COURT OF APPEALS
DECISION
DATED AND RELEASED

May 23, 1996

NOTICE

No. 95-1285-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDOLPH S. GUENTERBERG,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Columbia County: LEWIS W. CHARLES, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

GARTZKE, P.J. Randolph Guenterberg appeals from a judgment of conviction on two counts of burglary, § 943.10(1)(a), STATS. Guenterberg entered ***Alford*** pleas after the trial court denied his motions to suppress evidence obtained as a result of a warrantless search of his home and his vehicle.[1] For purposes of appeal, the searches are treated as one. The issues are

[1] Under an ***Alford*** plea, a defendant pleads guilty to a charge but claims innocence.

whether Guenterberg voluntarily consented to the search by the police of his residence and his vehicle and, if not, whether the probation search was lawfully conducted.[2] Because we conclude that Guenterberg voluntarily consented to the police search, we affirm without deciding whether the probation search was lawful.

A warrantless search conducted pursuant to a voluntary consent without probable cause does not violate the Fourth Amendment to the United States Constitution. ***United States v. Cody***, 7 F.3d 1523, 1527 (10th Cir. 1993). Whether the consent is valid turns on its voluntariness.

Voluntariness of a consent to search is determined from the totality of the circumstances. ***State v. Nehls***, 111 Wis.2d 594, 598, 331 N.W.2d 603, 605 (Ct. App. 1983). The State must prove voluntary consent by clear and convincing evidence. ***Laasch v. State***, 84 Wis.2d 587, 592, 267 N.W.2d 278, 282 (1978). The test is whether the consent to search was given in the absence of actual coercive, improper police practices designed to overcome resistance. ***State v. Xiong***, 178 Wis.2d 525, 532, 504 N.W.2d 428, 430 (Ct. App. 1993). "[O]vert acts are not the sole criterion of coerciveness. If there is evidence that police are taking subtle advantage of a person's personal characteristics, that may be a form of coercion." ***Id***. at 534, 504 N.W.2d at 431.

When applying the test, we review the trial court's findings of historical facts under the clearly erroneous standard, and we "independently apply constitutional principles to the facts as found to determine whether the

(..continued)
North Carolina v. Alford, 400 U.S. 25 (1970); ***State v. Garcia***, 192 Wis.2d 845, 856, 532 N.W.2d 111, 115 (1995).

[2] The record contains references to the warrantless search of Guenterberg's home as a parole search, a probation search and an administrative search. However named, the warrantless search was conducted pursuant to WIS. ADM. CODE § DOC 328.21 (April 1990) which authorizes Department of Corrections field staff to search a parolee's or probationer's living quarters or property if reasonable grounds exist to believe that the quarters or property contain contraband. ***Griffin v. Wisconsin***, 483 U.S. 868, 875-76 (1987), held Wisconsin's probation system has made the warrant requirement impracticable and justifies replacement of the standard of probable cause by "reasonable grounds" as defined by the Wisconsin Supreme Court.

standard of voluntariness has been met." ***Id***. at 531, 504 N.W.2d at 430 (citations omitted).

The historical facts are substantially undisputed, notwithstanding some variations in the testimony at the suppression hearing. In February 1993 Guenterberg was on parole, living in a trailer park in Beaver Dam. His parole agent in Green Bay learned from officer Welton of the Mayville police department that Guenterberg was a burglary suspect. Having other information that Guenterberg had been involved in thefts in the Green Bay area, his parole agent believed it likely that he possessed stolen property. She contacted the Beaver Dam parole office and requested that a Beaver Dam parole agent conduct a probation search.

On February 4, 1993, James Rehrauer, a parole agent in Dodge County, met with police officers from the Beaver Dam, Mayville and Portage police departments. He testified that the policy is that a parole officer have law enforcement officers present to provide security when a probation search is conducted. The officers went to the trailer court where Guenterberg lived. He was absent. Rehrauer temporarily left Guenterberg's trailer, and when he returned Guenterberg was handcuffed.

Rehrauer testified that he identified himself to Guenterberg as a parole agent with the Beaver Dam office. He told Guenterberg that his Green Bay parole agent had requested a search, and he was going to search both Guenterberg's residence and vehicle. He asked Guenterberg if he would allow the officers to enter his residence, and Guenterberg agreed. Rehrauer, the officers and Guenterberg entered the trailer, and Rehrauer began his search while Guenterberg spoke with the officers.

