STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP2029-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAMION L. BROWN,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE CLARE L. FIORENZA, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented in this case can be resolved by applying established legal principles to the facts; therefore, the State does not request either oral argument or publication.

SUPPLEMENTAL STATEMENT OF THE FACTS

Criminal Complaint. The State charged Brown with one count of possession of heroin with intent to deliver, greater than 50 grams, and one count of delivery of heroin, 3 grams or less, in a criminal complaint and information that also included one count of delivery of heroin against co-defendant Donte Lamar Williams and one count of possession of heroin against co-defendant Phillip James Schmidt (2; 5). According to the complaint, Officer Zebdee Wilson saw Schmidt purchase heroin in a "hand-to-hand drug transaction." Two men in a silver Infiniti, later identified as Williams and Brown, pulled into a Walgreens parking lot. Brown got out and received money from Schmidt in exchange for baggies of a substance that Schmidt later told police he had purchased from Brown that was identified as heroin (2:3).

The next day, Schmidt assisted police in monitoring a phone call between Schmidt and Brown that discussed another purchase of heroin to be delivered near North 52nd Street and West Capitol Drive (2:3-4). Assisting in this investigation, Police Officer Bodo Gajevic observed the silver Infiniti parked outside 3776 North 52nd Street, which Schmidt confirmed was the same car that met him at the Walgreens parking lot the previous day, and saw two men leave the 3776 residence, get into the Infiniti and drive towards North 52nd Street and West Capitol Drive (2:4). After police stopped the Infiniti and Officer Wilson identified Brown as the same man he had seen engaged in the "hand-to-hand drug transactions at the Walgreens parking lot" the previous day, Brown and Williams were arrested (2:4).

Officer Gajevic spoke with Williams, who told him that he and Brown lived together at 3776 North 52nd Street and Williams granted consent to search that address for narcotics, including heroin, and firearms (2:4). During the search, the officers found a total of six corner-cut bags of heroin in the

kitchen drawer and in the basement in an amount "indicative of mid-level heroin trafficking" with the approximate street value of $12,408 (2:5-6).

Motion to Suppress. Brown filed a motion to suppress the evidence obtained from the search of 3776 North 52nd Street, alleging that the search was without a warrant and was "not upon a valid consent of the defendant's roommate, Donie Williams, was outside the permissible scope of any such consent, and that the consent was coerced, all in violation of the defendant's rights under the Fourth And Fourteenth Amendments of the Federal Constitution, and Article 1, Sec. 11 of the State of Wisconsin Constitution" (13:2).

At the hearing on Brown's suppression motion, Williams testified that after he and Brown were arrested, he was taken into an alley and Officer Gajevic came to talk to him (73:26-27). Williams testified that Officer Gajevic asked him his address and for permission to go in the house, and Williams told him "no" two times (73:32). Officer Gajevic then asked Williams if he was on parole and what his agent's name was, and Williams testified that at that point, it was his "assumption" that "maybe he had my agent on the phone" but he did not know for sure (73:35). When Officer Gajevic again asked for permission to search his house, Williams testified that he "thought about a number of consequences" such as "going to jail" and having his parole "revocated" and so, he "told [Officer Gajevic] he can go back in the house" (73:36).

Agent Daniel Isaacson, a field supervisor for the Wisconsin Department of Corrections, testified that he was riding along with the officers who made the traffic stop of Brown and Williams on the day they were arrested (73:104-07). Agent Isaacson saw Officer Gajevic talking to Williams and heard him tell Williams that police suspected there were drugs at his residence of 3776 North 52nd Street (73:111-13). Agent Isaacson further heard Officer Gajevic tell Williams that he

"had a couple of options, that number one, he could get consent from him to search the residence, or he would apply through the court system to get a search warrant for that residence" and Agent Isaacson then heard Williams give Officer Gajevic "consent to go to the residence to search" (73:113). Agent Isaacson testified that he did not hear anything stated about "Williams facing any type of action regarding his supervision" (73:114).

On cross-examination, Agent Isaacson testified that he observed Officer Gajevic's demeanor while he was having the conversation with Williams and it was "calm, collected and explained perfectly clear[ly] . . . the reason why he was there and what – essentially, what was going on": that Officer Gajevic "suspected that there were narcotics in the residence at 3776 North 52nd" (73:122-23). Agent Isaacson testified that Williams responded by saying "[y]ou can go ahead and – and search. You won't find anything" (73:124). Agent Isaacson did not hear Officer Gajevic threaten or see him touch Williams, he did not hear Officer Gajevic ask Williams multiple times for consent, and he did not hear Williams say "no, you can't go into that house" (73:124-25).

