COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 98-0872-CR
98-1639-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY L. WATSON,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Brown County: WILLIAM M. ATKINSON and WILLIAM C. GRIESBACH, Judges. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIUM. Jeffrey L. Watson appeals a judgment of conviction for armed robbery in violation of § 943.32(1) and (2), STATS. Watson also appeals a judgment of conviction for attempted armed robbery in violation of

§§ 943.32(1) and (2) and 939.32, and an order denying his motion for postconviction relief. In regard to his conviction for armed robbery, Watson asserts that the trial court erred by denying his motion to suppress evidence seized during an unlawful search of his residence. Watson contends, concerning the attempted armed robbery conviction, that the court erred by denying his motion for postconviction relief because the prosecutor breached the plea agreement. We reject Watson's arguments and affirm the judgments of conviction and the order denying postconviction relief.

I. BACKGROUND

A. Armed Robbery

Watson was charged with armed robbery in violation of § 943.32(1) and (2), STATS. The charges stem from allegations that Watson, armed with a knife, robbed a SuperAmerica store in Brown County. An employee, Chris Fischer, claimed that Watson approached him to purchase a pack of gum. After operating the cash register, Fischer turned toward Watson, who came over the counter at him with a knife in his right hand. Watson told Fischer to get down on his knees and grabbed the money from the cash register. Watson then demanded that Fischer take him to the back room where the safe was located. Because Fischer did not have access to the safe, Watson took the money out of the till and demanded that Fischer stay in the back room until he left the premises. A surveillance camera tape shows the robber wearing a short, tight denim jacket and athletic shoes with a white and black pattern on the bottom.

Robert Haglund and Thomas Molitor, detectives for the Green Bay Police Department, were assigned to the robbery. They found Watson's wife, Lynn Ann Watson, at her mother's house and asked for consent to search her

home for items Watson allegedly wore during the SuperAmerica robbery. Lynn and the officers drove separately to her residence. Although she emphatically stated that she did not believe her husband committed these crimes, she congenially agreed to the search and signed a consent to search her residence. Lynn let the officers into her apartment. Haglund and Molitor found faded blue jeans and a pair of Adidas tennis shoes. Lynn retrieved a green denim jacket for the detectives. These articles matched the clothing viewed on the videotape.

Watson brought a pretrial motion to suppress, arguing the evidence was the fruit of a warrantless and unlawful search of his residence. The State claimed that Watson's wife consented to the search. Relying on the testimony of Haglund and Molitor, the trial court denied Watson's motion to suppress. At trial, a jury found Watson guilty of armed robbery. He was sentenced to forty years' imprisonment. Watson appeals the trial court's order denying his motion to suppress and judgment of conviction.

B. Attempted Armed Robbery

Watson was also charged with attempted armed robbery in violation of §§ 943.32(1) and (2) and 939.32, STATS. The charges arise from allegations that Watson attempted to rob another Brown County gas station. A store employee, Trevor Zadow, reported that Watson entered the store holding a long, thin kitchen knife. When Watson told Zadow to turn off the lights, Zadow informed Watson that he could not turn them off because they were hooked to the alarm. Watson was going to take the money out of the cash register when a car pulled up to the store. Zadow struggled with Watson, and Watson ran out the door.

Watson entered a plea of no contest to the charge of attempted armed robbery in accordance with the following plea agreement:

> My understanding of the plea agreement is that the State would dismiss a theft charge that's pending in case number 96-CF-1676. In exchange my client would enter a plea to attempted armed robbery. The State would recommend that the sentence on the attempted armed robbery would run concurrent to a conviction for an armed robbery that occurred last week in Judge Atkinson's court.
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> Also, I understand that the sentence on this attempted armed robbery, according to the State, the State would recommend that the sentence be no greater then the armed robbery sentence that's pending in Branch 8. Additionally, it's my understanding that the State would not charge a robbery charge from a Super America store on East Mason Street that allegedly occurred two years ago.

At sentencing, the State recommended a sentence of eighteen years, concurrent to the sentence Judge Atkinson imposed for the armed robbery. The State emphasized that imposing a concurrent sentence was not an inutile gesture:

> In this case, I don't think it is a waste. First of all, the sentence that he received from Judge Atkinson is a very long and substantial sentence, but above and beyond that, that sentence was a result of a jury trial. There was motion practice in that case. I don't think any errors were committed by Judge Atkinson or anyone else, but I think by sentencing him in a concurrent fashion, you give the community some assurance that if that sentence is ever reversed and vacated, he will still have a substantial sentence to serve as a result of the sentence imposed by this Court, and that's why I'm asking you to impose a sentence in a concurrent fashion.
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> Above and beyond that, I think the 40 years sentence that would be consecutive to his parole would give him an opportunity to apply for parole in slightly more than ten years. I think that's reasonable. I think he should have that opportunity to apply for parole. Not withstanding his horrible record, but I think – I asked for the 40-year sentence, and I think it was appropriate, but I don't think this Court should sentence him to any type of a consecutive sentence. I think a concurrent sentence for the number that

> I've suggested would be completely appropriate and consistent with all of the sentencing goals that I have mentioned.