Rehrauer testified he saw a pair of tennis shoes on the floor of the trailer. Detective Manthey of the Portage police department had shown him photographs of foot imprints left at the scene of a burglary in Portage. When Rehrauer examined the tennis shoes, he saw markings on the heel areas consistent with those on the shoes in the photographs, and he believed the shoes might provide evidence of a crime, a violation of Guenterberg's parole. Because he had no evidence locker, Rehrauer gave the shoes to officer Welton.

Rehrauer testified that at no time when he spoke to Guenterberg did he threaten him with revocation of his parole, make promises to him, or tell him that he had to sign forms presented to him by the police officers. He noticed nothing abnormal about Guenterberg in the trailer. Guenterberg did not yell or use bad language and he was cooperative. As a parolee, he had no right to refuse to allow the parole search and his parole could be revoked for refusing to cooperate. Refusal to consent to a police search would not have violated his parole.

Rehrauer testified that after Welton spoke with Guenterberg regarding permission for the police to conduct their independent search, Guenterberg signed an authorization to that effect, and the police went outside to search his vehicle. The police conducted that search, but had they not done so, Rehrauer would have.

Detective Meyer, with the Beaver Dam police department, testified that he told officer Welton he would not participate in a search unless he had permission, and they discussed the form needed for a permissive police search. Meyer provided a consent-to-search form.

Detective Meyer testified that before they entered the trailer, he asked Guenterberg if the police could enter his residence to conduct a police search. Meyer explained to Guenterberg outside the trailer that a probation search and a police search are separate, and that the police asked for his consent and not the parole agent. Guenterberg responded, "Yeah, no problem." Inside the trailer Guenterberg consented to a search of his vehicle. After Welton explained the consent-to-search form, Guenterberg signed it. The form states that the person consenting knows of his "lawful right to refuse to consent to such a search." After Guenterberg signed the consent form, Meyer saw tennis shoes on the floor. He pointed out the shoes to Rehrauer because the Portage detective had said a burglary had occurred in his jurisdiction, a tennis shoe print had been left and Meyer had seen the photographs of the print. Rehrauer picked up the shoes. Meyer asked Guenterberg if he could search Guenterberg's vehicle. Guenterberg consented. Detective Meyer testified that when he searched the vehicle, he found coins, some pry bars, screwdrivers, a map and a "slim jim lock jock," a device used to unlock vehicles. He turned those items over to officer Welton.

Timothy Welton, an officer with the Mayville police department, testified that Guenterberg signed the consent form in his presence. When Welton was with Guenterberg, no weapons were displayed, his custody was not used as a leverage against him, nobody told him he would be released if he signed the consent form, no promises had been made to sign, no threats were made by the officers, no threats were made regarding revocation of parole, none of the officers discussed revocation with him, he was not threatened with physical abuse, and his emotional condition seemed good.

Welton testified that later that day Guenterberg was taken to the Dodge County jail where he signed a statement. Welton wrote it out, except for the answers which Guenterberg himself wrote. According to the statement, Guenterberg gave his voluntary consent to detectives Meyer and Orlandoni to search his vehicle and residence, the searches were voluntary and he had signed a permission to search.

Detective Manthey of the Portage police department was present when Guenterberg was arrested. He heard no threats, and saw no physical force.

George Pfiffer testified that he and Guenterberg were neighbors. On February 4, 1993, Pfiffer saw squad cars pulling in front of his trailer. The officers said they were looking for Guenterberg and wanted to know if the car parked outside was his. One detective went to and started to search it. He did not get inside but he had the doors open. Pfiffer did not see them remove anything from the vehicle.

Guenterberg testified that when he arrived at his home, officer Orlandoni said he was under arrest on an apprehension warrant from his parole agent and "they" would like to search his residence and vehicle. Guenterberg agreed. He testified, "I was under the impression that this was through my P.O. and so forth, that I had no--if I refused to cooperate with my P.O. in any shape or form, that would be a reason for revocation."[3] He had "no

[3] The "P.O." is Guenterberg's parole agent, also referred to in the record as his parole or probation officer. We refer to him as the parole "agent" to minimize confusion between the agent and the police officers.

gripes" about submitting to a search because he knew he had "no choice any way, by my P.O." At the jail he signed a statement that he had voluntarily signed a permission to search. He wanted to cooperate because he did not want to be "revocated." Shortly after he was paroled in October 1992, he signed a rule stating he was to make himself available for search of his residence or any property under his control. He understood a parolee cannot refuse any request that a parole agent makes of him, and the alternative is parole revocation proceedings.

