COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP324-CR **Cir. Ct. No. 2007CF2086**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KINGSTON D. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Kingston D. Brown appeals from a corrected judgment of conviction for cocaine-related offenses. The issue is whether Brown voluntarily consented to the search of his home. We conclude that the trial court's

conclusion that he did is supported by its factual findings that are not clearly erroneous. Therefore, we affirm.

¶2 Brown was arrested for selling cocaine to an undercover police officer in the parking lot of a laundromat. He was placed in a squad car and was asked by a police officer if he would consent to a search of his home. Brown signed the officer's memo book indicating his written consent. During the search of Brown's residence, police seized cocaine and marijuana.

¶3 Brown was charged with and ultimately pled guilty to delivering between one and five grams of cocaine, in violation of WIS. STAT. § 961.41(1)(cm)1r. (2007-08), possessing with intent to deliver more than forty grams of cocaine, in violation of § 961.41(1m)(cm)4. (2007-08), and possessing no more than two hundred grams of marijuana with intent to deliver, in violation of § 961.41(1m)(h)1. (2007-08).[1] Prior to pleading guilty, however, Brown moved to suppress the evidence recovered from a search of his home to challenge the voluntariness of his consent. The trial court conducted a suppression hearing and denied the motion.

¶4 Brown then pled guilty to the three charges. The trial court imposed an aggregate concurrent sentence of seven years: two years of initial confinement

[1] All references to the Wisconsin Statutes are to the 2007-08 version.

and five years of extended supervision.[2] Brown appeals to challenge the denial of his suppression motion. *See* WIS. STAT. § 971.31(10).

¶5 The issue is whether Brown's consent was voluntary. He claims that it was not because it was conditioned upon his accompanying the officers during the search (which they did not allow), and it was prompted by threats of taking his child and of waking a judge to obtain a warrant. There was conflicting evidence at the suppression hearing on how the officer obtained Brown's consent. The trial court acknowledged and then resolved those conflicts, and ultimately found that Brown's consent to the search was voluntary. Brown challenges the trial court's assessment of the State's proof and the accuracy of its factual findings. We consequently review the conflicting testimony of the two arresting officers, Brown and the police detective who interviewed Brown, to assess the trial court's credibility and factual findings.

¶6 Milwaukee Police Officer Angela Juarez testified that on the day of Brown's arrest, she was working in an undercover capacity, wearing plainclothes and riding in an unmarked squad car. She was waiting at a laundromat parking lot, and when signaled, she and her partner, Milwaukee Police Officer Jason Enk, apprehended Brown. Enk arrested Brown and placed him in the back seat of the squad car where, Juarez testified, she told Brown that "it's normal procedure to follow up [and search the accused's residence] regarding an undercover

[2] For selling cocaine, the trial court imposed a three-year sentence, comprised of one- and two-year respective periods of initial confinement and extended supervision. For possessing cocaine with intent to deliver, the trial court imposed a seven-year sentence, comprised of two- and five-year respective periods of initial confinement and extended supervision; for possessing marijuana with intent to deliver, the trial court imposed a one-year period in the House of Correction. These sentences were imposed to run concurrent to each other.

transaction or anything to do with narcotics." Juarez testified that Enk was driving the car. She described Brown as "[c]alm, cooperative," and testified:

> I identified myself as a police officer. I politely asked him if he had anything illegal back at his house and if we could search his residence in which I did receive verbal consent and then I asked if he would – would not mind signing my memo book stating that he did give me consent, written consent also.

According to Juarez, Brown signed her memo book within "[a] couple minutes" of his arrest. Brown was arrested at 8:30 p.m., and he consented in writing to the search at 9:03 p.m. Juarez also testified that after Brown had orally and verbally consented to the search, he "state[d] … that if there was anything in the house it would be approximately in the kitchen by a washer." Juarez admitted that she had not given Brown his ***Miranda*** warnings, and did not tell him that he could refuse to consent to the search.[3] Juarez also testified that they went to Brown's house; she denied that they stopped at the Mitchell Park Conservatory (also known as "the Domes") with Brown.

¶7 Brown testified that Enk arrested him in the laundromat parking lot and placed him in an unmarked squad car. Brown's account of what happened in the squad car however, differed from Juarez's account. Brown said that from that parking lot, Enk drove them (Brown, Juarez and himself) to the Domes where, according to Brown:

> [A]fter I was arrested they [Enk and Juarez] told me either I can give 'em somebody or get them somethin' or she [Juarez] was gonna notify Social Service to have my

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966) (warning the accused of the risks and consequences of self-incrimination).

> child taken away from me. Then they were gonna have to wake the judge to get a search warrant to search my house.