Officer Gajevic testified that he was conducting surveillance on 3776 North 52nd Street and saw Brown and another individual get into a silver Infiniti car and drive northeast on 52nd Street (73:144). After Brown and Williams were pulled over and arrested and their vehicle was searched, Officer Gajevic spoke to Williams in the presence of Agent Isaacson and Officer Farina (73:149-51). Officer Gajevic identified himself as a police officer and explained the nature of the investigation and what had happened with the heroin transactions over the past two days, and that Williams was under arrest "for party to the crime of dealing heroin on these two occasions" (73:154-55). Officer Gajevic further told Williams that it was Officer Gajevic's understanding that Williams had been "involved in a delivery of heroin on the

prior date in the parking lot of the Walgreen's located at 51st and Capitol and that he was also involved in the delivery of heroin on that date, the 20th, and that it was ironic that both deliveries occurred within a block from his residence on North 52nd Street" (73:154-55). Williams denied being involved in heroin dealing but he did not appear frightened or agitated: "He didn't raise his voice at all. He was very polite. He was responsive" (73:156-57). Officer Gajevic told Williams that based on the investigation, police believed that "there might be heroin contained within 3776 North 52nd Street" and Williams responded that "there wouldn't be any heroin in his apartment" (73:158).

Within the first five minutes of their conversation and still in the presence of Agent Isaacson and Officer Farina, Officer Gajevic asked Williams for consent to search his apartment and "further advised him that it would be his option to give consent, that I wanted him to do it willingly" but "in the alternative, I would attempt to apply for a search warrant based upon the information that we'd obtained so far in our investigation" (73:160-61). Officer Gajevic specifically testified that the phrase he used in the conversation – "attempt to apply" – was the phrase he "always use[d]" because "[a] search warrant is not guaranteed" and that Williams "interrupted that conversation by advising me that I could go ahead and conduct a search and that no heroin would be found there, based upon his knowledge" (73:161-62).

After Williams told Officer Gajevic to "'[g]o ahead and search it. There's not going to be any heroin,'" Officer Gajevic told Williams that "he still would be arrested and, based upon that statement, would that change his opinion at all, if I could still conduct a search of the address of 3776 North 52nd Street consensually" and Williams responded to "go ahead. He would give consent to conduct a search" (73:162-63). Officer Gajevic further testified that his explanation to Williams that if he did not give consent the police would attempt to get a search

warrant was not a "threat" or attempt "to induce him into giving me the consent," but it was an "option" and his opinion was that if he would have applied he would have been able to obtain a search warrant (73:163-64). However, in this case, he believed that Williams gave his consent to search voluntarily:

> It's probably one of the most clear-cut conversations I had with an individual relative to getting a consent search. There was no hemming and hawing. There was no, let me think about it for a while. There was no, [h]ey can I talk to somebody? You know, it was – [h]e was very willing, very cooperative to the point of almost urging us to go back to that residence. He wanted to prove a point.
>
> . . . I truly believed, you know, that Mr. Williams was being sincere in his consent to enter that residence and that that consent was done without coercion. It was freely and voluntarily and knowingly made by Mr. Williams.

(73:164).

At the conclusion of the evidentiary phase of the suppression hearing, the circuit court set a briefing schedule for supplemental briefs from the parties and a date for oral ruling and a final pretrial hearing (73:229-32).

Oral Decision Denying Motion to Suppress. In its oral decision, "with respect to the consent issue," the circuit court found that "it is undisputed that . . . Williams told Officer Gajevic that he could, in quote, go ahead, end of quote, and search the residence at 3776 North 52nd Street"; however, Williams now "asserts that although [he] consented to the search at 3776 North 52nd Street, that consent was not a free and unconstrained choice" (77:7, A-Ap. 107). The circuit court reviewed the testimony of Williams at the suppression hearing, including that he told Officer Gajevic "no" several times when Officer Gajevic asked if he could search his apartment and that after Williams "thought about a number of consequences" he "called him back" and "told him he can go back in the house"