Guenterberg testified he did not recall any officer asking for consent to search the residence or his vehicle and telling him it was an independent police investigation and not a parole search. He understood the search was by his parole agent. When the police asked him to sign a police consent, he did not read it, because he considered it a "formality." When he signed he thought it was "just a formality because my P.O. wanted to search my residence." He thought his consent covered the search of both his residence and his vehicle.

Following the suppression hearing, the trial court denied Guenterberg's motions. The court found that Guenterberg had voluntarily consented to the searches by the parole officer and the police. No weapons were drawn, no promises were made, and no threats were made. The trial court took into account Guenterberg's personal characteristics. The court said that while the number of officers present meant possible intimidation, Guenterberg did "not impress this Court as one who is very susceptible to intimidation, [he] having spent nine or ten years in the state prison system." The court said that the testimony by Pfiffer that the officers had searched Guenterberg's vehicle before they obtained a consent, was not credible, because he testified from a statement Guenterberg's girlfriend had typed. The trial court denied the motions to suppress.

The trial court's findings of historical facts are skimpy. We employ the clearly erroneous standard when reviewing factual findings by a trial court. Section 805.17(2), STATS. To the extent the court did not make specific findings to support its conclusion that Guenterberg had voluntarily consented to the police search, we may assume that the court impliedly made such findings. ***Sohn v. Jensen***, 11 Wis.2d 446, 453, 105 N.W.2d 818, 820 (1960). Our review is not limited to the suppression hearing record. We may take into account facts

appearing on the face of the judgment or developed at the sentencing hearing. *See* ***State v. Gaines***, 197 Wis.2d 102, 106-07 n.1, 539 N.W.2d 723, 725 (Ct. App. 1995) (appellate review of suppression orders may include trial evidence, evidence at the preliminary hearing and the record supporting issuance of a warrant).

The judgment shows that Guenterberg was born in June 1960. We know from the sentencing hearing that although he had not graduated from high school, he had a general equivalency degree and that he indeed served some nine years in prison. Consequently, at the time of the search he was a mature adult armed with a reasonable education and experience in the criminal system.

Guenterberg emphasizes that he believed that the search was being conducted by his parole agent and that he had to consent to a police search. But detective Meyer testified that he explained to Guenterberg that a probation search and a police search were separate, that it was the police who had asked for his consent and not the parole agent, and that Guenterberg had responded, "Yeah, no problem." Guenterberg himself made no claim at the suppression hearing that the parole agent or any police officer told him that he had to consent to a police search or that the police search was a search by the parole agent. Guenterberg's belief to the contrary--that he had no right to refuse to consent--is immaterial. "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent." ***Schneckloth v. Bustamonte***, 412 U.S. 218, 227 (1973). No evidence exists that the police caused Guenterberg to believe he had no right to refuse to consent. This is not a situation in which the police misrepresented their right to search. *See* ***Bumper v. North Carolina***, 391 U.S. 543, 548 (1968) (no consent existed to search when officer misrepresented he had a warrant).

Guenterberg states that the police strategy was from the beginning to search his home for evidence of a crime, using the parole agent to gain entry, and that they planned to obtain Guenterberg's signature on a consent form at the same time the parole agent said he had no right to refuse to consent to the search. Assuming the police had planned to search Guenterberg's home by using the parole agent to gain entry, the entry was lawful and obtained without coercion or trickery or misrepresentation. Guenterberg consented to the police

search, and there is no evidence that his parole agent or any police officer told him he had no right to refuse to consent. The Green Bay parole agent initiated the search. The police conducted their own search but only after lawfully entering Guenterberg's home and obtaining his consent.

We conclude that the trial court's order denying Guenterberg's motions to suppress is proper. The judgment convicting Guenterberg of burglary must be affirmed.

By the Court.—Judgment affirmed.

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