The State, in support of its sentencing recommendation, emphasized the seriousness of Watson's offense, the impact on the community, his in-depth criminal history, compulsion to commit violent crimes and inability to rehabilitate himself.

Watson filed a motion for postconviction relief claiming that the State breached its plea agreement because its statements at the sentencing hearing did not support the sentence it recommended. He appeals the trial court's denial of his motion for postconviction relief.

II. ANALYSIS

A. Voluntary Consent

Watson first argues that the trial court erred by denying his motion to suppress. Specifically, he contends that his wife involuntarily consented to the search of their residence. Whether consent to a search was voluntary is an issue of "constitutional fact." *See* ***State v. Phillips***, 218 Wis.2d 180, 577 N.W.2d 794 (1998).

> The standard of review by the appellate court of the trial court's findings of evidentiary or historical facts is that those findings will not be upset on appeal unless they are contrary to the great weight and clear preponderance of the evidence. This standard of review does not apply, however, to the trial court's determination of constitutional questions. Instead, the appellate court independently determines the questions of "constitutional" fact.

Id. at 190, 577 N.W.2d at 799 (quoted source omitted).

We must first determine whether the trial court's findings of fact are contrary to the great weight and clear preponderance of the evidence. The trial court relied on Haglund's and Molitor's testimony in concluding that Lynn Watson's consent was voluntary. The trial court held that, "I am satisfied by the credible testimony of Officers Haglund and Molitor that the defendant's wife at the time, Lynn Watson, voluntarily executed Exhibit No. 1 to give consent to search the premises …."

Watson's challenge to the search and seizure rests upon the following: Lynn alleged that the officers threatened that if she would not give consent, they would get a search warrant and beat down her door. She also contends that the officers became rude toward the end of the search and told her they should take a picture of her residence and send it to social services so her kids will get taken away. Lynn further claims that Haglund was "snotty" and stated that "I better wake up and realize what kind of husband I really married." She asserts that she felt pressured and that she had to let the officers in her home or they would get a search warrant and break down her door. In many other respects, her testimony corresponded with the officers'.

Both officers testified to the following facts. They approached Lynn at her mother's home, fully informed her of the basic nature of their investigation, and that Lynn voluntarily consented to the search of her home. When the parties arrived at the Watson residence, Lynn signed the voluntary consent form and opened the door to let the officers into her apartment. Lynn stated that she had no problem with the officers taking the articles of clothing and even retrieved the green denim jacket for them. She was very cooperative and told the officers that if they needed anything else she would be glad to cooperate. The officers testified that they did inform her that if she did not consent to the search they would apply

for a search warrant. They did not, however, threaten that if she did not consent they would break down her door or call social services to view her messy house. They testified that at no time did they become threatening or aggressive with Lynn. The officers additionally testified that they did not make the statement that, "Do you realize what kind of a husband you married?"

The trial court found the officers' testimony more credible. *See* ***State v. Nehls***, 111 Wis.2d 594, 599, 331 N.W.2d 603, 605 (Ct. App. 1983). We will not disturb the trial court's credibility finding when it heard the witnesses' testimony and observed their demeanor and decided to believe the officers over Lynn. *See* ***id***. Therefore, we conclude that the trial court's findings of historical fact were not against the great weight and clear preponderance of the evidence. *See* ***id***.

Next, after independently reviewing the historical facts, we conclude that Lynn's consent to search the Watson residence was voluntary. The burden is on the State to prove by clear and convincing evidence that Lynn's consent was voluntary. *See* ***Phillips***, 218 Wis.2d at 197-98, 577 N.W.2d at 802.

> 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.

Id. (Quoted sources omitted.)

Looking at the totality of the circumstances, the evidence presented evinces that the officers did not use any misrepresentations, deception or trickery to convince Lynn to give her consent to search the apartment. *See* ***id***. at 198, 577

N.W.2d at 802. The officers testified that they fully informed her as to the charges against her husband and the reason for their search. Moreover, there is no evidence that the officers threatened, physically intimidated or punished Lynn. *See* ***id***. at 199, 577 N.W.2d at 803. The officers testified that they did not become coercive or aggressive. They stressed that they did not threaten to knock down her door, nor did they threaten to call social services. Furthermore, the evidence establishes that the search of the home took place over non-threatening, cooperative conditions. *See* ***id***. at 200, 577 N.W.2d at 803. Lynn let the officers into the apartment. She agreed to cooperate and informed them that if they needed anything she would be willing to assist, which she later demonstrated by voluntarily retrieving the green denim jacket for the officers. *See* ***Nehls***, 111 Wis.2d at 599, 331 N.W.2d at 605-06 (a circumstance the court may consider when trying to determine whether consent was voluntarily given is whether the "consenter" assisted in the search). Finally, we do not see any of Lynn's characteristics, such as age, intelligence, education, physical and emotional condition, and prior experience with police, which would suggest involuntary consent. *See* ***Phillips***, 218 Wis.2d at 202, 577 N.W.2d at 804.