(77:10-12, A-Ap. 110-12). With respect to the testimony of Agent Isaacson, the circuit court specifically noted that "Agent Isaacson heard no threats from Officer Gajevic"; he "did not touch Mr. Williams, and no weapons were drawn"; Officer Gajevic's demeanor was "calm, collected, and he explained perfectly clearly the reason he was there and what was going on"; and Agent Isaacson "did not hear Officer Gajevic ask multiple times for consent" nor hear "Williams say that he was not giving consent" (77:14, A-Ap. 114). The circuit court then summarized the testimony of Officer Gajevic, including that he asked Williams for consent and advised him that it was "his option to give consent" and that in the alternative, Officer Gajevic told Williams that he "would attempt to apply for a search warrant" (77:15, A-Ap. 115). Further, Officer Gajevic testified that "Williams was very polite and responsive to his questions" and said "[g]o ahead and search it" even after Officer Gajevic told him he would still be arrested (77:16, A-Ap. 116).

The circuit court noted that there was "conflicting testimony" and found "more credible the testimony of Agent Isaacson and Officer Gajevic with respect to what occurred back on this date in question" (77:16, A-Ap. 116). The court found that "Williams consented to the search freely and voluntarily in the absence of any express or implied duress or coercion" and that "no deception or trickery was used in order to obtain the consent from Mr. Williams" (77:18, A-Ap. 118). Therefore, the court determined that Williams' consent was "freely and voluntarily given," that "there is no basis to suppress based upon an invalid consent provided by Mr. Williams to the residence that he shared with Mr. Brown" and denied Brown's motion to suppress (77:20, A-Ap. 120).

Judgment of Conviction and Appeal. Brown pled guilty to count one of possession of heroin with intent to deliver and was sentenced by a judgment of conviction to seven years' initial confinement and seven years' extended supervision, and

count two of delivery of heroin was dismissed and read in (50; 91:40-41). Brown appeals from the judgment of conviction (58).

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED BROWN'S MOTION TO SUPPRESS.

On appeal, Brown makes one argument in support of suppression of the evidence found in Brown and Williams' apartment: that the State did not establish that Williams' consent to the search of the residence shared by Williams and Brown was voluntary and therefore the search violated Brown's Fourth Amendment rights (Brown's brief at 9). However, based on the totality of the circumstances, including the circuit court's credibility determinations of the testimony of Williams, Agent Isaacson and Officer Gajevic, the circuit court correctly found that the State had shown that Williams voluntarily consented to the search and therefore that Brown's constitutional rights were not violated.

A. Relevant law and standard of review regarding a challenge to a circuit court's denial of a motion to suppress based on finding voluntary consent.

Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact that this court reviews under two different standards. A circuit court's findings of fact will be upheld unless they are clearly erroneous. *State v. Hughes*, 2000 WI 24, 233 Wis. 2d 280, ¶ 15, 607 N.W.2d 621. This court then independently applies the law to those facts *de novo*. *Id.*

Under the Fourth Amendment to the United States Constitution, warrantless searches, especially searches inside a private dwelling, are *per se* unreasonable; however, there are exceptions to the warrant requirement that have been well established in the law. *See generally Holt v. State*, 17 Wis. 2d 468,

477, 117 N.W.2d 626 (1962) ("A home is entitled to special dignity and special sanctity"); *State v. Milashoski*, 159 Wis. 2d 99, 111-12, 464 N.W.2d 21 (Ct. App. 1990), *aff'd* 163 Wis. 2d 72, 471 N.W.2d 42 (1991) (cataloguing exceptions to search warrant requirement). One such exception "recognizes the validity of searches with the voluntary consent of an individual possessing authority." *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (citation omitted); *see generally State v. McGovern*, 77 Wis. 2d 203, 252 N.W.2d 365 (1977).

In order to preserve the integrity of the warrant requirement, when the State seeks to admit evidence searched or seized without a warrant on grounds of lawful consent, it must prove, by clear and convincing evidence, that it obtained such consent. *State v. Tomlinson*, 2002 WI 91, ¶ 21, 254 Wis. 2d 502, 648 N.W.2d 367.

> To determine if the consent exception is satisfied, we review, first, whether consent was given in fact by words, gestures, or conduct; and, second, whether the consent given was voluntary. The question of whether consent was given in fact is a question of historical fact. We uphold a finding of consent in fact if it is not contrary to the great weight and clear preponderance of the evidence.

