COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1267-CR **Cir. Ct. No. 00-CF-55**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CAIN WISKOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Trempealeau County: ROBERT W. RADCLIFFE, Judge. *Affirmed*.

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

¶1 PER CURIAM. Cain Wiskow appeals a judgment convicting him of burglary to a dwelling as a repeater, contrary to WIS. STAT. § 943.10(1)(a).[1] He

[1] All statutory references are to the 1999-2000 version unless otherwise indicated.

argues that the trial court erroneously denied his suppression motion because a warrantless search of his room violated his Fourth Amendment rights. Because Wiskow's mother validly consented to the search, we reject his arguments and affirm the judgment.

¶2 After Wiskow was released from prison, he stayed at the home where his mother, Debra Wiskow, lived with her boyfriend. Although her boyfriend owned the home, there is no dispute that Debra acted as the custodian of the house while her boyfriend, a long distance truck driver, was away.

¶3 Wiskow had not contributed any rent because he was permitted to live there for the first month rent free. He had only been living there for three weeks when he became a suspect in a burglary.

¶4 Gregory Greggerson, the police chief of the City of Osseo, was investigating the burglary when he went to the house where Wiskow lived. He was acquainted with the house and its occupants, having visited it some ten to fifteen times before. When he arrived at the house to investigate the burglary, Wiskow's mother, Debra, answered the door.

¶5 Greggerson explained that Wiskow was a suspect and requested permission to come in and search the premises. Wiskow was not at home at the time, but Debra consented to the search and pointed out the room where Wiskow slept. She accompanied Greggerson to the room. Greggerson asked whether he could search to see if there was any stolen property in the room and Debra said fine, "she wanted it out."

¶6 The room where Wiskow slept served as a passageway to gain entrance to another bedroom in the house where his sister, her child and her

boyfriend slept. Wiskow did not move any furniture or personal property into his room, but there was a mattress on the floor on which he slept. Wiskow testified that the room was never locked because Wiskow was not allowed to prevent his sister, her child and her boyfriend access to their adjoining room. A closet in Wiskow's room had no door and was filled with baby clothes.

¶7 Greggerson found stolen credit cards, a screwdriver and other items under the mattress on the floor. Greggerson returned to Wiskow's house on a later date and searched the basement, finding additional evidence, including stolen coins. On a subsequent date, Debra telephoned Greggerson and asked him to come to the house to pick up additional stolen property she had discovered.

¶8 Wiskow was charged with burglary and brought a motion to suppress evidence derived from Greggerson's searches. The trial court found that Wiskow had no reasonable expectation of privacy because the basement was a common area and the room in which he slept was used by others for storage of their personal effects and served as the only access to another bedroom used by his sister, her child and her boyfriend. The court also stated, that "[t]he only person who apparently acted on behalf of the [house's] owner here is [Wiskow's] mother who readily consented to the search …." The court denied Wiskow's suppression motion. Wiskow pled to the charge and now appeals his judgment of conviction.

¶9 Wiskow argues that the trial court erroneously concluded that he had no reasonable expectation of privacy in his room at his mother's boyfriend's house.[2] He compares his situation to that of the overnight guest in ***Minnesota v.***

[2] Wiskow confines his challenge to the search of his bedroom, on the theory that the subsequent searches were derivative.

Olson, 495 U.S. 91, 96 (1990), whose "status as an overnight guest is alone enough to show that he had an expectation of privacy in the home …." ***Id.*** at 96-97. Wiskow contends that he had an even greater expectation of privacy than that of an overnight guest. We conclude that it is unnecessary to address the issue of Wiskow's privacy expectation because the trial court correctly denied Wiskow's suppression motion on the basis of consent.

