STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2010AP3034

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH M. SOBCZAK,

Defendant-Appellant.

ON APPEAL TO REVIEW THE ORDER DENYING
DEFENDANT-APPELLANT'S MOTION TO SUPPRESS,
THE HONORABLE PATRICK J. FARAGHER, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ISSUES PRESENTED

Whether a warrantless search of a home is reasonable when consent to search is given by a girlfriend of the son of the owners, who is staying there with permission, but who does not reside at the home or have connections to the property?

Answered by the Trial Court: Yes

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Publication is not requested.

STANDARD OF REVIEW

The question of whether a search or seizure is reasonable under the Fourth Amendment is a question of constitutional fact. Appellate courts decide constitutional questions independently, benefitting from the analysis of the circuit court. *State v. Kieffer*, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998), *see State v. Van Camp*, 213 Wis. 2d 131, 140, 569 N.W.2d 577, 582 (1997).

STATEMENT OF THE CASE

On September 5, 2009, Officer Nathaniel Dorn of the Hartford Police Department was dispatched to 1558 Chestnut Court in Hartford, Wisconsin. (R.1 p.2.) Dorn was responding to a phone call that dispatch received from a female that identified herself as Kristina Podella. (R.3 p.7.) Kristina told dispatch that she was the girlfriend of the son who lived at 1558 Chestnut Court in Hartford and that she was at the residence using the son's computer when she came across pictures that she wanted to talk to an officer about. (R. 3 p.7.) Dorn went to the address and observed it to be a single-family residence. (R.8 p.8).

When Dorn arrived, Kristina met him at the front porch. (R.3 p.20). Kristina told Dorn that she was the girlfriend of Kenneth M. Sobczak, that the two met online and that they had been together for roughly three months. (R.3 p.8.)

Dorn obtained Kristin's date of birth, and observed her to be approximately 19-20 years old and of normal intelligence. (R.8 pp.8-9.) Dorn became aware during the conversation that Kristina did not reside at the premises. (R.3 p.21.) Through their conversation, Dorn learned that Kristina resided somewhere in South Milwaukee, and was at the premises because her boyfriend had asked her to come spend the weekend at his house. (R.8 p.10.) Kristina told Dorn that the home belonged to her boyfriend's parents. (R.3 p.21.) Dorn verified with Kristina that the home did not belong to the defendant himself, but rather to his parents. (R.8 p.11.) Kristina told the officer that the owners of the home were gone for the weekend on vacation. (R.3 p.9.) Kristina said that Sobzcak was at work, but that prior to leaving, she asked if she could use his laptop. (R.3 p.9.) Dorn recalled that Kristina said Sobczak left for work a few hours prior to her call to the police. (R.8 p.13.) Dorn said Kristina told him she had been at the residence since Friday, and they were having this conversation on Saturday afternoon. (R.8 p.23.)

Kristina told the officer that Sobzcak gave her permission to use his laptop "because she was bored and wanted something to do." (R.3 p.9.) Upon cross-examination at the suppression hearing, Dorn was asked whether Kristina told him she had to ask permission from Sobzcak prior to using his computer. Dorn responded, "I don't know if she had to; but she did ask permission to use his computer." (R.8 p.23.) While using the laptop, Kristina said that she came across images that she deemed disturbing and that she thought some of them featured individuals who were under 18 years old engaged in elicit behavior. (R.3 pp.9-10.)

Dorn estimated that his conversation on the porch with Kristina lasted 10 minutes. (R.8 p.26.)

Kristina did not bring the laptop with her to the porch; rather, it remained inside the residence. (R.3 p.21.) Dorn told Kristina that he would need to see the video, and that she could either bring the computer to the porch or that they could go inside and look at the video. (R.8 p.14.) Kristina stated they could go inside to look at the video. (R.8 p.14.) Dorn entered the home with Kristina's permission through the front door. (R.3 p.21.) Dorn did not attempt to contact the owners of the home prior to entering. (R.3 p.21.) Dorn did not attempt to contact Sobzcak prior to entering. (R.3 p.21).