State v. Artic, 2010 WI 83, ¶ 30, 327 Wis. 2d 392, 786 N.W.2d 430 (citations omitted). "The determination of 'voluntariness' is a mixed question of fact and law based upon an evaluation of 'the totality of all the surrounding circumstances.'" *Id.* ¶ 32. "In considering the totality of the circumstances, we look at the circumstances surrounding the consent and the characteristics of the defendant; no single factor controls." *Id.* ¶ 33 (citing *State v. Phillips*, 218 Wis. 2d 180, 197-98, 577 N.W. 2d 794 (1998)):

> In *Phillips*, this court considered multiple non-exclusive factors to determine whether consent was given voluntarily: (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent; (2) whether the police threatened

> or physically intimidated the defendant or "punished" him by the deprivation of something like food or sleep; (3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite; (4) how the defendant responded to the request to search; (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and (6) whether the police informed the defendant that he could refuse consent. *Phillips*, 218 Wis. 2d at 198-203, 577 N.W.2d 794; *State v. Bermudez*, 221 Wis. 2d 338, 348-51, 585 N.W.2d 628 (Ct. App. 1998).

Artic, 327 Wis. 2d 392, ¶ 33.

B. Relevant law and standard of review regarding the discretion of the circuit court to deny a suppression motion.

Whether to grant or deny a motion to suppress evidence lies within the discretion of the circuit court. *State v. Keith*, 216 Wis. 2d 61, 68, 573 N.W.2d 888 (Ct. App. 1997). Therefore, an appellate court will overturn an evidentiary decision of the circuit court only if that court erroneously exercised its discretion. *Id.* at 69.

> When we review a discretionary decision, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. In considering whether the proper legal standard was applied, however, no deference is due. This court's function is to correct legal errors. Therefore, we review *de novo* whether the evidence before the circuit court was legally sufficient to support its rulings. Furthermore, if evidence has been erroneously admitted or excluded, we will independently determine whether that error was harmless or prejudicial.

Id. (citations omitted).

> On review of a motion to suppress, [an appellate] court employs a two-step analysis. First, we review the circuit court's findings of fact. We will uphold these findings unless they are against the great weight and clear preponderance of the evidence. "In reviewing an order suppressing evidence, appellate courts will uphold findings of evidentiary or historical fact unless they are clearly erroneous." Next, we must review independently the application of relevant constitutional principles to those facts. Such a review presents a question of law, which we review de novo, but with the benefit of analyses of the circuit court[.]

State v. Dubose, 2005 WI 126, ¶ 16, 285 Wis. 2d 143, 699 N.W.2d 582 (citations omitted).

An appellate court will not reweigh the suppression-hearing testimony. "Confronted with the conflict of testimony, it [is] the trial court's obligation to resolve it." *State v. Owens*, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989). When an appellate court reviews a circuit court's decision on a suppression motion, the appellate court defers to the circuit court's credibility determinations. *Id.* at 929-30. "Any [unresolved] conflicts in testimony will be resolved in favor of the trial court's finding. The credibility of [witnesses] testifying at a suppression hearing outside the presence of the jury is a question for determination by the trial court." *State v. Flynn*, 92 Wis. 2d 427, 437, 285 N.W.2d 710 (1979) (citations omitted).

> It is the function of the trier of fact, and not [an appellate] court, to resolve questions as to the weight of testimony and the credibility of witnesses. This principle recognizes the trial court's ability to assess each witness's demeanor and the overall persuasiveness of his or her testimony in a way that an appellate court, relying solely on a written transcript, cannot. Thus, we consider the trial judge to be the "ultimate arbiter of the credibility of a witness," and will uphold a trial court's determination of credibility unless that determination goes against the great weight and clear preponderance of the evidence.

Hughes, 233 Wis. 2d 280, ¶ 2 n.1 (citations omitted). "On review of the circuit court's decision, we apply a deferential, clearly erroneous standard to the court's findings of evidentiary or historical fact. The standard also applies to credibility determinations." *State v. Jenkins*, 2007 WI 96, ¶ 33, 303 Wis. 2d 157, 736 N.W.2d 24 (citation omitted).

C. Because the evidence at the suppression hearing and the credibility determinations of the circuit court proved by clear and convincing evidence that Williams consented to the search, the circuit court properly exercised its discretion to deny Brown's motion to suppress.