¶10 The question whether a search or seizure is reasonable under the Fourth Amendment is a question of constitutional fact. ***State v. Kieffer***, 217 Wis. 2d 531, ¶16, 577 N.W.2d 352 (1998). "Appellate courts decide constitutional questions independently, benefiting from the analysis of the circuit court." ***Id.*** In reviewing an order deciding a suppression motion, appellate courts will uphold findings of evidentiary or historical fact unless they are clearly erroneous. ***Id.***

¶11 "Warrantless searches are 'per se' unreasonable and are subject to only a few limited exceptions." ***Id.*** at ¶17. "One of those exceptions is valid third-party consent." ***Id.*** The bounds of third-party consent to search have been described as follows:

> [T]he authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements … but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id. at ¶18 (citing ***United States v. Matlock***, 415 U.S. 164, 171 n.7 (1974) (citations omitted)). "As characterized by the *Matlock* Court, it is the sufficiency of the consenting individual's relationship to the premises to be searched, that the State must establish." ***Id.***

¶12 "In Wisconsin there is no presumption of common authority to consent to a search when an adult defendant lives with his or her spouse's parents or close relatives." ***Id.*** at ¶44. 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. *See* ***id.*** at ¶17. "[S]ufficiency of the close relative's relationship to the premises is not necessarily established by the relative's familial relationship to the defendant, although that connection is a factor." ***Id.*** at ¶23.

¶13 The United States Court of Appeals has observed:

> Searches by consent make a police officer's job easier because neither probable cause nor a search warrant is required. But what should be a rather cut-and-dried area of the law to understand and apply is anything but, as "consent searches" are fertile ground for suppression litigation in courtrooms all over the country. Was the consent voluntary? Was it a broad or narrow consent? Did the person who gave consent know it could be withheld? Was the consent expressed or implied, and if implied, is that O.K.? When, as here, the consent comes from a third party, issues relating to actual or apparent authority to consent and the relationship between the parties come to the fore.

United States v. Ladell, 127 F.3d 622, 624 (7th Cir. 1997).

¶14 A third-party consent to search the property of another is based on "a reduced expectation of privacy in the premises or things shared with another." ***Id.*** When an apartment, for example, is shared, "one ordinarily assumes the risk that a co-tenant might consent to a search, at least to all common areas *and those areas to which the other has access.*" ***Id.*** (emphasis added). "A third-party consent is also easier to sustain if the relationship between the parties—parent to child here, spouse to spouse in other cases—is especially close." ***Id.***

¶15 Given the totality of the circumstances here, we are satisfied the State established that Debra had authority to consent to the search of the home.

The trial court implicitly rejected Wiskow's testimony that his mother never entered his bedroom without his permission. *See* ***In re Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Debra lived with her boyfriend, who owned the home. In his absences, which apparently were frequent due to the nature of his job as a trucker, Debra assumed the role of the custodian. She allowed her son to reside in a room that served as the only access to the bedroom shared by her daughter, granddaughter and her daughter's boyfriend. Wiskow's room was not kept locked. That the room was not used exclusively by Wiskow was apparent by the doorless closet that housed baby clothes. We conclude that the State met its burden of proving Debra's actual authority to consent to the search.

¶16 Relying on ***Keiffer***, Wiskow argues that because he is an emancipated child, his mother would not be authorized to consent to the search. We conclude that ***Keiffer*** is easily distinguished on its facts.

¶17 In ***Kieffer***, our supreme court determined that a father-in-law did not have actual or apparent authority to consent to a search of his son-in-law's loft area in a detached garage some fifteen to twenty feet behind his house. ***Kieffer***, 217 Wis. 2d at ¶28. As part of the father-in-law's agreement with his daughter and son-in-law, they had the only keys to the area and the father-in-law would not enter their living area without their permission.

¶18 Here, Wiskow did not live in a separate apartment or unattached space. His room was in a central part of the house, providing the only access to another bedroom. Based upon the nature of Debra's relationship with the owner of the house, her relationship with Wiskow, and Wiskow's reduced expectation of

privacy in his room due to its use and access by other household members, Debra's consent was valid.

By the Court.—Judgment affirmed.

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