**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

April 4, 2000

**Cornelia G. Clark**
**Acting Clerk, Court of Appeals**
**of Wisconsin**



**Nos. 98-3382-CR & 98-3383-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JEFFREY KROHN,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments and orders of the circuit court for Milwaukee County: MICHAEL J. BARRON, Judge, and RAYMOND E. GIERINGER,[1] Reserve Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

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[1] Judge Michael J. Barron entered the order denying the motion to suppress, the original judgments of conviction and the order denying Krohn's motion for sentence credit. Judge Raymond E. Gieringer entered the orders denying Krohn's motions for postconviction relief.

¶1 PER CURIAM. Jeffrey Krohn appeals the judgments of conviction for three counts of burglary and from the postconviction orders reaffirming the denial of his motion to suppress. Krohn claims that the trial court erred when it did not suppress evidence of crimes found by the police during a warrantless search of his property that he had stored at a friend's residence. He also claims that the trial court erred when it failed to suppress evidence of crimes found during the execution of a search warrant at a storage locker he rented. Krohn argues that the warrantless search and seizure of property he had stored at Janine Vierthaler's was unlawful because Vierthaler's consent to search the property was invalid and he had a reasonable expectation of privacy in the stored belongings, under the Fourth Amendment. Krohn also claims that since this seized property formed the basis for the search warrant permitting the search of his rented storage locker, the evidence found in the locker was "tainted" and it, too, should have been suppressed. We affirm.

## I. BACKGROUND.

¶2 Krohn asked Vierthaler if he could store some cardboard boxes and other material in her garage. She agreed and the two signed a written contract on November 3, 1995. One of the terms of the contract required Krohn to pay Vierthaler $100 per month as rent. Krohn never paid Vierthaler any of the money called for in the contract and, in late December, Vierthaler moved Krohn's property out of her garage and into the yard. After earlier attempts at getting Krohn to remove his belongings were unsuccessful, Vierthaler spoke to Krohn on January 14, 1996, and advised him that if he did not remove his property, she would place it with her trash the next day.

¶3 Contemporaneous with these events, West Allis Detective Luanne Gracyalny was investigating several burglaries that occurred in West Allis on November 3, 1995, December 27, 1995, and January 6, 1996. All of the burglaries were of company offices located within three office buildings. During these burglaries, phones, phone equipment and installation materials, along with computer and computer-related materials, were stolen. The investigation revealed that in each instance, keys were missing and none of the buildings' exterior doors showed signs of forced entry.

¶4 Detective Gracyalny learned that Krohn operated two companies, U.S. Bell and Digicom, and that these companies were engaged in the business of installing phones and related equipment. Detective Gracyalny's investigation also uncovered the fact that Krohn had recently been arrested for the theft of a telephone system in another municipality. As a result, Detective Gracyalny obtained Krohn's picture and showed it to several witnesses. Krohn was identified as the man claiming to be an electrical contractor who was seen in an empty office located next to the burglarized office on the day before the burglary. Another witness, who worked in a different burglarized building and who claimed to know by sight everyone who worked there, identified Krohn as the stranger whom she saw entering the basement of the building on the day of the burglary. This witness also identified Krohn's car as the one she saw outside the building at the same time.

¶5 Armed with this knowledge, Detective Gracyalny attempted to find Krohn and, on January 14, 1996, he called Vierthaler, whom he believed to be Krohn's friend, to discuss Krohn's whereabouts. During this phone conversation, Vierthaler informed Detective Gracyalny that she had recently phoned Krohn and told him that he needed to remove his property from her yard by January 15, the

next day, or she would dispose of it. Detective Gracyalny asked if he could come to Vierthaler's house and look through the boxes and the other materials. Vierthaler gave her consent. While en route to Vierthaler's home, Detective Gracyalny received a phone call from Vierthaler telling him that Krohn was currently at her home retrieving his property. Detective Gracyalny parked his car some distance from Vierthaler's residence and watched as Krohn stuffed many of the boxes into his car and drove off. Detective Gracyalny followed Krohn to a mini-warehouse where Krohn put the items into a storage locker.

