

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2018

Sheila T. Reiff
Clerk of Court of Appeals

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

Appeal No. 2017AP426-CR

Cir. Ct. No. 2015CF678

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUAN M. ORTA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
JOHN S. JUDE, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Juan M. Orta pled no contest to possession with intent to deliver cocaine (>5 – 15 grams) as a second or subsequent offense.¹ He contends evidence seized from his home pursuant to a warrantless entry should have been suppressed because the teen-aged daughter of Ana Trinidad, Orta’s cohabitant girlfriend, did not have actual or apparent authority to consent to enter his home and did not voluntarily consent. We disagree and affirm.

¶2 City of Racine police officer Chad Melby responded to a domestic disturbance involving Orta and Trinidad. Both had outstanding warrants. As he walked up the driveway, Melby encountered A.M., who told him she was sixteen years old, that Trinidad was her mother, that her mother had been arguing and was being abused by Orta, and that both Orta and Trinidad were home.

¶3 Trinidad’s adult son, who did not live at the residence, had reported the altercation when he learned of it from A.M. After Orta and Trinidad were escorted to the police transport vehicle, the son told Melby that Orta sold illegal narcotics out of the apartment and asked if Melby would conduct a canine search. Melby explained that he did not have standing to do so as the son did not live there.

¶4 A.M. then approached Melby and told him that she lived in the apartment and would “go get the narcotics.” Melby followed her up the driveway toward the door leading to the upper apartment and up the stairs. He stopped at the top of the stairs “right in the doorway” leading into the kitchen. A.M. entered another room, came out with two cans of what looked like household cleaners, and

¹ The Honorable John S. Jude, who presided over the proceedings, retired in August 2016 and passed away in February 2017.

set them on the kitchen table. At her direction, Melby unscrewed the bottoms and found in each what appeared to be cocaine in a plastic baggie in a rubber glove. Melby put the materials back inside the cans and told A.M. to return them to where she found them. He followed as A.M. entered the bathroom and watched her put one can under the sink and the other in a plastic storage container across from the sink.

¶5 Melby then obtained a search warrant based on the information gained when he came into the home with A.M. Police recovered two cans with hidden compartments inside of which were baggies containing a substance that tested positive for cocaine.

¶6 Orta moved to suppress the evidence. Trinidad testified at the suppression hearing that the police did not ask her or Orta for permission to search the residence and that she and Orta, not A.M., were in charge of allowing guests into the home. She also testified that A.M. had a key to the apartment, that there was only one bathroom in the apartment, and that A.M. washed her hands, brushed her teeth, showered, and used the toilet in the bathroom.

¶7 The court denied Orta's motion. While it ruled that A.M. did not have actual authority to consent to a limited search, the court concluded it was reasonable for Melby to infer that A.M. had apparent authority to consent to his entry and, from her actions, that she wanted him to follow her into the house and to search the cans she retrieved and invited Melby to examine. The court also noted that A.M. had the right to common or shared use of the bathroom. Orta appeals.

¶8 Review of an order denying a motion to suppress presents a question of constitutional fact. *State v. Hughes*, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607

N.W.2d 621. “We uphold a circuit court’s findings of fact unless they are clearly erroneous ... then independently apply the law to those facts *de novo*.” *Id.* We review a circuit court’s decision regarding a consent search in a similar manner. *State v. Floyd*, 2017 WI 78, ¶12, 377 Wis. 2d 394, 898 N.W.2d 560.

¶9 Warrantless searches are presumptively unreasonable. *State v. Phillips*, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998). A search conducted pursuant to a valid consent is a recognized exception to the warrant requirement. *State v. Artic*, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430. Consent operates as a valid exception to the warrant requirement, however, only if the consent was “freely and voluntarily given” by one “having either actual or apparent authority over the place to be searched.” *State v. Wantland*, 2014 WI 58, ¶23, 355 Wis. 2d 135, 848 N.W.2d 810. Consent to search may be given verbally or in non-verbal form through gestures or conduct. *State v. Tomlinson*, 2002 WI 91, ¶37, 254 Wis. 2d 502, 648 N.W.2d 367.

¶10 Under certain circumstances consent to search may be given by a person other than the subject of the search. *Id.*, ¶22. Even if that third party lacks the actual authority to consent to the search, police may rely upon his or her apparent common authority, if such reliance is reasonable in view of the surrounding circumstances. *Id.*, ¶25. A minor child generally will not have the equivalent authority of a parent or guardian to consent to a search of their common home, but in some situations, a child reasonably could possess the authority to consent to a search or police entry of the parent’s home. *Id.*, ¶¶30, 31.

Whether the child possesses such authority will depend on a number of factors, and courts must look at the totality of the circumstances to make such a determination. The primary factors to be considered are the child’s age, intelligence, and maturity, and the scope of the search or seizure to which the child consents....

The age, intelligence, and maturity of the child are important because, as a child gets older and more mature, the child will generally be entrusted with greater responsibility. The scope of the consent is also particularly important because there are parts of a family's home where the parents have an increased privacy interest, and where the child could not reasonably give consent to a search, even though a parent could.

Id., ¶¶31-32 (internal citations omitted).

