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

January 19, 2000

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



**No. 99-1849-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**BRYCE C. NELSON,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Reversed and cause remanded.*

¶1 HOOVER, P.J.[1] The State appeals an order granting Bryce Nelson's motion to suppress evidence. The circuit court concluded that Nelson's roommate had neither actual nor apparent authority to consent to the search of Nelson's room that led to the discovery of marijuana. This court concludes that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1997-98).

the evidence the State produced at the suppression hearing demonstrated the roommate's actual authority and was uncontradicted. Therefore, the order granting Nelson's motion to suppress evidence is reversed and the cause is remanded for further proceedings.

¶2 Officer Charles Golden investigated an anonymous complaint of marijuana odor emanating from an apartment later determined to be leased by Nelson and his roommate, Daniel Dacko. Dacko admitted Golden into the apartment and consented to a search. Golden eventually found a marijuana growing operation in a closet in a room Dacko identified to Golden as Nelson's. Nelson moved to suppress the evidence derived from Golden's search on the basis that Dacko did not have actual authority to consent to a search of his room and that Golden did not have a reasonable basis to believe Dacko had apparent authority to give consent.

¶3 Golden was the only witness at the suppression hearing. Golden testified that when he began his investigation, he did not know who lived in the apartment. Dacko met Golden at the door and when the door opened, Golden smelled a strong odor of marijuana. He asked Dacko for identification, and Dacko admitted Golden while Dacko retrieved his driver's license. While in the apartment's entryway, Golden observed on a table what appeared to be a pipe used for smoking marijuana. When confronted, Dacko admitted that the pipe was his. Golden detected that the pipe had the odor of marijuana.

¶4 Upon Golden's request, Dacko gave Golden permission to search the apartment. When Golden initiated the search, he was not aware that Dacko had

any roommates.[2] During his search, Golden discovered what he referred to as a "bedroom." The lights in this room were turned off, but he could see a bright light emitting from a closet in the room. Golden also detected a strong odor of marijuana. The room was extremely hot compared to the rest of the apartment. Based on these facts, his training and experience, Golden believed the closet may contain a marijuana grow operation.

¶5 There was no bed, mattress or other furniture in the room. There was a pile of clothes in the same closet "where the marijuana was being grown." The officer asked Dacko whose "bedroom" it was, and Dacko indicated it was his roommate's, later identified as Nelson. At some point, Dacko informed Golden that Nelson slept on the couch in the living room.[3]

¶6 Golden placed Dacko under arrest and informed him of his ***Miranda*** rights. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). Dacko then executed a consent to search form. Golden then conducted a more thorough search of the apartment.

¶7 Before searching the closet, Golden asked Dacko "if the room was a common room to he and his roommate," after explaining that "a common area meant that both he and his roommate could go freely in and out of the room any time." According to Golden, Dacko's verbatim response was that whatever was in that room was half his responsibility. He indicated to the officer that he was in and out of that room and took care of the items that were found in the closet.

[2] Golden did not ask Dacko if he had any roommates until after he conducted an initial search of the apartment.

[3] Golden did not indicate when Dacko told him that Nelson slept in the living room or how the subject arose.

Golden asked Dacko if there were areas in the apartment that "either he or his roommate exclusively had to themselves?" Dacko indicated that Nelson did not normally go into Dacko's room, but that they both had permission to go into all of the other rooms.

¶8 The State argued at the hearing that Dacko had apparent authority to consent to the search of the room containing the grow operation. The circuit court determined that the State had failed to meet its burden to prove apparent authority. The court, in ruling from the bench, essentially found that Dacko was not credible. It noted that "the officer testified that he was told that this room belonged to Mr. Nelson.[4] Then there is some other information that is contradictory."[5] The circuit court later rendered findings of fact and conclusions of law as follows:

**FINDINGS OF FACT**

> 1. Daniel Dacko did not have common access to the closet in which the evidence suppressed was located.
>
> 2. Daniel Dacko indicated this room belonged to the defendant.
>
> 3. Daniel Dacko gave inconsistent information regarding whose room it was and who had access to the room.
>
> 4. Daniel Dacko was not a credible individual as conceded by the State at the hearing.
>
> 5. Daniel Dacko's information regarding his alleged right to access defendant's room was not adequately investigated.

[4] The circuit court did not indicate during its oral ruling whether it found this statement inconsistent with Dacko's latter assertion that he had common access to the room, that Nelson slept in the living room, or both.