On appeal, Brown argues that the State failed to establish that Williams freely and voluntarily consented to the search of the home Brown shared with Williams. Brown claims that this is based on a "number of factors," including that Williams was arrested and "confronted with his probationary status when he purportedly gave consent," "there was no probable cause to arrest him," police "officers claimed they could get a search warrant," and "Williams initially denied consent to search" (Brown's brief at 13-14). However, the conflicting testimony about these issues was the subject of discretionary credibility determinations made by the circuit court, and the circuit court properly found that the State proved by clear and convincing evidence that Williams gave voluntary consent for the search.

In its oral decision, the circuit court summarized its findings of fact based on the witness testimony related to Williams' consent:

> Officer Gajevic was the only officer that spoke with Mr. Williams regarding consent. He was direct and up-front with Mr. Williams. Officer Gajevic advised Mr. Williams about the investigation and only asked for consent after he explained the information that they had and the options that were available.

> There's no evidence that the officers threatened Mr. Williams or deprived him in any way. In fact, I believe, at one point the testimony was that it was a hot day, and they . . . moved Mr. Williams – into some shade.
>
> There's no credible testimony in this record that Officer Gajevic in any way threatened Mr. Williams with revocation if consent was not granted. And, in fact, after Officer Gajevic advised the defendant that he was still going to be arrested, Officer Gajevic asked if they could still go into the residence, and Mr. Williams advised him that he could.
>
> Mr. Williams was cooperative with Officer Gajevic. He readily gave consent after being advised of the fact that they would attempt to apply for a search warrant if there was no consent.

(77:18-19, A-Ap. 118-19).

The circuit court properly exercised its discretion in finding that Williams gave consent to search his apartment. Officer Gajevic testified that Williams was "polite and responsive to his questions" and clearly stated to Officer Gajevic: "Go ahead and search it. There is not gonna be any heroin in the apartment" (77:16, A-Ap. 116). Agent Isaacson, who was present when Officer Gajevic asked for consent from Williams, testified that he heard "no threats from Officer Gajevic," he "did not hear Officer Gajevic ask multiple times for consent" and he "never heard Mr. Williams say that he was not giving consent or that they could not go in the house" (77:14, A-Ap. 114). The court found that the testimony of Officer Gajevic and Agent Isaacson that Williams voluntarily gave consent without any duress or coercion (77:14-16, A-Ap. 114-16) was more credible than the testimony of Williams that he initially denied consent and gave consent because he thought he would get his parole revoked if he did not (77:10-11, A-Ap. 110-11). When reviewing a suppression motion, an appellate court defers to the circuit court's credibility determinations and upholds the circuit court's findings of fact

unless that court clearly erred in making those findings. *See Flynn*, 92 Wis. 2d at 437. The record established at the suppression hearing shows that the circuit court did not clearly err.

The circuit court also properly determined that Williams gave consent voluntarily:

> I've considered all the factors set forth in *Artic*, and I've considered the totality of all the facts and circumstances, and I do find that there was consent that was freely and voluntarily given by Mr. Williams in this case and that there is no basis to suppress based upon an invalid consent provided by Mr. Williams to the residence that he shared with Mr. Brown.

(77:19-20, A-Ap. 119-20). The circuit court identified the correct legal standards (77:17-18, A-Ap. 117-18) and then analyzed and applied them in relation to the facts presented at the suppression hearing (77:18-20, A-Ap. 118-20).

The circuit court found credible the testimony of Agent Isaacson that he heard no threats directed towards Williams and that "Officer Gajevic's demeanor" was "calm, collected, and he explained perfectly clearly the reason he was there and what was going on" (77:14, A-Ap. 114). Further, the circuit court noted that Officer Gajevic's testimony that "after advising Mr. Williams of basically everything I knew relative to the whole operation, I asked for Williams [to] . . . give a consent to conduct a search of his apartment. I further advised him that I – it would be his option to give consent, that I wanted him to do it willingly" (77:15, A-Ap. 115). Brown's only evidence contradicting this testimony was Williams' testimony that he denied consent several times and gave consent after Officer Gajevic told him that if he did not consent, he was "going to jail" and that Williams "thought maybe he might have had my [parole] agent on the phone" (77:10-11, A-Ap. 110-11).

The circuit court found "more credible the testimony of Agent Isaacson and Officer Gajevic with respect to what occurred back on this date in question" (77:16, A-Ap. 116). Further, the court found that there was "no evidence that the officers threatened Mr. Williams" and "no credible testimony in this record that Officer Gajevic in any way threatened Mr. Williams with revocation if consent was not granted" (77:19, A-Ap. 119).