¶6 After observing Krohn place the boxes in the storage locker, Detective Gracyalny returned to Vierthaler' home and waited for Krohn to return to retrieve the remaining material. When Krohn did not return within an hour, Detective Gracyalny, relying on Vierthaler's consent, searched through the remaining boxes and seized various items which were positively identified as coming from the November 3 and December 27 burglaries.

¶7 The next day, Detective Gracyalny obtained a search warrant for Krohn's storage locker, and seized additional items that linked Krohn to the earlier crimes. After executing the search warrant, Detective Gracyalny left a note at the storage locker instructing Krohn to contact him. When Krohn failed to do so, Detective Gracyalny traced one of the phone numbers used by Krohn to a local business. There, he discovered that the owner had contracted with Krohn for the installation of a phone system in the store in exchange for Krohn's being allowed to install a voice mail system for his businesses at the store. When Detective Gracyalny saw the voice mail system, he seized it because it matched one that had been reported stolen in the burglaries. The voice mail system was later identified as property stolen in one of the burglaries.

¶8 On November 8, 1996, Krohn was charged with three counts of burglary, one count of forgery-uttering and one count of theft by fraud.[2] On September 19, 1997, Krohn was charged with an additional count of burglary.[3] Krohn filed a motion to suppress the evidence seized from both Vierthaler's home and the storage locker. The trial court denied the motion, concluding that, under the totality of the circumstances, Krohn had failed to prove that he had a reasonable expectation of privacy in the boxes located at Vierthaler's premises. Consequently, the trial court also determined that the search warrant was valid. The trial court further concluded that Detective Gracyalny had ample evidence to obtain a search warrant for the storage locker without the evidence obtained at Vierthaler's home.

¶9 On December 2, 1997, Krohn pled no contest to two of the burglary counts charged in the original complaint, and the remaining counts were dismissed. He also pled no contest to the burglary charged in the later complaint. With respect to the first two burglary charges, the trial court sentenced him to eighty months' imprisonment on each count, to be served consecutively. On the later burglary charge the trial court sentenced Krohn to ten years' imprisonment, but stayed that sentence and placed Krohn on probation for ten years, consecutive to the other sentences.

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[2] The forgery-uttering and theft by fraud charges concern events unrelated to the burglaries.

[3] Krohn was charged in two separate cases that were consolidated for trial. Although Krohn appeals the three burglary counts on which he was convicted, he does not appear to challenge the search that produced the evidence which led to the burglary charge that occurred on January 6, 1996. The evidence for that charge was not obtained during the warrantless search or the search authorized by the warrant. Rather, it was obtained after the owner of the mini-warehouse discovered Krohn's belongings in a separate storage locker never rented to Krohn. The owner then called the police and the police discovered evidence of the January 6, 1996, burglary.

## II. ANALYSIS.

1. *The search of Krohn's property stored at Vierthaler's premises was proper.*

¶10 Krohn argues that the search of his property left at Vierthaler's premises violated the Fourth Amendment because Vierthaler did not have authority to consent to the search and Krohn had an expectation of privacy in his property. Whether evidence should be suppressed because it was obtained in violation of the Fourth Amendment is a question of constitutional fact that this court reviews under a two-step standard of review. *See* ***State v. Phillips***, 218 Wis. 2d 180, 189-90, 577 N.W.2d 794 (1998). First, the trial court's findings of evidentiary or historical fact will be accepted by this court and may not be upset unless they are contrary to the great weight and clear preponderance of the evidence. *See* ***id.*** at 190 (citation omitted). We then independently apply constitutional principles to the facts as found by the trial court. *See* ***id.***

¶11 As noted, the property found at Vierthaler's residence was seized without a warrant. In a challenge to a warrantless search, the burden of proving that the search was reasonable and complies with the Fourth Amendment falls on the State. *See* ***State v. Keiffer***, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998). The State bears that burden of proof by clear and convincing evidence. *See* ***id.*** at 542; *see also* ***Illinois v. Rodriguez***, 497 U.S. 177, 181 (1990). The trial court, after considering all the circumstances, determined that Krohn did not have a reasonable expectation of privacy in his belongings left at Vierthaler's premises.

We agree.[4] Further, our review of the record satisfies us that the search was proper because Detective Gracyalny obtained Vierthaler's consent to search Krohn's belongings found on her property and Vierthaler had actual authority to consent to the search.