Once inside, the Dorn asked Kristina to show him the image she was talking about. (R.3 p.10.) At the suppression hearing, Dorn stated that he told Kristina he was going to have to view the video. (R.3 p.15.) When asked whether he asked Kristina if he could view the video, Dorn replied, "Correct. I said I'm going to have to look at it." (R.8 p.15.) When the question was posed to Dorn whether he asked Kristina if she would show him the video, Dorn replied, "Yeah. I asked if she would be able to find it for me." (R.8 p.15.) Dorn stated that Kristina had some difficulty locating the file, (R.3 p.22), but she eventually brought up the image on the computer. (R.3 p. 10.) Dorn looked over her shoulder as she showed him the images to which she referred. (R.3 pp.10-11.) Upon seeing images that he believed to constitute child pornography, Dorn contacted the Chief at Hartford Police Department. (R. 3 p.25.) At that time, Dorn took possession of the laptop

and exited the residence with the laptop. (R.3 p.26.) Dorn took the laptop back to the Hartford Police Department. (R.3 p.26.)

Dorn did not have a search warrant when he entered the residence, nor did he testify that he made any effort to a secure a warrant prior to entry. (R.3, p. 26.) Sometime after Dorn observed the images on the computer and removed the computer from the residence, the Hartford Police Department executed a search warrant at the residence. (R.3 p.10.) When Dorn was asked what authority he believed that Kristina had to allow him to enter the Sobczak home, Dorn answered that "[s]he was there legally. She was invited there. She had access to the home. She wasn't restricted to any parts of the home. I believed that she was able to use the home." (R.8 p.24.) Dorn was also asked whether Kristina had items at the residence and he stated that she had a bag and a suitcase. Dorn did not believe that Kristina helped to pay the mortgage or utility bills, nor did he believe that she had her own room at the residence. (R.8 p.25.) Dorn did not recall whether he asked Kristina if she had a key to the residence. (R.8 p.27.) Dorn could not recall whether he asked Kristina if she had ever been at the residence before. (R.8 p.23.)

The state did not produce any other witnesses to discuss Kristina's relationship to the premises. With the exception of testimony about her gaining permission to use the computer, no other evidence addressed Kristina's mutual use or joint control of the premises or any of its effects.

At a suppression hearing before the Honorable Patrick J. Faragher on December 11, 2009, the state argued that as to the computer, Sobczak assumed the

risk that others would look at the computer because he lost his subjective expectation of privacy when he allowed another person access to the computer. (R.8 p.30.) The state argued further that whether the computer was inside or outside the residence was a non-issue. The state argued that Kristina gave valid consent to look at the computer, and because she had been permitted to use the computer by the defendant, she had the authority to consent to a search. As to seizing the computer, the state argued that upon seeing what he believed was child pornography, the officer was authorized to seize the item. (R.8 pp.30-31.)

The defendant, by his attorney, argued that Kristina had neither actual nor apparent authority to allow the officer into the home. (R.8 pp.33-34.) Because there was no valid third-party consent, the officer was not acting on an exception to the warrant requirement when he entered the home and the search violated the defendant's constitutional rights. Therefore, the defense argued, any evidence obtained from the search needs to be excluded. Further, as it relates to the computer, the defense argued that Kristina lacked authority to let anyone look through the computer's contents, merely because she was given permission to use it. (R.8 p.32.)

The court found that Kristina was authorized to stay in the home and was also authorized to use the computer. The court noted that the issue did not hinge on whether the consenting party had property rights or title ownership. Rather, it stated, "[i]t's about who has a right to be there then." (R.8 p.39.) The court concluded that the only relevant facts were "that this witness was there for the

weekend; so she had right to possess and use that property appropriately with grant of authority. Clearly, that meant to use the bathroom, main living, bedroom." (R.8 p. 39.) Further, the court concluded that the laptop was in the common area. The court found that the defendant granted use of the laptop to a person who knew how to use a laptop. Once Kristina found what she thought was illegal material, she had the right to leave the home and report the matter to police, and she also had the authority to return to the home according to the court.

