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DISTRICT IV

April 5, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP211-CR State of Wisconsin v. Walter Brown, Jr. (L.C. # 2007CF1828)

Before Higginbotham, Sherman and Kloppenburg, JJ.

Walter Brown, Jr. appeals from a judgment of conviction for possession of marijuana and from an order denying his postconviction motion for sentence modification.[1] He challenges the denial of his motion to suppress the marijuana discovered during a warrantless search of the

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[1] Brown does not raise any issues on appeal regarding the denial of his postconviction motion.

basement of his apartment building. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[2] We affirm the judgment and the order.

Police received a tip that Brown was selling marijuana out of his residence and keeping drugs in the basement of the residence. Brown resided in a four-unit apartment building. An officer was admitted into the apartment building by another tenant of the building. After the officer indicated to the tenant that he was at the building with regard to possible illegal activity, the tenant told the officer he could go into the basement and that the basement door was unlocked. The tenant showed the officer where the light switch was located and went down to the basement with the officer. In the rafters in the common area of the basement, officers discovered marijuana. Brown's motions to suppress evidence of the marijuana found in the basement, on the ground that the warrantless search was without consent, were denied.[3]

Brown first argues that he had a reasonable expectation of privacy in the basement of the apartment building protected by the Fourth Amendment prohibition of an unreasonable warrantless search. *See* ***State v. Trecroci***, 2001 WI App 126, ¶26, 246 Wis. 2d 261, 630 N.W.2d 555 (to assess standing to mount a constitutional challenge to a search, the critical inquiry is whether the person has a legitimate expectation of privacy). We will assume, without deciding, that Brown had a reasonable expectation of privacy in the basement area of the apartment. However, as Brown concedes, the basement was a common area for all tenants. This case is

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[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[3] Judge Patrick Fiedler denied a motion to suppress on July 16, 2008. Nearly two years later, Brown, acting pro se, filed additional motions to suppress which Judge Sarah O'Brien denied.

about whether the officer was given consent to search the basement by one of the tenants and we turn directly to that issue. *See* ***U.S. v. Matlock***, 415 U.S. 164, 170 (1974) ("the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared"); ***State v. St. Germaine***, 2007 WI App 214, ¶15, 305 Wis. 2d 511, 740 N.W.2d 148 (one exception to the rule that a warrantless search is per se unreasonable is valid third-party consent from one who has common authority over the premises); ***State v. Kelley***, 2005 WI App 199, ¶8, 285 Wis. 2d 756, 704 N.W.2d 377 (a search conducted pursuant to valid consent is constitutionally permissible).

"The State bears the burden of proving by a preponderance of the evidence that the search and seizure falls within the third-party consent exception." ***St. Germaine***, 305 Wis. 2d 511, ¶16. Consent must be given knowledgeably and voluntarily. ***State v. Kiekhefer***, 212 Wis. 2d 460, 475, 569 N.W.2d 316 (Ct. App. 1997). Brown contends that the tenant's consent was not voluntary because the officer never asked for consent to search for drugs or to do anything more than a "property check." Brown also argues that the scope of the search exceeded the consent given by the tenant for a property check.

As a preliminary matter, Brown states that when consent is not requested, it cannot be knowingly and voluntarily given and he cites to ***Kiekhefer***, 212 Wis. 2d at 475 ("That which is not asked for cannot be knowingly or voluntarily given."). However, at the suppression hearing Brown conceded that there was in fact consent to enter the basement. Brown cannot argue for the first time on appeal that the officer's failure to use the word "search" or obtain the tenant's written consent was a failure to request consent. Simply, this is not a case like ***Kiekhefer*** where officers were admitted into the house by Kiekhefer's mother simply to speak with Kiekhefer and officers never asked for permission to search the home or Kiekhefer's room. ***Id.*** at 465-66, 475.

We now turn to whether the tenant's consent to the officer's search of the basement was voluntary. To determine voluntariness we look to the totality of the circumstances for consent given in the absence of duress or coercion, either express or implied. ***Kelley***, 285 Wis. 2d 756, ¶10. The standard for measuring the scope of consent given is that of objective reasonableness—what would the typical person understand from the exchange between the officer and the person giving consent. ***Id.***, ¶13. Both these inquiries are answered here by the officer's indication to the tenant that he was investigating illegal activities at the apartment building. The phrase "investigating illegal activities," although not specific as to drugs, was not deceptive as to the officer's purpose for going into the basement. It was also broad enough that a reasonable person would not believe consent was given only for a glancing look around the basement. The tenant's subjective belief that the officer was only going to check for a security breach in the basement is not controlling. Additionally, having left the officer in the basement because he had to go to work, the tenant did not place any limitation on the scope of his consent.

There was no coercion involved in obtaining the tenant's consent and consent to the search was voluntary. The search did not exceed the scope of consent. The motion to suppress was properly denied.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and the order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals