COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 1999

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. 99-0845-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM H. FOUCAULT,

DEFENDANT-APPELLANT.

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUDITH N. FOUCAULT,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Kewaunee County: DENNIS J. MLEZIVA, Judge. *Affirmed.*

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

¶1 PER CURIAM. William and Judith Foucault appeal their judgments of conviction for manufacturing marijuana contrary to §161.41(1)(h)1, STATS., 1993-94. They claim the trial court failed to make sufficient findings of fact to support its conclusion that a search of their residence was consensual. We disagree and affirm the judgments.

FACTS

¶2 After receiving information that the Foucaults had obtained illegal drug-growing equipment, three law enforcement officers went to the Foucaults' residence to investigate. When they arrived, William Foucault was outside, preparing to leave for work. The officers approached him, identified themselves, and began asking questions concerning the suspected marijuana growing operation.

¶3 William Foucault eventually admitted to growing marijuana plants and gave the officers consent to search his house. The search resulted in the recovery of marijuana and drug paraphernalia. The Foucaults filed motions to suppress evidence, claiming that Foucault's consent to the search was not voluntary. Specifically, the Foucaults claimed that the officers threatened William Foucault in order to procure his consent.

¶4 The circumstances surrounding William Foucault's consent to search his house were disputed at the suppression hearing. William Foucault testified that he originally denied that he was growing marijuana. He testified that he told

the officers that he needed to leave for work and would not allow them to search his home. He further testified that he only admitted to growing marijuana and consented to the search after the officers threatened him. He claimed that the officers threatened that if he would not consent to their search he would be arrested, the officers would get a search warrant and then return to search and "tear [the] house apart."

¶5 The three officers testified consistently with one another, but told a different version from William Foucault. They testified that relatively early in their discussion outside the residence, William Foucault admitted he was growing marijuana plants and voluntarily allowed the officers to enter his house to search. Before the search began, however, William Foucault called an attorney. While he talked to his attorney, one of the officers contacted the district attorney's office and was advised that the officers had probable cause to arrest the Foucaults based on William Foucault's earlier incriminating admissions. When William Foucault finished his phone call, he asked the officers to leave. The officers then informed the Foucaults that they would be arrested if they would not consent to the search of their home and William Foucault consented.

¶6 The trial court found that the officers' testimony was credible and that they did not act improperly in conducting their interview and search. Therefore, it denied the Foucaults' motion to suppress.

STANDARD OF REVIEW

¶7 Voluntariness of consent is a question of constitutional fact, and we generally review a circuit court's determination of this mixed issue of fact and law under the two-step analysis laid out in ***State v. Turner***, 136 Wis.2d 333, 343-44, 401 N.W.2d 827, 832-33 (1987); *see also* ***State v. Phillips***, 218 Wis.2d 180, 192-

93, 577 N.W.2d 794, 800 (1998). In this case, however, the Foucaults have only challenged the sufficiency of the trial court's factual findings. We will not upset the trial court's findings of evidentiary or historical fact "unless those findings are contrary to the great weight and clear preponderance of the evidence." ***Phillips***, 218 Wis.2d at 194-95, 577 N.W.2d at 801. Credibility determinations will not be overturned unless patently or inherently incredible, or in conflict with the laws of nature or conceded facts. *See* ***Chapman v. State***, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975).

ANALYSIS

¶8 The Fourth Amendment requires that the State demonstrate, by clear and convincing evidence, that the consent was voluntarily given. *See* ***Phillips,*** 218 Wis.2d at 196-97, 577 N.W.2d at 802.

¶9 The Foucaults argue that the trial court failed to develop the essential factual issue of whether "the police had probable cause for a search warrant at the time the [officers made threats about arresting William Foucault]." If the officers had probable cause when they threatened to arrest them, the Foucaults concede the search was legal. However, if the officers did not have probable cause when they threatened to arrest William Foucault, the search was illegal. They argue that this was a critical issue and that the case should be remanded for the court to make this finding.

¶10 We conclude, however, that the trial court did make this factual finding. It found that the officers' testimony was "clear" and "credible." As the Foucaults themselves acknowledge, the only significant difference between the officers' and the Foucaults' testimony was regarding the time when the officers threatened William Foucault with arrest. The officers testified that they only

threatened William Foucault after he incriminated himself, while he testified that the threats induced him to incriminate himself. This conflict required the trial court to make a determination of credibility. The trial court made this determination by continually describing the officers' testimony as credible. Because the trial court chose to accept the officers' testimony and not William Foucault's, it implicitly found that he incriminated himself before he was threatened with arrest. Credibility determinations will not be overturned unless patently or inherently incredible, or in conflict with the laws of nature or conceded facts. *See* ***Chapman***, 69 Wis.2d at 583, 230 N.W.2d at 825. Here, the officers' testimony was not deficient in any of these manners.

¶11 There is additional evidence that the trial court made the requisite factual findings. While acknowledging that police may within reasonable bounds use misrepresentations, tricks and other methods of deception to obtain evidence, the court explicitly found that in this case "none of that was done." The court also stated that it must determine "whether or not there was any improper police practice used in this case." The court explicitly found there was no improper police procedure. It acknowledged that "[William] Foucault certainly felt pressure from the police, but what the officers did here was not illegal or an improper police practice but was within their authority." If the officers had threatened arrest before they had probable cause, they would have acted improperly. Therefore, these findings also imply that the trial court found that the officers did not threaten the Foucaults with arrest until after William Foucault made the incriminating statements.

¶12 Therefore, we conclude that the trial court made the finding that William Foucault incriminated himself before the officers threatened him with

arrest and that this finding is not against the great weight and clear preponderance of the evidence. *See* ***Phillips***, 218 Wis.2d at 194-95, 577 N.W.2d at 801.

By the Court.—Judgments affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.