The court held that Kristina had authority to report the material she found, and that she had the authority to give consent to enter the common area where she could enter to look at that computer. (R.8, p.42.) Once the officer saw the material and was satisfied that it contained evidence, the court ruled that it was within his authority to secure the computer based on the exigent circumstances that computers are subject to theft, destruction and physical damage. (R.8, p.43.) The court stated that a person "does not have expectation of privacy in something which they have granted permission" (R.8 p.44.) The court held that because the defendant gave Kristina permission to use the computer, he lost his expectation of privacy to what was in the computer. (R.8 pp.45-46.) The court held that her authority to consent did not change after she discovered what she believed to be illegal material. After making these conclusions, the circuit court denied the defendant's motion to suppress the evidence.

ARGUMENT

I. THE EVIDENCE GLEANED FROM THE DEFENDANT'S COMPUTER SHOULD BE SUPPRESSED BECAUSE THE CONSENT GIVEN TO SEARCH THE HOME WAS WITHOUT ACTUAL OR APPARENT AUTHORITY

This case raises constitutional issues related to evidence obtained from a computer in the defendant's home after an officer entered the home and seized the evidence. A search has been described as "an examination of one's premises or person that…implies exploratory investigation or quest." *State v. McGovern*, 77 Wis. 2d 203, 213, 252 N.W.2d 365 (1977) (quoting *Molina v. State*, 53 Wis. 2d 662, 668, 193 N.W.2d 874 (1971)). "The proper way to search a dwelling place is to obtain a search warrant. A home is entitled to special dignity and special sanctity." *Holt v. State*, 17 Wis. 2d 468, 477, 117 N.W.2d 626 (1962).

In this case, it is not disputed that the officer entered the dwelling of the defendant without a warrant. While inside, Officer Dorn located the defendant's computer and looked through the computer's files to locate illegal images saved to the device. As soon as the officer crossed the threshold to the home, the defendant's constitutional rights were implicated. The officer's entry to the defendant's home constituted a search and the issue here is whether the officer relied on a valid exception to the warrant requirement when he gained access to the home.

It is well established that warrantless searches are *per se* unreasonable and are subject to only a few limited exceptions. *State v. Kieffer*, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). The burden of proving that a warrantless search complies with the Fourth Amendment rests upon the state; that burden is by clear and convincing evidence. *Kieffer*, 217 Wis. 2d at 541-42. One exception to the warrant requirement is valid third-party consent. *See United States v. Matlock*, 415 U.S. 164, 171 (1974). Third-party consent can be sufficient to circumvent the warrant requirement if the third-party has either actual authority to consent to a search or apparent authority, based on the facts available to the officer conducting the search. *See Kieffer*, 217 Wis. 2d at 542, 548.

A. Because the defendant's girlfriend did not have joint access or mutual use of the premises, she lacked actual authority to consent to a search of the premises.

Sobczak's girlfriend lacked actual authority to consent to a search of Sobczak's parents' home and Sobczak's computer because she was merely a temporary houseguest with limited access and no control over the premises or the property searched.

A third-party can consent to a police search of a common area so long as the third party has mutual use or joint access of the area searched. *Matlock*, 415 U.S. at 171. In order to determine whether a party has mutual use and joint access, the court must look to the evidence produced by the state as to the consenter's

specific relationship with the property in question. *Kieffer*, 217 Wis. 2d at 542. A third-party's potential property rights over premises are neither a necessary or controlling component of whether that person has actual authority to consent to a search. *Matlock*, 415 U.S. at 171. To decide whether an individual has the actual authority to consent to a search, courts have considered factors like whether the individual could come and go as she pleased, whether she had a key and the same rights of usage as others with actual authority, whether she would knock before entering, and whether she would refer to the premises as her own.

