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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2016AP001609-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

FAITH N. REED,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND DECISION DENYING SUPPRESSION, ENTERED IN THE MONROE COUNTY CIRCUIT COURT, THE HONORABLE J. DAVID RICE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

DID KIRK SULLIVAN IMPLIEDLY AND VOLUNTARILY CONSENT TO LAW ENFORCEMENT ENTERING HIS APARTMENT?

The trial court answered yes and denied the defendant's suppression motion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent anticipates that the issues raised in this appeal can be fully addressed by the briefs. Accordingly, Plaintiff-Respondent is not requesting oral argument. Further, publication is not warranted under Wis. Stat. § 809.23.

STATEMENT OF FACTS

On December 13, 2015, at approximately 1:20 p.m., Officer Steven Keller of the Tomah Police Department was dispatched to an altercation in the street at 308 Murdock Street in the City of Tomah, Monroe County, Wisconsin (20:7). Officer Keller's investigation into the altercation was captured on his body camera and the recording was admitted as Exhibit #1 during the suppression hearing on March 15, 2016 (20:13-14; 19).[1]

When Officer Keller arrived at 308 Murdock Street, he met with Daniel Cannon and Kirk Sullivan in the roadway outside a multi-unit apartment complex (20:7; 19 at 0:33). Cannon and Sullivan advised Officer Keller that two brothers, Brandon and Jerome Harris, got into an altercation but Cannon and Sullivan broke it up (20:8). Sullivan advised Officer Keller that one of the Harris brothers was likely at Sullivan's nearby apartment (20:11). Officer Keller knew Faith Reed also resided at this apartment (20:12). As Officer Keller continued to speak with Cannon and Sullivan, dispatch advised Officer Keller that Sullivan was on probation for battery and strangulation and suffocation (19 at 5:35-5:47).

Officer Keller suggested to Sullivan that they go look for Jerome Harris at Sullivan's apartment (19 at 7:49-7:58). Specifically, Officer Keller suggested, "[L]et's go look and see if he's over there" (19 at 7:49-7:58). In response, Sullivan began to lead Officer Keller to his apartment building (20:11, 25, 29; 19 at 7:49-8:33).

When Sullivan reached the exterior door to the apartment building, Sullivan opened the door and he and Officer Keller walked through it (20: 11; 19 at 8:39-8:44). Once inside the apartment building, Sullivan led Officer Keller up a flight stairs (19 at 8:45-8:57). At the top of the stairs, Sullivan led Officer Keller through a second door and down a hallway to the door to his apartment (19 at 8:57-9:16). As Officer Keller followed Sullivan down the hallway, Officer Keller advised dispatch he would be entering Sullivan's apartment (19 at 9:15). Once at the door, Sullivan quickly knocked on the door, opened the door, walked in, and called for Jerome (20:12, 17, 26; 19 at 9:16-9:20). Officer Keller was a few steps behind Sullivan and reached the

[1] As Reed notes in her brief, the body camera footage is equipped with a running clock. The state will also make reference to specific portions of the recording with the document number "19" followed by the time imprinted on the video recording.

door as it was closing (20:12, 26; 19 at 9:21). As the door was closing, Officer Keller placed his hand on the door to keep the door open, pushed the door open further so he could enter, and then entered Sullivan's apartment (20:12, 26-27; 19 at 9:21-9:29). During this time, Officer Keller observed a man, later identified as Jerome Harris, concealing an item (20:27). In its ruling, the trial court stated the circumstances surrounding the apartment door closing were not clear (20:43-44, 46-47).

Officer Keller testified Sullivan did not give explicit verbal permission to enter the apartment; Officer Keller testified Sullivan "did not tell [him] that [he] had to stay out of the apartment nor did [Sullivan] tell me to just come right in, either" (20:25). Officer Keller testified that by Sullivan's conduct, he directly assumed Sullivan was giving permission for him to enter Sullivan's apartment (20:25).

Upon Officer Keller's entry into Sullivan's apartment, Officer Keller determined the item Jerome concealed was marijuana, and Officer Keller observed marijuana residue on the counter (20:18). At some point, Reed was placed under arrest and transported to the jail (1:5). During Reed's booking at the jail, a pill, available by prescription only, was located on Reed's person. (1:5).[2]

At the suppression hearing, the state argued Sullivan implicitly consented to Officer Keller's entry into his and Reed's apartment and asked the trial court to deny the defendant's motion (20:30-34). Reed's trial attorney argued Sullivan did not consent to the entry and even if Sullivan initially consented to the entry, Sullivan revoked that consent when he closed the apartment door behind him (20:35-38). The trial court ruled Sullivan impliedly and voluntarily consented to the entry into the apartment by his conduct (20:46-47)

The trial court found Sullivan directed Officer Keller to a place where he knew Officer Keller wanted to go and noted "it certainly was obvious that [Sullivan] was leading the way to the apartment" (20:43). Despite Reed's contentions Sullivan closed the apartment door, the trial court observed it was not clear who closed the door and that the

[2] The record is silent on the specific circumstances and details surrounding the discovery of the pill because Reed did not raise the issue of suppression of the pill in the trial court. This will be discussed in further detail in the Argument section of this brief.

circumstances of the door closing were ambiguous (20:44, 46-47). The trial court concluded Sullivan's conduct of identifying the individuals involved in the altercation, informing Officer Keller where those individuals were located, and leading Officer Keller to the location of one of those individuals indicated Sullivan was "freely and voluntarily by his conduct implying his consent" to Officer Keller to find Jerome Harris (20:44-45). Based on this, the trial court denied Reed's suppression motion (20:47).