¶12 In ***Schneckloth v. Bustamonte***, 412 U.S. 218 (1973), the Supreme Court reaffirmed the principle that the search of property, without a warrant and without probable cause, but with proper consent voluntarily given, is valid under the Fourth Amendment. *See* ***id.*** at 219. Determining whether the warrantless search of Krohn's belongings was lawful, based upon Vierthaler's consent, requires us to determine whether Vierthaler had the authority to consent to Detective Gracyalny's search of the property. *See* ***Keiffer***, 217 Wis. 2d at 541-42. In establishing actual authority, the State must establish that the consenting individual's relationship to the premises to be searched is sufficient. *See* ***United States v. Matlock***, 415 U.S. at 164, 171 n.7 (1974).

¶13 Krohn contends that Vierthaler did not have the authority to consent to the search of his property because the case law permits third-party consent searches only when the party consenting to the search is a mutual user of the property. Krohn submits that, since he and Vierthaler did not have mutual use of the land where the boxes were stored, Vierthaler had no authority to consent to a search of the boxes. Krohn is wrong.

[4] Although we do not decide the case on this theory, we note that a strong argument can be made that Krohn abandoned the property, and therefore, Krohn had no standing to object to the search. One can have no expectation of privacy for abandoned property. *See* ***State v. Bauer***, 127 Wis. 2d 401, 407, 379 N.W.2d 895 (Ct. App. 1985) (warrantless seizure of property whose owner has abandoned it or requested another to destroy or get rid of it does not violate the Fourth Amendment).

¶14 Here, Krohn never shared authority with Vierthaler for the real estate where the items were stored; Vierthaler owned the property outright. Thus, Krohn had no interest in the property where the goods were stored, and he had no right to enter Vierthaler's premises without her permission. It is undisputed that even when the property was stored in the garage, Krohn had no garage key and that he was required to seek admittance through Vierthaler.

¶15 Krohn confuses this case with those where parties have mutual access to a premises. Krohn had no mutual access with Vierthaler to the property. Thus, the cases dealing with mutual access are not dispositive. We conclude that the State has successfully established that Vierthaler's relationship to the property was substantial, as she was the owner of the property. As a consequence, we are satisfied that Vierthaler had actual authority to consent to the search of the boxes located in her backyard, particularly when it is arguable that the items were no longer legally on her property.

¶16 The next issue is whether Krohn had a reasonable expectation of privacy in the property left at Vierthaler's. As noted, after Krohn failed to pay the monthly fee, Vierthaler removed his property from the garage and placed Krohn's belongings in her backyard. Krohn was notified that his belongings had been moved outside of the garage and into the yard. Despite this knowledge, he allowed the items to remain there for over two weeks, in the middle of winter, before he retrieved them. Krohn's actions are not those of a person interested in protecting his property or claiming privacy over his belongings.

¶17 Krohn took no precautions that one who is expecting privacy would ordinarily take. Indeed, it was Vierthaler, not Krohn, who placed a blanket over the top of the boxes to protect them from the snow. Krohn failed to protect the

boxes from the elements or ask Vierthaler to protect them, and he did not secure his property against possible theft or observation by passers-by. Moreover, the contract stated that if the money was not paid, Vierthaler could sell or dispose of the property. As the trial court observed, Krohn originally "did have a property interest in the items seized," but the trial court concluded that "[Krohn] knew for two months that he hadn't paid Janine and that she had the right under their contract to do with the items as she so pleased if he did not honor the agreement…. This was true any time after November 10th." Thus, we conclude that Krohn had no expectation of privacy in the property.

¶18 Although no Wisconsin case is exactly on point, an Indiana case, ***Taylor v. State***, 587 N.E.2d 1293 (Ind. 1992), comes closest to the facts here. There, Taylor called a friend and asked him to remove a file cabinet from his garage. The friend obliged and removed the file cabinet to another location. After Taylor was charged with murder, the police obtained the consent of Taylor's friend to search the file cabinet. Taylor challenged this consent search. The trial court, in denying Taylor's motion to suppress the documents seized from the file cabinet, relied on ***United States v. Sellers***, 667 F.2d 1123 (4th Cir. 1981), when it determined that the discovered documents were admissible. The Indiana Supreme Court affirmed the trial court's ruling. The ***Sellers*** case holds:

> Valid third-party consent to a search may be given by one who "shares with the absent target of the search a common authority over, general access to, or mutual use of the place or object sought to be inspected under circumstances that make it reasonable to believe that the third person has the right to permit the inspection in his own right and that the absent target has assumed the risk that the third person may grant this permission to others." Moreover, whenever one "knowingly exposes his activities [or effects] to third parties, he surrenders Fourth Amendment protections" in favor of such activities or effects.