Brown specified that "[t]hey asked me for consent to search my house during the time we w[ere] in the [Domes] parking lot." Brown testified that he signed the memo book after he was taken to his residence, and at that time he "told 'em the only way I was gonna sign that [was] if I was able to go in there with them to show 'em where … so they wouldn't tear up my house." Brown admitted that his concern with the search was "to make sure … so they wouldn't … just go all over my house and tear things up after I showed them where it [the contraband] was." Brown testified that, although the officers told him that he could go in the house with them, "after [he] signed the consent … the male detective [Enk] asked who had my house keys and after that they just went in the house." Brown described Juarez's demeanor as she "was nice in her own little way, but as far as where the conversation-wise with threatenin' me with my son and the judge, no."

¶8 The prosecutor then called the arresting officer, Enk, as a rebuttal witness. Enk testified that he arrested Brown in Brown's car, searched him, and placed him in the back seat of the unmarked squad car. Enk testified that he was nearby when Juarez talked to Brown, but was unable to testify about the substance of that conversation. Enk testified consistent with Juarez's testimony that Brown consented to the search of his residence while at the laundromat parking lot. Enk however, testified that he then drove them to the Domes, prior to driving to Brown's residence.

¶9 City of Milwaukee Police Detective Robert Rehbein, who interviewed Brown after Brown had been taken to the police department, also testified. According to Rehbein, Brown never mentioned that his consent was

conditioned upon his accompanying the officers, or that the officers did not comply with his alleged condition.

¶10 The crucial testimony was from Juarez and from Brown. The trial court recounted the testimony, acknowledging some inconsistencies, and provided its reasons for denying suppression. It began by finding the State's witnesses more credible than Brown, who it found difficult to follow, and who arguably had some "marijuana issues," requiring the trial court to discount his testimony and "his ability to recall with … detail … [a]s compromised somewhat … balancing that against otherwise sober police officers conducting the investigation."

¶11 The trial court recounted that:

> Mr. Brown testified that he required that he be in the home. [The trial court] do[es]n't find it was a valid position or reasonable one if indeed it was ever stated. [The trial court] would agree with [the prosecutor] on that, that is different from consent to search part but not all the home. Telling the officers how they can do a search and conditionally that you be there while already in custody would certainly raise issues regarding officers' safety perhaps in a matter that would not constitute any valid limiting of the officers' ability to search.

The trial court returned to the issue of Brown's allegedly conditional consent and reasoned that had he given "begrudging consent" or been "miffed" at the officers for allegedly agreeing to his condition, only to renege once he had consented, that the renege would have been "notable enough where if that was an issue it would have been raised [with Rehbein during their interview]." The trial court continued that:

> The defendant did apparently talk about the location where items might be found in the home…. That may be consistent again with his desire that they minimize any disruption to the home but that doesn't otherwise give [the trial court] any indication again that would support the

> notion that he had conditioned the consent on a search of that particular area.

The trial court also found that Brown's consent was not the result of threats. The trial court acknowledged the conflicting testimony on the existence or absence of threats and found that the officers had not threatened Brown about having his child removed from the home or about having to "wake the judge to get a search warrant" to compel Brown's consent. It acknowledged that Brown was handcuffed at the time, but considering that he had just been arrested for selling cocaine, the handcuffs were not unusual or unduly coercive. The trial court found that Brown was "fairly well-spoken" and although he "might have been under the influence of marijuana," that his consent was knowledgeable and voluntary.

¶12 The trial court mentioned that Brown had not been given his ***Miranda*** warnings prior to consenting to the search. It explained however, that Juarez's question, whether he would consent to a search of his residence, was "normal follow-up procedure [following an arrest incident to] a narcotics investigation," and requires only a yes or no answer, as opposed to an incriminating response.

¶13 The issue on appeal is whether Brown voluntarily consented to the search of his residence.

> The test for voluntariness is whether consent to search was given in the absence of duress or coercion, either express or implied. We make this determination after looking at the totality of the circumstances, considering both the circumstances surrounding the consent and the characteristics of the defendant. No single criterion controls our decision.

State v. Phillips, 218 Wis. 2d 180, 197-98, 577 N.W.2d 794 (1998) (citations omitted). On appeal, we apply a mixed standard of review to the trial court's

rulings: we will not reverse the trial court's findings of evidentiary fact unless they are clearly erroneous; however, we independently review the trial court's conclusions of constitutional fact. *See* ***State v. Owens***, 148 Wis. 2d 922, 926-27, 436 N.W.2d 869 (1989). Stated otherwise, we defer to the trial court's factual findings; we independently determine whether Brown's consent was voluntary. *See* ***Phillips***, 218 Wis. 2d at 197-98; ***Owens***, 148 Wis. 2d at 926-27.

¶14 The trial court is the ultimate arbiter of credibility and of finding the facts. *See* ***Owens***, 148 Wis. 2d at 930. It found the police officers' testimony more credible than Brown's testimony. It found that Brown had consented to the search, as evidenced by his signature in Juarez's memo book. It found that Brown had been cooperative, and had not imposed his presence as a condition to his consent, and that he had not been threatened. These findings are supported by Juarez's testimony on which the trial court may properly rely. The trial court's factual findings were not clearly erroneous. Accepting those factual and credibility findings, Brown's consent was voluntary.

By the Court.—Judgment affirmed.

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