Reed now argues the circuit court erred in denying her suppression motion.

ARGUMENT

I. The trial court correctly found Sullivan impliedly and voluntarily consented to Officer Keller entering his residence.

A. Applicable legal principles and standard of review.

Law enforcement officers may enter a residence without a warrant if they have consent. Wis. Stat. § 968.10 (2015-16); *see Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). When consent is the justification for entering a residence, the state must demonstrate by clear and convincing evidence that consent was given and that the consent was freely and voluntarily given. *Kelly v. State*, 75 Wis. 2d 303, 316, 249 N.W.2d 800 (1977).

Generally, whether an individual has consented is a question of fact. *See, e.g., State v. Phillips*, 218 Wis. 2d 180, 196-97, 577 N.W.2d 794 (1998) (upholding circuit court's factual determination that the defendant consented to the search of his bedroom). The circuit court's findings of these historical facts are reviewed under the clearly erroneous standard and will be sustained unless contrary to the great weight and clear preponderance of the evidence. *State v. Johnson*, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182 (citing *State v. Turner*, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987); *see also Phillips*, 218 Wis. 2d at 190. Whether the given consent is voluntary is a mixed question of fact and law. *Phillips* 218 Wis. 2d at 189-95. The circuit court's application of constitutional principles to historical facts is reviewed de novo. *Id.*

Here, Reed does not explicitly challenge whether the purported consent was voluntary. Rather, the main contested issue is whether there was consent in fact. Thus, the heart of the issue is whether the trial court's finding of consent in fact was clearly erroneous.

B. The trial court correctly found Sullivan gave consent in fact.

The trial court expressly found Sullivan impliedly consented in fact to Officer Keller entering his apartment by his actions (20:43-47).

Consent does not have to be verbally given. *Phillips*, 218 Wis. 2d at 197. When actions are taken in response to a request, actions can speak just as loudly as words. Pertinent to the case at hand, consent may be communicated by gestures or conduct. *Id.*

The state has not located a case directly on point with the case at hand, but *Phillips* comes close. In *Phillips*, an officer asked to search a defendant's bedroom. 218 Wis. 2d at 187. Instead of responding verbally, the defendant opened the bedroom door, walked into the bedroom, and handed the officer the item the officer requested to retrieve from the bedroom. *Id*. The Wisconsin Supreme Court affirmed the circuit court's finding that the defendant's conduct provided a sufficient basis on which to find the defendant consented to the search of his bedroom. *Id* at 197.

Reed concedes the circuit court's finding that Sullivan implicitly consented by his conduct to Officer Keller *going to* the apartment is supported by the record (Brief for Defendant-Appellant at 12). However, Reed argues the record does not support a finding that Sullivan implicitly consented to Officer Keller *entering* the apartment (Brief for Defendant-Appellant at 13). Reed argues that insofar as the trial court held so, that finding of historical fact is clearly erroneous and asks this court to overturn it (*Id*.).

In support of her position, Reed cites *State v. Johnson* for the well-settled legal principle that "mere acquiescence" is not consent. 177 Wis. 2d 224, 234, 501 N.W.2d 876 (Ct. App. 1993). However, "mere acquiescence" does not apply to the current case. Sullivan did not merely acquiesce. Sullivan advised Officer Keller one of the altercation suspects was at Sullivan's residence. Officer Keller suggested they go to Sullivan's apartment to see if the suspect was in the apartment so that he could speak with the suspect (19 at 7:49-7:58). One cannot see if a suspect is in a location unless he enters the location. In response to the suggestion, Sullivan led Officer Keller to, *and into*, the apartment (20:12, 17, 26-27; 19 at 9:16-9:29). Sullivan's conduct was purposeful and aimed at assisting Officer Keller make contact with the suspect he requested to make contact with at the location he requested to make the contact. By way of contrast, there was no request to enter and no verbal or nonverbal response in *Johnson*.

Accordingly, the record supports the trial court's factual finding Sullivan impliedly consented in fact by his actions to Officer Keller entering his apartment.

C. The trial court correctly found Sullivan's consent was voluntarily given.

The next issue is whether Sullivan's consent was voluntarily given. The trial court expressly found Sullivan's consent was voluntarily given (20:43-47).

Whether consent is given voluntarily is determined by looking at the totality of the circumstances. *Schneckloth*, 412 U.S. at 227. A primary factor is the presence or absence of police coercion in the form of pressure, threats, or inducements. *Id.* at 229. Other factors courts have considered are personal characteristics of the individual giving consent. *State v. Xiong*, 178 Wis. 2d 525, 534-36, 504 N.W.2d 428 (Ct. App. 1993). Those personal characteristics may include the individual's age, education, intelligence, emotional condition and prior experience with police. *Id*.