B. Breach of Plea Agreement

Watson claims that the State violated the spirit of the plea agreement by preceding its recommendation of a concurrent sentence with a lengthy recitation of aggravating factors. When the facts are undisputed, whether the State's conduct breached the plea agreement is a question of law that we review de novo. ***State v. Wills***, 193 Wis.2d 273, 277, 533 N.W.2d 165, 166 (1995).

A defendant has a constitutional right to enforce a negotiated plea agreement. ***State v. Smith***, 207 Wis.2d 258, 271, 558 N.W.2d 379, 385 (1997). "Although a defendant has no right to call upon the prosecution to perform while the agreement is wholly executory, once the defendant has given up his bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled." ***Id***. A plea agreement is breached when the prosecutor does not make the negotiated sentencing recommendation. ***Id***. at 272, 558 N.W.2d at 385. Moreover, "the state may not accomplish 'through indirect means what it promised not to do directly,' i.e., convey a message to the trial court that a defendant's actions warrant a more severe sentence than that recommended." ***State v. Ferguson***, 166 Wis.2d 317, 322, 479 N.W.2d 241, 243 (Ct. App. 1991) (quoted source omitted). There is no requirement, however, that the State give an "enthusiastic recommendation" of the plea agreement. ***Id***. at 322 n.2, 479 N.W.2d at 243 n.2.

At the sentencing hearing, the prosecutor presented the court with the following aggravating factors to support its sentencing recommendation. The prosecutor stressed that:

> [T]he crime for which Mr. Watson is to be sentenced is, of course, a very serious crime, not withstanding that fact that it was an attempted armed robbery as opposed to a completed armed robbery ….
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> I believe that this crime would have a significant impact on Mr. Zadow ….
>
> ….
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> … the fact that he was injured, I think, really underscores the dangerousness of the conduct. … Mr. Zadow was placed at great risk.

The prosecutor further emphasized Watson's compulsion and lack of deterrence in committing these crimes,

> To me, when I look at his record and I look at his background, the fact that he got paroled from prison in a year – I mean, it was a chance of a lifetime that was given to him to return to his family, be with his children, to take care of them. And he just squandered that. He was not able to stay free from crime for even five months without committing serious crimes. Again, my sense is that these crimes are almost a compulsion. The result of a compulsion, I should say.
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> ….
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> We get back to the notion of deterrence, and three prison sentences of five years a piece did not have any effect on him. I don't know a sentence that could be imposed by this Court is going to have much impact.
>
> Rehabilitation, of course, is a very important factor for the Court to consider. Frankly, I think he's had many opportunities to – for rehabilitation, none of them have worked, and it's obvious inasmuch as he's now being convicted of – he's now standing before you to be convicted for an attempted armed robbery. I don't know whether or not the prison sentence can help Mr. Watson.
> …
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> Another consideration which I think is just critical is protection of the public. I think the public needs to be protected from Mr. Watson. He does not seem to be able to stop committing violent crimes and these armed robberies are, or attempted armed robberies, that background, that situation always gives rise to people being injured and hurt, regardless of whether a gun or knife is used.

A plea agreement does not estop the State from informing the court of aggravating factors in support of a lengthy sentence. ***Ferguson***, 166 Wis.2d at 324, 479 N.W.2d at 244. "At sentencing, pertinent factors relating to the defendant's character and behavioral pattern cannot be 'immunized by a plea agreement between the defendant and the state.'" ***Id***. (Quoted source omitted.) The primary factors the court must consider in sentencing are the nature of the

crime, the character of the defendant, and the rights of the public. ***Id***. at 325, 479 N.W.2d at 245. As long as the spirit of the plea agreement was not violated the State could put before the court any information supporting its argument for an eighteen-year prison term. ***State v. Voss***, 205 Wis.2d 586, 595, 556 N.W.2d 433, 436 (Ct. App. 1996).

Here, the State's reference to aggravating factors before its sentence recommendation was not a breach of the plea agreement, but merely to support its eighteen-year sentence recommendation. As in ***Ferguson***, the prosecutor had the "unenviable task" of convincing the sentencing court that Watson's actions were such that he deserved an eighteen-year sentence but that it should be served concurrently with a forty-year sentence for an armed robbery at the SuperAmerica. The trial court found that the prosecutor made his recommendation in earnest.[1] Not only did he recommend a concurrent sentence, but he carefully explained to the Court why it did not feel a concurrent sentence would be a "waste" due to Watson's past criminal history. Thus, we conclude that the State did not breach the plea agreement by presenting aggravating factors in support of its sentencing recommendation.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.

[1] The trial court observed, "I'm confident that Attorney Luetscher sincerely recommended a concurrent sentence in this case. I'm confident that he complied with the plea agreement."