The ability of a third-party to consent to a search of a common area was thoroughly addressed in *United States v. Matlock*. The United States Supreme Court describes third-party consent to search:

> [T]he authority which justifies the third-party consent…rests…on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Matlock, 415 U.S. at 171, fn. 7. Thus, if the state demonstrates that a third-party shares mutual use, joint access or control for most purposes, that person has actual authority to consent to a search of a common area. *Matlock*, 451 U.S. at 171. The policy behind such consent stems from the realization that when parties share use and access of a common area, each individual party loses the reasonable expectation of privacy as to that area.

The Wisconsin Supreme Court adopted the *Matlock* Court's characterization of third-party consent searches in *Kieffer*. Particular facts relating to the consenting individual and his relationship to the premises must be carefully considered in determining whether the consenter has actual authority. *Kieffer*, 217 Wis. 2d at 546-47. In *Kieffer*, the court held that a father-in-law, who allowed his daughter and her husband to live above his garage, did not have actual authority to consent to a search of the garage loft by inquiring police officers. *Kieffer*, 217 Wis. 2d at 547. The court considered the fact that the defendant and his wife had the only keys to the loft and that they paid a portion of the utility bills. The couple considered the father-in-law their landlord and had established, at least somewhat, a separate household. *Kieffer*, 217 Wis. 2d at 546. Furthermore, the state did not show that the father-in-law had "joint access or control" over the premises that would allow him to give the police permission to search the area. *Kieffer*, 217 Wis. 2d at 546. The father-in-law could not have entered the loft at his own will, and would generally knock before entry out of respect for the couple's privacy. *Kieffer*, 217 Wis. 2d at 546. Though the father-in-law had a property interest over the space, because he lacked joint access and control, the father-in-law did not have actual authority to consent to a police search.

The mere presence of a person on the premises of another is not enough to show that person has actual authority to consent to a search. *See State v. Verhagen*, 86 Wis. 2d 262, 272 N.W.2d 105 (Ct. App. 1978). The Wisconsin Court of Appeals held as a matter of law that a wife lacked actual authority to consent to a

home search of her husband's residence when the wife had initiated divorce proceedings and had left the defendant two weeks prior to the search. *Verhagen*, 86 Wis. 2d at 266. In *Verhagen*, the wife was present at the home to retrieve some of her belongings per a temporary order granted by a family court commissioner. *Verhagen*, 86 Wis. 2d at 266. While on the premises, the wife allowed police to search multiple areas of the home and property. *Verhagen*, 86 Wis. 2d at 266. Even though the wife was present on the premises with a court's authority and even though she continued to have a property interest in the premises, the court held that the wife lacked actual authority to consent to a search. *Verhagen*, 86 Wis. 2d at 267. Recalling the language of *Matlock*, the court of appeals held that the wife no longer had equal rights to the use or occupancy of the premises. *Verhagen*, 86 Wis. 2d at 267. The court held that the wife's access—limited to retrieving belongings—was not sufficient to grant her actual authority to consent to a search. *Verhagen*, 86 Wis. 2d at 268.

Giving someone permission to be in your home does not amount to giving them permission to consent to a search on your behalf. *See State v. McGovern*, 77 Wis. 2d 203, 252 N.W.2d 365 (1977). In *State v. McGovern*, a houseguest opening the door to police and allowing them entry was not deemed to have actual authority to consent to a search because he "was not the owner, or tenant, or occupant of the house, or of any rooms therein and had no authority from any of the occupants, or tenants, or owners to consent for any of them." *McGovern*, 77 Wis. 2d at 214. After considering the consenter's relationship to the premises, the

court determined that the houseguest failed to meet the criteria for a proper third-party consent as discussed in *Matlock* because no evidence presented showed he had "mutual use of the property, that he had joint access or control for most purposes, or that the room's occupants assumed the risk one of their number might permit the common area to be searched." *McGovern*, 77 Wis. 2d at 214-15.