In this case, there is no evidence of police coercion that would render Sullivan's consent involuntary. Officer Keller did not have a threatening encounter with Sullivan. Officer Keller asked Sullivan questions about the altercation between the Harris brothers and Sullivan provided necessary information (20:7-10). The conversation between Officer Keller and Sullivan occurred in a non-coercive atmosphere, on public street and sidewalk (19 at 0:33). Officer Keller did not place Sullivan in handcuffs (20:10). Officer Keller did not place Sullivan in his patrol vehicle (20:10). Officer Keller did not arrest Sullivan (19). Officer Keller did not demand to be taken into Sullivan's apartment (19 at 7:49-8:33). When Officer Keller suggested he and Sullivan go to Sullivan's nearby apartment, Sullivan began to lead the way without any expressed hesitation (20:11, 25, 29; 19 at 7:49-8:33). According to the testimony accepted by the trial court, Sullivan was not a suspect and he was assisting with Officer Keller's investigation (20:41, 43, 44-45).

Similarly, there is no evidence of any personal characteristics of Sullivan's that would have impacted his ability to voluntarily consent. The recording of Sullivan's interaction with Officer Keller indicates Sullivan is an individual of normal intelligence and had the ability to effectively communicate (19). Sullivan also, presumably, had prior

experience with police because he was on probation for battery and strangulation and suffocation (19 at 5:35-5:47).

Accordingly, this court should affirm the trial court's finding that Sullivan's consent was voluntary.

II. If this court does not affirm the trial court's consent finding, the pill should not be suppressed because the defendant failed to raise the issue in the trial court.

The state concedes that if this court concludes Sullivan did not voluntarily consent to the entry into his residence, the marijuana and statements Reed gave regarding the marijuana should be suppressed. However, the state disagrees the remedy for Reed also extends to suppression of the pill because the issue of suppression of the pill is belated.

It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal and will be deemed waived. *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). This waiver rule is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice. *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 894-95 (1991) (Scalia, J., concurring) (citing 9 C. Wright and A. Miller, *Federal Practice and Procedure* § 2472, p. 455 (1971)). The rule promotes both efficiency and fairness, and "go[es] to the heart of the common law tradition and the adversary system." *Caban*, 210 Wis.2d at 604-05; *see also State v. Erickson*, 227 Wis.2d 758, 766, 596 N.W.2d 749 (1999).

Wisconsin law requires movants to "[s]tate with particularity the grounds for the motion *and the order or relief sought*." Wis. Stat. § 971.30(2)(c) (2015-16) (emphasis added). This requirement provides notice to the opposing party and circuit court of the issues so that the defendant's assertions may be fully argued and considered. *Caban*, 210 Wis. 2d at 605.

The party who raises an issue on appeal bears the burden of showing the issue was raised before the circuit court. *Id.* at 604.

In the present case, Reed's written motions and briefs in support of her motions failed to state the issue of suppression of the pill with particularity; the written materials were solely focused on suppression of the marijuana (16, 17). Nevertheless, foreseeing that suppression of the pill might be an issue, the state sought clarification on the issue at the time of the suppression hearing (20:3-4). Reed's trial attorney conceded the written motions did not address the pill and dismissed the issue of suppression of the pill as being "clearly fruit of the poisonous tree" if the trial court ruled in favor of the defendant (20:4). Following this, no testimony was elicited on the matter of the pill nor was any argument made regarding it (20).

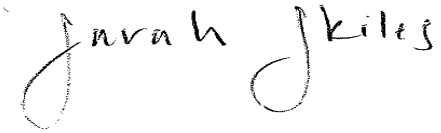
Reed's motion and conduct at the motion hearing consistently communicated she was concerned with suppression of the marijuana and was, at that time, uninterested in litigating any suppression issues regarding the pill. Consequently, there is no record of the circumstances surrounding the discovery of the pill and thus no legal theories can be applied to determine whether suppression of it is appropriate. This was Reed's motion. It was her responsibility to decide on the claim or claims that would be litigated. Reed should not now benefit from an incomplete record by bringing this issue up on appeal.

Accordingly, the state respectfully requests this court to find Reed has waived any challenge to the suppression of the pill.

CONCLUSION

For the above reasons, the state respectfully requests this court affirm the trial court and affirm the judgment of conviction.

Dated this 9th day of February, 2017.



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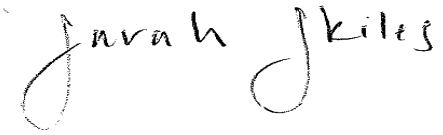
CERTIFICATION AS TO FORM AND LENGTH

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 1,637 words.

Dated this 9th day of February, 2017.



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

I hereby certify that:

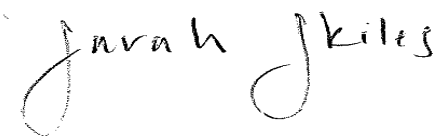
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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 9th day of February, 2017.



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