¶11 The circuit court made the following findings: it was reasonable for Melby to conclude that A.M. had the maturity to consent to a limited search or seizure, as she volunteered that she lived on the property and knew where the drugs were hidden; if Melby did not know A.M.'s exact age, there was nothing in the record to suggest she did not possess the physical and intellectual maturity of an average mid-teenager;² it was reasonable for Melby to infer that A.M. implicitly wanted him to follow her into the house, as he was immediately behind her as they entered the building and climbed the stairs to the second floor and she did not protest or hint that he should not follow her; Melby waited at the doorway to the apartment until A.M. brought the drugs to the kitchen table and did not conduct the search himself; A.M. placed the cans in Melby's plain view, then directed him to unscrew the bottoms and check the contents; and A.M. entered a room described as the bathroom, which she would have the right to common or shared use of with the other occupants of the home. The court concluded that, under these circumstances, whether A.M. retrieved and brought the cans to the kitchen table for Melby's viewing or brought them to him outside the house made no constitutional difference.

² Melby testified that A.M. told him she was sixteen when he initially encountered her outside the residence.

¶12 The court’s findings have ample support in the record. A.M.’s knowledge of Trinidad’s and Orta’s presence in the apartment, the arguing, the abuse, and the location of the drugs evince a sufficient level of maturity and intelligence such that she could allow others inside the residence’s common areas. A.M. retrieved the drugs from a common area and Melby examined the containers in another common area. Neither entered a place where Orta had a superior expectation of privacy, such as his bedroom. We conclude that A.M. had the authority to give consent for police to enter or search those common areas where she and Orta shared “a greater mutual use and a similar expectation of privacy.” *See id.*, ¶32.

¶13 We turn now to whether Melby reasonably could conclude that A.M. voluntarily consented to his entry into the home and to the search of the cans. To be considered voluntary, a consent to search must be “an essentially free and unconstrained choice” that does not result from either express or implied coercion. *Artic*, 327 Wis. 2d 392, ¶32 (quoted source omitted). Determining voluntariness is a mixed question of fact and law based on an evaluation of the totality of the circumstances. *Id.* Relevant factors include whether any misrepresentation, deception, or trickery was used to entice the consent; whether the individual was threatened or physically intimidated; whether the conditions attendant to the request to search “were congenial, non-threatening, and cooperative, or the opposite”; the individual’s response to the request; the individual’s general characteristics, including age, intelligence, education, physical and emotional condition, and prior experience with police; and whether the officer informed the person that consent could be withheld. *Id.*, ¶33. In the

absence of express or implied duress or coercion, a person's consent generally is voluntary. *Id.*, ¶34.³

¶14 When Melby declined to undertake a canine search because Trinidad's son did not reside there, A.M. initiated contact with Melby and informed him that she did live there and was going to enter the apartment and retrieve the drugs. She made no verbal or other indication of protest when Melby followed her to the building, up the stairs, and to the doorway of the apartment. She went into the bathroom and emerged with the two cans, placed them on the kitchen table and directed Melby to open them by unscrewing the bottoms. A.M.'s actions demonstrate her consent to Melby's entry into the residence and to his search of the cans.

¶15 *Tomlinson* and *Arctic* make clear that A.M.'s consent also was voluntary. *Tomlinson* police went to Tomlinson's home to arrest him without a warrant. *Tomlinson*, 254 Wis. 2d 502, ¶20. When a detective knocked on Tomlinson's door, a fifteen- or sixteen-year-old girl opened the door and identified herself. *Id.*, ¶7. A detective told her the police were looking for Tomlinson, who was inside. *Id.* The detective asked for permission to enter. *Id.* The girl said nothing, opened the door, and walked into the house; the officers followed. *Id.* Tomlinson did not object. *Id.*, ¶37. Even on this limited interaction between the girl and the detective upon his request to enter, the supreme court concluded that the detective reasonably could have interpreted the girl's action in turning to enter

³ The State's burden of proving consent alternately has been stated to be by clear and convincing evidence, *State v. Tomlinson*, 2002 WI 91, ¶21, 254 Wis. 2d 502, 648 N.W.2d 367, and by a preponderance of the evidence, *State v. St. Germaine*, 2007 WI App 214, ¶16, 305 Wis. 2d 511, 740 N.W.2d 148. We do not decide the matter here because we conclude the State would prevail under either standard.

the house as an invitation to follow her inside, such that the consent to enter the house was valid. *Id.*, ¶¶37-38.

¶16 Applying the *Artic* factors likewise strongly supports a conclusion that A.M.'s consent was voluntary. Melby did not deceive, trick, threaten, or physically intimidate A.M. The circumstances surrounding her consent were congenial, non-threatening, and cooperative. A.M. initiated contact with Melby on her own after he declined the nonresident son's request to search the home. Melby did not request or instruct A.M. to do anything; rather, she told Melby what she intended to do. A.M. did not object when Melby followed her up to the residence or when he entered. She brought the canisters to him and told him how to open them. Taken together, A.M.'s words and actions demonstrate an intelligence and maturity and an appropriate physical and mental condition to consent, which she did without any prompting from Melby.

¶17 The circuit court's findings are not clearly erroneous. We likewise conclude that A.M. had apparent authority to consent to the entry and search and that her consent was voluntarily given.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