Kristina did not have actual authority to consent to a search, because the state produced no evidence that Kristina had mutual use or joint access of the premises. Kristina was not a part owner of the home or even tenant. No evidence presented demonstrates that Kristina had been at the home before, that she could come and go as she pleased or that there was any mutual use of the premises. No evidence demonstrated that Kristina had access to the home on her own, that she had a key, or that she kept belongings at the residence. No evidence discussed the extent to which Kristina could access the home when she was visiting. The only evidence describing Kristina's relationship to the premises suggested that she needed permission to be at the home and had no independent use or access to the property.

As evidenced in both *Verhagen* and *McGovern*, the mere lawful presence of someone at a residence does not give that person any authority to consent to a search. The facts of this case are similar to the facts in *McGovern*, in which a houseguest opened the door and allowed police officers to enter the home of another. The houseguest was at the premises by invitation and his presence was

legal. However, the guest was not a tenant, owner or occupant of the home. Therefore, the guest lacked actual authority to consent to a search.

> The trial court found [the houseguest] was not authorized to consent to entry by the police. It stated, "The testimony is likewise uncontradicted that...[the houseguest] was not the owner, or tenant, or occupant of the house, or of any rooms therein and had no authority from any of the occupants, or tenants, or owners to consent for any of them."

McGovern, 77 Wis. 2d at 214. Similarly, there is no evidence that Kristina was a tenant, owner or occupant of Sobczak's home. Rather, there was evidence to the contrary: that Kristina was a temporary weekend guest. No one disputes that she had the defendant's permission to be at the home.

Without evidence that Kristina had mutual use and joint access to the home, she does not meet the criteria of having actual authority as set forth in *Matlock*. The state failed to produce any evidence aside from the notion that Kristina was at the home with the permission of the defendant. Kristina lacked the authority to consent to a search and the warrantless search was therefore invalid.

B. <u>The responding officer lacked a reasonable basis to believe that Sobczak's girlfriend possessed apparent authority to consent to a search and therefore the search was constitutionally invalid</u>

Sobczak's girlfriend made it clear to the officer that she was a temporary guest at the home and that the computer did not belong to her. Given the facts of which he was clearly aware, the responding officer would not have been reasonable to believe that the girlfriend had authority to consent to the search.

Courts have held that even if a third party lacks actual common authority, police may reasonable rely on the third party's apparent authority to conduct a search. *See Illinois v. Rodriquez*, 497 U.S. 177, 186-87 (1990). The courts must decide whether the information available to the officer at the time of the search would justify a reasonable belief that the party consenting had the requisite authority to do so. This test is objective. *Kieffer*, 217 Wis. 2d at 548 (citing *Rodriquez*, 497 U.S. at 188-89). Police officers cannot take one's consent "at face value", *Kieffer*, 217 Wis. 2d at 549, but must consider the surrounding circumstances. According to the court in *Kieffer*, "[t]hat consideration often demands more inquiry." *Kieffer*, 217 Wis. 2d at 549.

Whether a person has apparent authority to consent is an objective question based upon the circumstances known to the officers at the time of consent. In *State v. Tomlinson*, 2002 WI 91, ¶ 26, 254 Wis. 2d 502, 648 N.W.2d 367 (2002), the Wisconsin Supreme Court considered the issue of apparent authority when police were allowed access to a home by a 15 or 16 year old female who answered the door. *Tomlinson*, 2002 WI 91 at ¶ 7. The court held that the girl had apparent authority to give the police consent because there was sufficient evidence for the officers to reasonably conclude that the girl who answered the door was one of the defendant's daughters. *Tomlinson*, 2002 WI 91 at ¶ 26. Prior to the search, police knew that Tomlinson had two teenage daughters around 15 years of age. *Tomlinson*, 2002 WI 91 at ¶ 27. When the girl opened the door, the defendant was nearby but did not object. *Tomlinson*, 2002 WI 91 at ¶ 27. There was no evidence

of anyone else in the home when the officers arrived. Given these circumstances, it was reasonable for the officers to believe that the girl allowing them access to the home was the defendant's daughter. *Tomlinson*, 2002 WI 91 at ¶ 29.

