

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0694

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES METZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
RICHARD J. SANKOVITZ, Judge. *Affirmed.*

¶1 FINE, J. James A. Metz appeals from the trial court's order revoking his automobile operating privileges as a consequence of Metz's refusal to comply with Wisconsin's implied consent law.

¶2 The only issue on this appeal is whether Metz was lawfully arrested. Two circuit judges considered the issue: the Honorable Jean W. DiMotto and,

following judicial rotation, the Honorable Richard J. Sankovitz. Judge DiMotto ruled that Metz's arrest was unlawful and, consequently, dismissed the refusal charge. Judge Sankovitz reconsidered Judge DiMotto's ruling, and determined that Metz was lawfully arrested. Metz challenges both Judge Sankovitz's decision to reconsider Judge DiMotto's ruling, and Judge Sankovitz's decision on the merits of the arrest. We affirm.

I.

¶3 At approximately 3 a.m., a police officer responded to a complaint that a red Corvette had crashed into a stone wall surrounding a house on the south side of Milwaukee. A citizen got the Corvette's license number and gave it to the officer. The officer also saw in the street part of the Corvette that had apparently come off as a result of the accident. The officer found the Corvette not far away, and saw footprints in the snow leading from the Corvette to a four-unit apartment complex.

¶4 The officer went to the apartment building, and was told by one of the tenants that she believed that the car's owner was in what she said was apartment number four. The officer went to that apartment and knocked on the door. The apartment belonged to Scott Grabowski, who answered the door. Grabowski lived in the apartment with his wife, and they were planning on leaving early in the morning to go to Chicago on the first leg of an overseas vacation. Earlier that morning Metz had come over to stay the night, and, when the officer arrived, was sleeping on a futon that Grabowski had set up in the living room.

¶5 Grabowski opened the door to the officer, but, at that point, the officer remained outside the apartment. The officer did not have a warrant, and saw Metz through the ajar door. At the suppression hearing, Grabowski told the trial court that

he opened the door about a body's width, and recounted his initial conversation with the officer:

Q Okay. Did the officer ask for entry into your apartment?

A He asked me again if I knew who owned it, or if that was my car. I told him again no. He said, do you mind if I come in and look around, or do you mind if I take a look around. I don't know what the verbiage was exactly.

Q How did you respond to this question, sir?

A I said, yes, I mind. I'm getting up in two hours. It's four in the morning. My wife's asleep. I said, I really don't want anybody in the apartment. [Sic] I don't know.

Q And what happened after you told him that?

A As I was finishing that statement, Jim [Metz], I guess, kind of got up, or whatever, and said something to the officer. And I turned around. They started engaging in conversation, at that point.

Q Did the officer then enter the apartment?

A I would say yeah.

When asked whether Metz invited the officer to come into the apartment, Grabowski replied:

Probably not literally. I don't know what that would entail. ... I mean they [sic] didn't say please come in to, you know, the apartment. You know. They started having a conversation. I don't remember what the exact content of that conversation was. But the officer and Mr. Metz were engaged in conversation from that point on.

When asked by Metz's lawyer at the suppression hearing that "you never had permission to enter someone's home?" the officer replied that he "didn't feel it was necessary, at that point [because] I was engaged in a conversation with someone that was in the residence." The officer testified that he assumed that he had consent to walk the several steps into the apartment during that conversation with Metz.

Indeed, Grabowski testified that far from objecting to the officer's slight entry into the apartment to talk to Metz, he (Grabowski) "just sat back and let them talk about whatever they were talking about."

¶6 Metz admitted owning the car, driving that night, and getting into the accident. The officer asked him to get dressed. Metz complied, and was arrested when he walked out of the apartment. Metz was arrested for fleeing the scene of an accident.

¶7 Judge DiMotto granted Metz's motion to suppress, holding that the arrest was illegal because the officer entered Grabowski's apartment unlawfully. Judge DiMotto specifically noted, however, that the State was not arguing that either Grabowski or Metz had consented to the officer's entry into the apartment. Subsequently, Judge DiMotto said that had she been aware of *State v. Phillips*, 218 Wis.2d 180, 577 N.W.2d 794 (1998), which was decided after she granted Metz's motion to suppress, her decision on the suppression motion "may well have been different." It is upon *Phillips* that Judge Sankovitz relied in granting the State's motion to reconsider Judge DiMotto's ruling.