***Id.*** at 1126 (citations omitted).

¶19 Here, Vierthaler had general access to Krohn's boxes left on her property. Thus, it was reasonable for her to believe that she could consent to a search of the boxes, particularly when Krohn reneged on the rental contract and delayed retrieving the boxes. Thus, we are satisfied that Krohn had no reasonable expectation of privacy for his belongings that would have prohibited Vierthaler from validly consenting to their search.

¶20 Krohn also argues that Detective Gracyalny's reliance on Vierthaler's apparent authority was unreasonable. Since we have determined that Vierthaler had actual authority, we decline to address this issue. Because of our decision on this first issue, it is not necessary for us to address the remaining arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

2. *There was probable cause for issuance of the search warrant.*

¶21 Krohn next argues that the evidence seized at the storage locker pursuant to the search warrant obtained by Detective Gracyalny should be suppressed. Krohn claims this is so because the warrantless search of his property found at Vierthaler's was unlawful, and thus, the items seized at the mini-warehouse covered by the search warrant are, under ***Wong Sun v. United States***, 371 U.S. 471 (1963), the "fruit of the poisonous tree," and are inadmissible.

¶22 The statutory requirements for issuance of a search warrant can be found in WIS. STAT. § 968.12. The statute permits a judge to issue a search warrant if probable cause is shown. *See* WIS. STAT. § 968.12(3)(c). Probable

cause exists if the totality of the circumstances suggests that the objects linked to the commission of a crime are likely to be found in the place designated in the warrant. *See* ***State v. Ehnert***, 160 Wis. 2d 464, 470, 466 N.W.2d 237 (Ct. App. 1991). Upon review, this court is obligated to give great deference to the warrant-issuing judge's determination of probable cause. *See* ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991).

¶23 Here, the fact that the consensual search of the boxes located at Vierthaler's yielded property stolen in the burglaries strongly suggested that the additional boxes retrieved by Krohn and stored in a locker would contain additional evidence of those crimes. Thus, probable cause existed for the search of the locker; there was no "taint," and we are satisfied that the court commissioner's issuance of the search warrant was proper. Moreover, as the trial court noted, Detective Gracyalny had ample evidence to support probable cause and to secure a search warrant for the storage locker without the evidence obtained at Vierthaler's. Detective Gracyalny had two eyewitnesses who placed Krohn at the scene of two separate crime scenes. Detective Gracyalny also knew that the items stolen were of a type that could be used in Krohn's business, and that Krohn had been arrested for a similar crime. Finally, the boxes moved by Krohn to the locker and stored at Vierthaler's house were of a size and shape that could contain the stolen property. Thus, under either theory, we are satisfied that the magistrate correctly determined that there was probable cause to issue a search warrant for Krohn's locker.

¶24 Finally, Krohn posits that the search warrant was overbroad and defective. He submits that the search warrant that permitted the police to seize the generically described "phone and computer equipment" and "paperwork and receipt's [sic] for above" violated the particularity requirement for search warrants

set out in ***State v. Noll***, 116 Wis. 2d 443, 343 N.W.2d 391 (1984). We decline to address these issues as Krohn raises them for the first time in his appellate brief. *See* ***State v. Rogers***, 196 Wis. 2d 817, 828-29, 539 N.W.2d 897 (Ct. App. 1995) (failure to raise a specific challenge in the trial court waives the right to raise them on appeal).[5] Accordingly, we affirm.

*By the Court*.—Judgments and orders affirmed.

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

[5] The State also argues that we should refuse to entertain this claim because Krohn has not included the search warrant and affidavit in support of the search warrant in the appellate record. The State points out that when an appellate record is incomplete in connection with an issue raised by the appellant, this court, pursuant to ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993), must assume that the missing material supports the trial court's ruling.