The *Tomlinson* court had to further consider whether and to what extent a minor child has the authority to consent to police entry of a parent's home. *Tomlinson*, 2002 WI 91 at ¶ 29. The *Tomlinson* court noted that children share use of the parents' property, although generally a child does not have equivalent authority as a parent to consent to a search of the premises. *Tomlinson*, at ¶¶ 30-31. Courts look at the totality of the circumstances and consider factors like the child's age, intelligence, maturity and scope of consent to determine if the search was reasonable. The court noted that there are certain areas of a home to which parents have a very clear expectation of privacy. *Tomlinson*, at ¶ 32. As for *Tomlinson*, the court held that given the child's age and apparent maturity, and taking into account the very limited scope of the officer's entry, the officers could have reasonably concluded the consent was valid. *Tomlinson*, at ¶ 32.

An officer must not take consent at face-value, rather apparent authority may require further inquiry for an officer's reliance upon it to be considered reasonable. *See Kieffer*, 217 Wis. 2d at 548-59. As discussed *supra* in part A, the court in *Kieffer* held that the father-in-law lacked actual authority to consent to a search because there was no evidence of joint access or control. The state argued that the police officers reasonably believed that the father-in-law had apparent authority to consent to the search. *Kieffer*, 217 Wis. 2d at 547. The state based its

contention on the fact that the officers knew the defendant and his wife did not pay rent, that there was no written lease, and that the father-in-law expressed an eagerness to rid his premises of drugs. *Kieffer*, 217 Wis. 2d at 547-48. However, the officers were unaware of the father-in-law's ability to gain access to and use the garage loft. The court expressed concern that the police made an insufficient inquiry into the surrounding circumstances. Specifically, the court wrote:

> In order to establish a reasonable belief in (the father-in-law)'s authority to consent, the police should have made further inquiry into the sufficiency of (the father-in-law)'s relationship to the loft premises.

Kieffer, 217 Wis. 2d at 550-51. The court gave examples of questions that the officers might have posed: whether it was the father-in-law's practice to come and go in the loft area as he pleased; whether the couple had the right to exclude others from the loft; whether the father-in-law considered himself to be the couple's landlord; whether the loft had a lock and whether the father-in-law had a key; whether the father-in-law had personal use of the space. Because it felt the officers failed to make a proper inquiry, the court held that the officers lacked a reasonable basis to believe that the father-in-law possessed apparent authority to consent to a search of the defendant's living area. *Kieffer*, 217 Wis. 2d at 550-51.

In this case, as discussed *supra* in part A, Kristina could not come and go in the home as she pleased, she could not exclude others from the home nor would she have been able to invite others into the home. Kristina did not have a key or have personal belongings at the space, except for her overnight bag. Given the facts available to Officer Dorn at the time of the search, it would not have been

reasonable for him to believe that Kristina had the authority to consent to any search of the residence. Officer Dorn and Kristina had only a 10 minute conversation, but during those 10 minutes, he was able to discern that Kristina did not live at the home and that she was only visiting over the weekend. She never once implied that she had equal mutual use or joint access to the premises. The fact that she was an invited guest at the home does not show evidence of mutual use of the premises.