¶8 *Phillips* recognized both that consent could be gleaned from actions as well as words, and that a search following even an unlawful entry to a home could be lawful if there was voluntary consent to that search. *See id.*, 218 Wis.2d at 197, 212, 577 N.W.2d at 802, 808. Judge Sankovitz issued a written decision, which held that "the evidence demonstrates clearly and convincingly that [Metz] gave consent [to the officer] to step into Mr. Grabowski's apartment to talk with him and that he voluntarily made statements that gave [the officer] probable cause to arrest him." Judge Sankovitz, however, determined that an initial slight entry by the officer was unlawful: "the State has not shown by clear and convincing evidence that [the

officer] had Mr. Grabowski's consent to take a step across the threshold when he was talking to him." Nevertheless, Judge Sankovitz ruled that "any taint" flowing from what Judge Sankovitz determined was the officer's unlawful entry had attenuated by the time the officer and Metz engaged in their voluntary conversation.

¶9 As noted, Metz argues that Judge Sankovitz should not have reconsidered Judge DiMotto's ruling, and, in any event, Judge Sankovitz erred in concluding that Metz's arrest was lawful under *Phillips*. We address these contentions in turn.

II.

¶10 When trial-court proceedings in a case are split between two or more judges, the successor judge has the power to reconsider a ruling made by the predecessor just as he or she would have the authority to reconsider his or her own rulings. *See Dietrich v. Elliott*, 190 Wis.2d 816, 823 & n.4, 528 N.W.2d 17, 20 & n.4 (Ct. App. 1995). The only proviso is that the successor judge may not make credibility determinations contrary to those made by the first judge, unless, of course, a new evidentiary hearing is held. *See Starke v. Village of Pewaukee*, 85 Wis.2d 272, 283, 270 N.W.2d 219, 224 (1978) ("[A] successor judge may in the exercise of due care modify or reverse decisions, judgments or rulings of his predecessor if this does not require a weighing of testimony given before the predecessor and so long as the predecessor would have been empowered to make such modifications."). Here, Judge DiMotto was under the impression that the officer's slight entry was unlawful and that it made illegal Metz's subsequent arrest. She did not consider whether either Grabowski or Metz consented to the officer's initial entry and his continued presence in the apartment during his conversation with Metz. Given the fact that at the time of her decision the law of this state was governed by the court of appeals'

decision in *Phillips*, 209 Wis.2d 559, 563 N.W.2d 573 (Ct. App. 1997), her decision was not unreasonable. Once, however, the court of appeals' decision in *Phillips* was reversed by the supreme court, less than a month after Judge DiMotto rendered her decision, the State properly moved for reconsideration.

¶11 Our review of Judge Sankovitz's legal conclusions—including his ultimate findings on consent and voluntariness—is *de novo*. *Phillips*, 218 Wis.2d at 194–195, 577 N.W.2d at 800–801. Nevertheless, we've been assisted in our analysis by his written opinion. Given *Starke*'s mandate that a successor trial judge may not reevaluate credibility of witnesses who have testified only before the predecessor judge, we accept the historical facts as found by Judge DiMotto, who, as noted, indicated that the supreme court decision in *Phillips* gave her second thoughts about the correctness of her pre-*Phillips* decision.

¶12 *Phillips* recognized that voluntary consent is an exception to the Fourth Amendment's warrant requirement. 218 Wis.2d at 196, 577 N.W.2d at 801. Further, *Phillips* noted that consent need not be verbal: “it may be in the form of words, gesture, or conduct.” *Ibid.* Here, although Grabowski objected to a full-blown search of his apartment because, as he explained in his testimony, he and his wife had to get up early to drive to Chicago for their overseas vacation, there is no evidence that he objected to the officer's slight entry, or to the officer's conversation with Metz. Thus, on our *de novo* review, we disagree with both Judge DiMotto and Judge Sankovitz that the officer's slight initial entry across the apartment's threshold was unlawful. If there ever was a case where there was consent by conduct to an officer's brief, slight, albeit warrantless intrusion into a home, this is it. Additionally, as Judge Sankovitz recognized, Metz talked to the officer voluntarily, and voluntarily acceded to the officer's request to get dressed and step outside. The officer did not use “misrepresentation, deception, or trickery,” *id.*, 218 Wis.2d at 198, 577 N.W.2d

at 802, there was no physical or psychological intimidation, *id.*, 218 Wis.2d at 199, 577 N.W.2d at 803, and, like in *Phillips*, the officer's conversation with Metz "took place under generally non-threatening, cooperative conditions," *id.*, 218 Wis.2d at 200, 577 N.W.2d at 803. The officer did not violate Metz's Fourth Amendment rights.¹

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

¹ Given our holding that the officer's initial entry into Grabowski's was not unlawful, we do not consider the issue of attenuation.