Under the standards for a circuit court's exercise of direction, assessment of credibility and determination of the validity of consent for a warrantless search, the circuit court properly exercised its discretion when the court determined that the State had shown by clear and convincing evidence that Officer Gajevic obtained voluntary consent from Williams to search the apartment he shared with Brown, and therefore properly denied the motion to suppress.

D. Officer Gajevic's statement that if Williams did not consent, he intended to attempt to get a search warrant was neither deceptive nor coercive.

Brown cites *State v. Kiekhefer*, 212 Wis. 2d 460, 473, 569 N.W.2d 316 (Ct. App. 1997) for the proposition that police may not threaten to obtain a search warrant when there are no grounds for a valid warrant (Brown's brief at 17). The State has no quarrel with this proposition; however, it is inapplicable here.

Officer Gajevic testified that when he asked Williams if he would give consent to search the apartment, he told Williams that "in the alternative, I would attempt to apply for a search warrant based upon the information that we'd obtained so far in our investigation, but that it would be his option whether or not to provide me with consent" (73:161). Officer

Gajevic clarified that he used the words "attempt to apply" because that's the

> phrase I always use. A search warrant is not guaranteed. Whether or not I believe, in my own mind, I would be able to obtain one, it's still not my final decision on the granting of a search warrant.
>
> But that's a discussion that we had, and Mr. Williams responded – interrupted that conversation by advising me that I could go ahead and conduct a search and that no heroin would be found there, based upon his knowledge.

(73:161-62).

"Threatening to obtain a search warrant does not vitiate consent if 'the expressed intention to obtain a warrant is genuine . . . and not merely a pretext to induce submission.'" *Artic*, 327 Wis. 2d 392, ¶ 41 (citations omitted). Brown claims that "[i]t is clear from the officer's testimony that there were no grounds to obtain a search warrant of Mr. Williams' home" (Brown's brief at 19). However, the record shows otherwise, including the testimony of Officer Gajevic and Agent Isaacson that the circuit court found credible.

Officer Gajevic testified that he was conducting surveillance of the residence that was searched at 3776 North 52nd Street to monitor the building for Brown, who had been identified as the person who sold heroin to Schmidt the previous day (73:143-44). Officer Gajevic testified that he saw Brown and another individual later identified as Williams come out of that address, get into the same silver Infiniti car that had been used in the previous day's heroin transaction and drive away (73:144). Officer Gajevic further testified that he had obtained information through a confidential source that Brown was involved in heroin activity and determined it was "the same Damion Brown that I was already familiar with based upon a prior arrest in the late '90's" (73:146). Clearly, a

suspect's criminal history is a legitimate factor to consider in a probable cause assessment. *See State v. Mordowanec*, 788 A.2d 48, 58 (2002) (defendant's "prior record for a narcotics offense" corroborated anonymous informant's information regarding marijuana grown on defendant's premises).

After Brown and Williams were arrested, Officer Gajevic advised Williams that "based upon the investigation that's been conducted so far that I think there might be heroin contained within 3776 North 52nd Street" (73:158). Officer Gajevic further testified that he told Williams that he would attempt to get a search warrant if Williams did not consent to the search not to "induce him into giving me the consent," but as an option because Officer Gajevic's opinion was that he "would have been able to obtain one" (73:163). The circuit court found this testimony credible and determined that "Williams was cooperative with Officer Gajevic. He readily gave consent after being advised of the fact that they would attempt to apply for a search warrant if there was no consent" (77:19; A-Ap. 119).

When asked on cross-examination what he would have included in his affidavit in support of a search warrant, Officer Gajevic replied that he would have included his "prior contacts with Mr. Brown," the "information that [he had] garnered regarding heroin dealing done by Mr. Brown by my informants over an extended period of time, with the most recent being in the month of May, one month prior," and "the fact that on the day prior a delivery was made in the parking lot at 51st and Capitol where Mr. Brown was positively identified by Mr. Schmidt . . . a block away from their residence" (73:209). Officer Gajevic continued:

> So you take that history, the fact that a drug transaction occurred, a delivery of heroin prior thereto where Mr. Brown was positively identified, where the vehicle is located a block away from the residence, where the individual, from my understanding, who made the call

> prior to routinely visits or does these transactions right by Walgreens.
>
> > . . . [and] the fact that we observed two subjects. . . . leave that residence and drive directly to where the transaction was to occur[.]