Dorn testified that he thought Kristina had the authority to consent because she had the defendant's permission to be on the premises. However, as the case law demonstrates, permission to be on another's premises does not give that visitor authority to consent to a search of that premises. Dorn's mistaken belief that he could search the home because Kristina was an invited guest is based on a misunderstanding of the law of consent. A reasonable officer, in Dorn's position, should have known the proper standard to obtain entry based upon third-party consent. Dorn cannot rely on a mistake of law to excuse a constitutional violation. Dorn, therefore, lacked a reasonable basis to believe that Kristina had the requisite authority to consent to a search.

C. <u>The defendant's girlfriend lacked authority to consent to a search of the computer located within defendant's home because any apparent authority she might have had does not extend to another's computer</u>

Even if the court finds that Sobzcak's girlfriend had apparent authority to consent to police entry into the defendant's parents' home, that apparent authority does not extend to the contents on the computer.

The scope of a search based on actual or apparent third-party authority is limited by the scope of that authority rather than the scope of the consent. *See State v. Pickens*, 2010 WI App 5, ¶ 9, 323 Wis. 2d 226, 779 N.W.2d 1. To reasonably rely on a third party's consent to search, an officer must consider the scope of the consenter's authority. If one's mutual use and joint access does not extend to certain areas or effects, then the consenter's authority to consent does not extend to those areas or effects. *Pickens*, at ¶ 45.

The Wisconsin Court of Appeals held that a co-occupant in a hotel room who had apparent authority to consent to police access of the room, did not have actual or apparent authority to consent to a search of the room's locked safe. *Pickens*, at ¶ 47. The occupant did not know of the safe or have a key. The state argued that so long as the police reasonably believed the occupant had authority to consent, and so long as the police believed that her consent extended to the interior of the safe, the search was valid. *Pickens*, at ¶ 45. The court noted the distinction between the scope of the consent and the scope of the person's authority to consent. Anyone can consent to the search of anything, but whether they have the *authority* to do so is the question police must reasonably answer in the affirmative before going forward with a search. Because the state failed to show that the co-occupant had actual or apparent authority "*over the safe* in room 216, the [s]tate

cannot rely on (the co-occupant's) consent to search as a valid basis for admitting the evidence police found inside the safe." *Pickens*, at ¶ 47 (emphasis added).

Kristina did not have authority to consent to a search of the defendant's computer. It is undisputed that Kristina had the defendant's permission to use the computer. Permission to use one's computer, however, does not convey the authority to consent to a search. Recall that in *McGovern*, the court held that giving a person permission to be present on one's property does not mean that person has given the third-party authority to consent to a search. This reasoning is analogous to one who gives another permission to use his personal effects. Just because someone has the owner's permission to use his property, does not convey authority to consent to a search of that property. The only way a third-party's consent is viable would be if that third party had *equal mutual use and joint access to the property in question.* Kristina did not have mutual use or joint access of the computer. Kristina did not have any ownership in the computer. She could not take the computer and download what she wanted on it; she was not free to use it at her will, but rather had to ask permission; she was not free to remove the computer from the premises or change any settings on it; she was not a regular user of the computer. The only evidence characterizing Kristina's relationship to the computer demonstrated that she felt the need to get permission from the computer's owner before use. A person who needs permission to use something does not have joint access or mutual use to that piece of property, and therefore cannot consent to the search of that property.

CONCLUSION

The defendant, Kenneth Sobczak, requests that the decision of the Circuit Court denying his suppression motion be overturned, that his conviction be vacated and that this matter be remanded to the Circuit Court. A third-party does not have authority to waive another's constitutional protection to be free from a search unless that third-party has mutual use and joint access to the premises or property. The state did not present any evidence that Kristina had actual authority to consent to a search of the home or computer. Further, Officer Dorn would not have been reasonable to rely on what he knew of Kristina's limited relationship to the property as a basis for the search, because it was clear that Kristina lacked the requisite authority to consent to a search.

Dated: _____

HETZEL & NELSON, LLC.

_____

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

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Dated: _____

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

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