

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 11, 1997

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. 97-2473-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SUSAN J. DREYFUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

VERGERONT, J.¹ Susan Dreyfus appeals a judgment of conviction for operating a motor vehicle while intoxicated, third offense, in violation of § 346.63(1)(b), STATS. The dispositive issue on appeal is whether the officers had consent to enter Dreyfus's residence and to enter her bedroom. We conclude that

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

the trial court properly held that the police officers did have consent, and we therefore affirm.

BACKGROUND

According to the testimony of Madison police officers Samantha Kellogg and Tara Dommershausen, they arrived at Dreyfus's residence at 14 Hollywood Drive after having determined that she was the owner of a vehicle with front end damage that had been left partially parked in a traffic lane on a city street. The vehicle and the first three numbers of the license plate matched the description of a vehicle seen driving away from the scene of an accident by the EMS officers who were called to the scene. Officer Dommershausen testified that she had been to the residence previously and was familiar with Dreyfus and her boyfriend, Jose Camacho. She knew that Camacho also lived at that address and told Officer Kellogg.

The officers testified that upon arriving at the residence, they knocked on the door a number of times and no one responded. While waiting at the front door, Camacho approached from outside and indicated that he had spoken with dispatch and was aware that Dreyfus had been involved in an accident. The officers told Camacho that they needed to speak with the person who had been driving the vehicle. Camacho told the officers his girlfriend was inside the trailer in the bedroom and that she told him she was involved in an accident. Camacho then opened the trailer's door, held the door open and motioned for the officers to come in. And, once the officers got inside the trailer, he motioned them to the bedroom.

Camacho also testified. He acknowledged that he lived in the trailer with Dreyfus but stated that the bedroom was her private room and that he usually

slept on the couch or in the back bedroom. His testimony on his interaction with the officers did not contradict theirs. Camacho testified that he saw the officers knocking on the door when he came from a neighbor's house where he had called 911 about the accident, because Dreyfus came home, on foot, distraught, upset and mentioned an accident. The officers asked if Dreyfus was there, and Camacho opened the door, went in the house and said, "She is in the house, in bed." Camacho opened the door and the officers followed him in. They asked where she was and he pointed to her room. The officers did not specifically ask Camacho if they could enter either the residence or the bedroom and he did not specifically tell them it was okay for them to enter either. Camacho testified that he did not say anything to the officers because he figured that they were "there on business and I felt like I was going to interfere and get into trouble if I refused them."

The officers talked to Dreyfus and observed that her speech was slurred, her eyes were bloodshot, she could not stand by herself, and she was losing control of her temper. Dreyfus acknowledged that she had been driving the vehicle and was involved in an accident on Park Street. After Dreyfus admitted to operating the vehicle, she was placed under arrest for operating under the influence of an intoxicant.

The trial court determined that Camacho let the officers into the residence and that the officers reasonably believed that he was consenting to their approaching Dreyfus in the bedroom when he pointed to the room in response to their question about where she was. The court found there was no basis for a reasonable officer to believe that Camacho lacked authority to give the officers permission to approach Dreyfus in the bedroom, and the court made a specific finding that Camacho's testimony that they lived together but that he slept on the couch was incredible. The trial court also concluded that once the officers saw

and spoke to Dreyfus, they had probable cause to place her under arrest for operating a motor vehicle while under the influence of an intoxicant and also a “potential hit and run.”²

DISCUSSION

The Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, prohibits police officers from making a warrantless entry into a person’s home, without the person’s consent, in the absence of probable cause and exigent circumstances. *Payton v. New York*, 445 U.S. 573, 590 (1980). The burden is on the State to show by clear and positive evidence that the consent was the result of free, intelligent, unequivocal and specific consent without duress or coercion, actual or implied. *State v. Johnson*, 177 Wis.2d 224, 233, 501 N.W.2d 876, 879 (Ct. App. 1993). The proper test for the voluntariness of the consent is whether under the totality of the circumstances it was coerced. *Id.* Voluntary consent need not be given by the defendant but may be given by a third person who has common authority over or other sufficient relationship to the premises. *United States v. Matlock*, 415 U.S. 164, 171 (1974).