(73:210).

Brown's argument that there were no grounds to get a warrant is simply not true. To the extent that Brown believes that this court must find as a matter of law that there was probable cause to search his apartment in order to render Williams' consent voluntary, the law does not require such a finding. Rather, it is sufficient if "the expressed intention to obtain a warrant is genuine." *Kiekhefer*, 212 Wis. 2d at 473 (internal quotation marks and citation omitted). In other words, as long as police arguably had probable cause to obtain a search warrant, it is not coercive for an officer to state that he thinks he could obtain one. *See id.* The circuit court found Officer Gajevic's testimony that he believed he could get a search warrant based on the ongoing investigation of heroin activity, his prior contacts with Brown and the events that occurred credible. Thus, the circuit court properly denied the motion to suppress because it found that Williams "readily gave consent" and was not coerced or threatened by Officer Gajevic's statement that if he did not consent, he would attempt to get a search warrant (77:19; A-Ap. 119).

E. Brown has forfeited his argument that the police had no probable cause to arrest Williams and even if he has not, Williams' arrest was not illegal and his consent to the search was valid.

For the first time on appeal, Brown argues that Williams' arrest was without probable cause and "[t]hat alone invalidates the consent" (Brown's brief at 14). Brown may not raise a new argument regarding the admissibility of evidence that was not

raised in his motion to suppress for the first time on appeal. See *State v. Peters*, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991) (to preserve the right to appeal a ruling on the admissibility of evidence, a defendant must inform the trial court of the specific ground upon which the objection is based. "General objections which do not indicate the grounds for inadmissibility will not suffice to preserve the objector's right to appeal").

Even if this court considers Brown's undeveloped argument that Williams' arrest was illegal and thus his consent was not valid, it is wholly without merit. Essentially, Brown appears to argue that there was insufficient evidence at the suppression hearing that police had probable cause to arrest Williams and therefore, "the State failed to prove that the consent to search obtained from Mr. Williams was not tainted by an illegal arrest" (Brown's brief at 16). However, the circuit court found credible Officer Gajevic's testimony that when he began talking to Williams, "he identified himself and explained the exact nature of the investigation, including what transpired the day before and that day, and that he was currently under arrest for party to a crime with dealing heroin on two occasions" and "after advising Mr. Williams of basically everything," Officer Gajevic asked for his willing consent to search the apartment (77:15, A-Ap. 115). The court further found that "Williams stated that he had nothing to do with the heroin dealing and that it was not his," but then said "Go ahead and search it. There is not gonna be any heroin in the apartment" (77:16, A-Ap. 116). Williams then asked whether "he was still going to be arrested, and Officer Farina told him, 'yes.' Officer Gajevic then asked Mr. Williams if he could still search, and Mr. Williams said he could go ahead" (77:16, A-Ap. 116). The court concluded that the State had shown by clear and convincing evidence that Williams' consent was voluntarily given without coercion and therefore "there is no basis to suppress based upon an invalid consent provided by

Mr. Williams to the residence that he shared with Mr. Brown" (77:20, A-Ap. 120).

Officer Gajevic's testimony that prior to Williams' giving consent, Officer Gajevic told him that he was "under arrest for party to the crime of dealing heroin on these two occasions" (73:154-55) and the circuit court's findings of fact support both the conclusion that there was probable cause to arrest Williams as a party to the crime to selling heroin and that his consent to search his apartment was given voluntarily and without any coercion. Officer Gajevic told him why he was under arrest and that did not affect his decision whether or not to consent to the search: "in fact, after Officer Gajevic advised [Williams] that he was still going to be arrested, Officer Gajevic asked if they could still go into the residence, and Mr. Williams advised him that he could" (77:19, A-Ap. 119). Brown has not shown that Williams' arrest was "illegal" and the State provided clear and convincing evidence that Williams' consent to the search was voluntary. Therefore, the circuit court properly denied Brown's motion to suppress because the search was conducted with the consent of Williams.

CONCLUSION

For the foregoing reasons, the circuit court properly denied Brown's motion to suppress and this court should affirm the judgment of conviction.

Dated this 17th day of March, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,923 words.

Dated this 17th day of March, 2016.

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Anne C. Murphy
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of March, 2016.

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