[5] The circuit court did not elaborate. Presumably the court was referring to Golden's testimony that when he arrived at the apartment and advised Dacko of the complaint he was investigating, Dacko initially denied any knowledge of marijuana being smoked in the apartment. Later he admitted that friends had been smoking there.

**CONCLUSIONS OF LAW**

1. Daniel Dacko did not have actual authority to consent to the search of defendant's room.

2. The officer did not have a reasonable basis to conclude that Daniel Dacko had apparent authority to consent to the search of the defendant's room.

On these findings and conclusions, the circuit court granted Nelson's motion to suppress the evidence seized pursuant to Dacko's consent.

STANDARD OF REVIEW

¶9 Whether a search or seizure is reasonable under the Fourth Amendment is a question of constitutional fact. This court decides constitutional questions independently, benefiting from the analysis of the circuit court. *See* ***State v. Kieffer***, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998). In reviewing an order suppressing evidence, appellate courts will uphold findings of evidentiary or historical fact unless they are clearly erroneous. ***Id***.

ANALYSIS

¶10 Warrantless searches are "per se" unreasonable and are subject to limited exceptions, *see* ***Katz v. United States***, 389 U.S. 347, 357 (1967), including valid third-party consent. *See* ***Kelly v. State***, 75 Wis. 2d 303, 314, 249 N.W.2d 800 (1977). The State has the burden to prove by clear and convincing evidence that a warrantless search was reasonable and in compliance with the Fourth Amendment. ***Id***. at 316. The State must establish the sufficiency of the consenting individual's relationship to the premises to be searched. *See* ***United States v. Matlock***, 415 U.S. 164, 171 (1974). Consent is determined by an objective standard: would the facts available to the officer warrant a person of

reasonable caution to believe the consenting party had authority over the premises? ***Illinois v. Rodriguez***, 497 U.S. 177, 188 (1990).

¶11 The State first asserts that Dacko had actual, shared authority with Nelson to consent to a search of Nelson's room. Alternatively, it contends that Golden reasonably believed Dacko had apparent authority to consent to the search. Because this court agrees that the evidence of actual authority is uncontradicted, this court need not address the State's alternative argument.[6]

¶12 The circuit court found that in response to the officer's inquiry, Dacko identified the room as Nelson's. Dacko also said that he had free access to the room. From this the court found that Dacko gave inconsistent information regarding whose room it was and who had access to it. Presumably, the circuit court's first written finding, that Dacko did not have common access to the closet, derived from this "inconsistency." The court's inferential finding is clearly erroneous. First, considering the court's use of the word "inconsistent" literally, Dacko did not give conflicting information regarding whose room it was or who had access. There is no evidence in the record that Dacko ever claimed that the room was other than Nelson's bedroom but that Nelson did not use it as such. Further, Dacko never claimed other than that he had free access thereto and to the closet within. Thus, the statements Dacko made regarding whose bedroom it was and his free access thereto remained consistent.

[6] Similarly, this court declines to consider Nelson's argument that the State failed to prove that Dacko's consent to the search was voluntary. As a general rule, appellate courts will not decide issues that have not first been raised in the trial court. ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). There is no reason to decide the issue in this case because Nelson concedes that "[t]he issue at hand is not so much the *voluntariness* of the consent, but the *authority* of Dacko to give it." (Nelson's emphasis.)

¶13 The foregoing, however, may beg the circuit court's intended point. Nelson argues that the court considered self-contradictory Dacko's statement that the room containing the grow operation was Nelson's bedroom and that Dacko had free access to the room and closet. When more than one inference can be drawn from the facts, this court must accept the inference drawn by the trial court as long as it is reasonable. *See* ***State v. Friday***, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989). The inference the circuit court drew, that because it was another's bedroom Dacko did not have free access to the room and closet, is not a reasonable inference under the undisputed evidence in this case. The statements that the room was Nelson's and that Dacko had free access are not inherently inconsistent. The room was being used as a place to grow marijuana, not as a bedroom, as established by what was and was not present in the room. Dacko's statement to Golden that Nelson sleeps on the couch in the living room was uncontradicted, as was his claim to free access. Indeed, Dacko's effective admission to Golden of joint ownership of the grow operation inferentially supports his claim of common access. Thus, while it is reasonable to presume that one's roommate does not have free access to one's bedroom, there is no legal or logical reason why the presumption may not be, and here was, overcome by unrefuted testimony.

¶14 In summary, the uncontroverted evidence adduced at the suppression hearing conclusively established that Dacko had actual authority to consent to a search of the grow operation room. Therefore, the order granting Nelson's motion to suppress evidence is reversed and the cause is remanded for further proceedings.

*By the Court.*—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.