In reviewing the trial court’s decision that there was consent meeting the constitutional standard, we accept the court’s findings of historical fact unless they are clearly erroneous. *State v. Murdock*, 155 Wis.2d 217, 225, 455 N.W.2d 618, 621 (1990). However, whether the facts as found by the trial court satisfy the

² The court also made findings and conclusions on other issues that we do not address on this appeal.

constitutional standard is a question of law, which we review de novo. *Id.* at 226, 455 N.W.2d at 621. *See also Johnson*, 177 Wis.2d at 233, 501 N.W.2d at 879-80.

Dreyfus argues that the trial court erred in determining that Camacho consented to the officers' entry into the trailer and into the bedroom because he was not asked for permission and did not expressly give consent, and it was reasonable to infer that Camacho was "under at least an implied duress" and subject to "at least an implied coercion" when he allowed the officers to enter. We observe initially that there is no requirement that there be an express request and response; rather, we are to consider the totality of the circumstances. One of the factors that is appropriate to consider is whether the person giving consent assisted the officers in locating the person or items sought. *See State v. Nehls*, 111 Wis.2d 594, 599, 331 N.W.2d 603, 605 (Ct. App. 1983). Camacho's response to the officers' statement that they wanted to speak with Dreyfus—opening the door into the trailer and pointing to the bedroom—gives rise to a reasonable inference that Camacho was consenting to the officers' entry into the trailer and into the bedroom, and the trial court so found.

There is nothing in the officers' conduct that suggests coercion. Camacho did testify that he felt he might get into trouble if he refused. However, he did not explain that further and there is nothing in the record that suggests an objective basis for this feeling. To the extent that Camacho's testimony on this point conflicts with that of the officers, it is evident that the court chose to believe the officers rather than Camacho, and that is not a basis for reversal. *See Nehls*, 111 Wis.2d at 599, 331 N.W.2d at 605. However, even if one accepted Camacho's testimony as a true account of his feelings, that is not a sufficient basis for a finding of coercion. *See id.* at 599, 331 N.W.2d at 606 (fact that person

giving consent was upset by presence of officers in her home and feared disruption does not make consent the product of coercion).

Camacho also contends that he did not have the apparent authority necessary to give consent to the officers to enter the bedroom because it was Dreyfus's "private bedroom." The trial court found Camacho's testimony that he slept on the couch to be incredible. We understand this to be a finding that Camacho had the actual authority to give consent to the officers to enter the bedroom where Dreyfus was because both Dreyfus and Camacho had common authority over the bedroom. Making credibility determinations such as this is the role of the trial court, not this court. *See State v. Flynn*, 92 Wis.2d 427, 437, 285 N.W.2d 710, 714 (1979). The trial court's finding on Camacho's authority is supported by the record because Camacho testified he lived there and the officers testified that they knew from prior contacts that Camacho was Dreyfus's boyfriend.

However, even if Camacho did not have common authority over the bedroom, we nevertheless affirm the trial court's ruling. The consent of a third party to a warrantless entry is valid when the officers, at the time of entry, reasonably believed the person to possess common authority over the premises, even if the person does not have that authority. *Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990). The trial court found that the officers reasonably believed that Camacho had authority to give consent, and those findings are supported by the record. Because the officers knew that Camacho and Dreyfus were in a relationship and lived together, it was reasonable for them to believe that, when Camacho pointed the way into the bedroom where Dreyfus was, he had common authority with her over the bedroom.

We conclude that the trial court properly determined that the officers entered the bedroom with voluntary consent and therefore did not violate Dreyfus's rights under the Fourth Amendment.³

By the Court.—Judgment affirmed.

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

³ Dreyfus also argues that the officers did not give Dreyfus her *Miranda* rights after she was arrested and therefore any statement she made after her arrest must be suppressed. Dreyfus does not tell us what these statements are. She does not argue that there was no probable cause to arrest, assuming a valid entry into the bedroom. We do not address arguments that are inadequately developed. See *State v. Petit*, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).

