the instant offenses, Huston, acting pro se, moved to suppress the evidence against him on the grounds that Moll's search of his cell phone was unlawful. Following a hearing, the circuit court denied the motion, and the matter proceeded to trial. The jury found Huston guilty of all eight counts of possession of child pornography.

On appeal, Huston challenges the circuit court's denial of his suppression motion. "Whether evidence should be suppressed is a question of constitutional fact." ***State v. Wright***, 2019 WI 45, ¶22, 386 Wis. 2d 495, 926 N.W.2d 157. When presented with a question of constitutional fact, we engage in a two-part inquiry: "First, we review the circuit court's findings of historical fact under the clearly erroneous standard. Second, we independently apply constitutional principles to these historical facts." *See* ***id.*** (citation omitted).

The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protect the right to be free from unreasonable searches. ***State v. Dearborn***, 2010 WI 84, ¶14, 327 Wis. 2d 252, 786 N.W.2d 97. A violation of the Fourth Amendment because of an unlawful search or seizure can result in the suppression of evidence pursuant to the exclusionary rule. ***Id.***, ¶15. A warrantless search is per se unreasonable unless it

[2] At the time he committed the underlying offenses, Huston was serving the extended supervision portion of his sentence for a conviction for first-degree sexual assault of a child.

falls within a clearly delineated exception to the warrant requirement. ***State v. Artic***, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430. Here, the State relies on the consent exception. *See* ***id.*** ("One well-established exception to the warrant requirement is a search conducted pursuant to consent.").

An agent's authority to conduct a search of an offender on supervision is outlined by WIS. ADMIN. CODE § DOC 328.22 (Oct. 2019). That code provision provides, in relevant part, that a search of an offender's property "may be made at any time, but only in accordance with this section." Sec. DOC 328.22(1). Specifically, there are three justifications for an agent to search an offender's property: (a) when "reasonable grounds" exist to believe the offender possesses contraband or evidence of a rule violation; (b) "[w]ith the consent of the offender, when a search or seizure is necessary to verify compliance with the rules"; and (c) "[w]hen ordered by the court."[3] Sec. DOC 328.22(2)(a)-(c). When the search involves the offender's property, the agent is required to obtain supervisory pre-approval. Sec. DOC 328.22(7)(a). A violation of federal or state statute is a rule violation. *See* WIS. ADMIN. CODE § DOC 328.04(3)(a) (Oct. 2019).

At the suppression hearing, Moll testified that the Baldwin Police Department informed her that it had received an anonymous tip that Huston had child pornography on his cell phone. Moll stated that she and Huston's newly assigned probation and parole agent, Brooklyn Berg, subsequently met with Huston when he arrived at the office to obtain a travel permit. Prior to the

[3] Huston acknowledges that a warrantless search conducted pursuant to valid state regulations that satisfy the Fourth Amendment's reasonableness requirement will be upheld, citing ***State v. Martinez***, 198 Wis. 2d 222, 230, 542 N.W.2d 215 (Ct. App. 1995). He does not argue that WIS. ADMIN. CODE § DOC 328.22 (Oct. 2019), which includes consent as an exception to the warrant requirement, falls short of satisfying the Fourth Amendment's reasonableness requirement.

meeting, Moll obtained permission from both her DOC supervisor and the regional chief to search Huston's phone.

Moll explained to Huston that she had received information that he had child pornography on his phone. She asked to examine his phone, and when Huston responded that he did not have it with him, Moll asked him to retrieve it from his residence. Huston left, and when he returned to the office, he handed Moll his phone. Moll testified as follows:

> [PROSECUTOR]: Did Mr. Huston give you permission to look at his phone?
>
> [AGENT MOLL]: He did.

During her search, Moll found no photos with child pornography stored on Huston's phone. However, when she opened the Google application on Huston's phone and selected one of the websites that showed up in his history of searches, Moll observed child pornography. She then contacted the police, who arrived approximately fifteen minutes later. Based on the information provided by Moll, the police obtained two search warrants that led to the charges against Huston.

In his argument to the circuit court, Huston argued that Moll broke the law by "bring[ing] up a web page." He claimed "she tampered with evidence" and "went far beyond the scope of a normal search." As relevant here, the State argued: "Regarding [the] search, there was a review under the probation rules of [Huston's] phone, for which they found during that review, they found information which was the basis of a search warrant."

After listening to the testimony, the circuit court denied the suppression motion. Specifically, the court explained that it was "satisfied, pursuant to DOC rules, that Ms. Moll did have the authority to search the phone[.]"

Huston continues to argue that the search warrants were not supported by probable cause because they were based on Moll's improper search of his cell phone. Huston contends that the sole issue on appeal is whether Moll had "reasonable grounds" to search his phone. To resolve this appeal, however, we need not address whether reasonable grounds existed because the record establishes that Huston consented to the search of his cell phone.[4] *See* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds* (circuit court may be affirmed on any ground sufficient to support the result it reached).

Agent Moll expressly testified that she searched Huston's phone after Huston gave his consent. Her search was authorized by § DOC 328.22(2)(b), and the search warrants that followed were supported by probable cause.[5]

[4] Insofar as Huston criticizes the State for making a new argument on appeal based on consent, he overlooks the distinction between an appellant's duty to raise all objections at the circuit court level and the respondent's freedom to raise new arguments for the first time on appeal. *See* ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds*.

[5] The fact that Agent Moll did not mention at trial that her search was based on Huston's consent does not somehow negate that consent, as Huston appears to suggest. The legality of the search was not an issue for the jury to decide as that issue was decided by the circuit court when it denied Huston's motion to suppress.

Further, in light of our determination that Huston consented to Moll's search, we do not reach the question of whether the good faith exception to the exclusionary rule would apply. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (we need not address all issues raised by the parties if one is dispositive).

In arriving at this conclusion, we reject Huston's alternative argument that any permission he may have given was illusory. In his reply brief, he asserts that he "did not freely consent when his agent led him to believe he had no choice under his rules of supervision." For the first time on appeal, Huston contends that he merely acquiesced to the search. *See* ***State v. Reed***, 2018 WI 109, ¶8, 384 Wis. 2d 469, 920 N.W.2d 56 ("Consent is not freely and voluntarily given if it is the result of mere 'acquiescence to a claim of lawful authority.'" (Citation omitted.)).

The only support in the record to which Huston directs us on the issue of acquiescence are Moll's references to her authority under the DOC rules of supervision. Those references, without more, do not establish Huston's mere acquiescence. Appellate courts decide appeals based on the law and the facts that are revealed by the appellate record, and we are bound by the record as it comes to us. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). Here, the record shows that Huston consented to the search of his cell phone.

Upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals