COURT OF APPEALS
DECISION
DATED AND RELEASED

September 18, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 96-2160-CR
96-2161-CR

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

NO. 96-2160-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHERYL C. BRITTON,

DEFENDANT-APPELLANT.

NO. 96-2161-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL C. THAISS,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Crawford County: MICHAEL T. KIRCHMAN, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Cheryl C. Britton and Paul C. Thaiss appeal from judgments convicting them of manufacturing marijuana and possessing it with intent to deliver. The police seized the evidence used to charge them after searching their premises. Both pleaded guilty to the charges after the trial court denied their motion to suppress that evidence. The sole issue on appeal is whether the trial court properly held that Britton voluntarily consented to the search. We affirm on that issue.

The parties presented the following evidence at the hearing on the suppression motion. Acting on an anonymous tip, police officers went to the appellants' home and encountered Britton. The officers informed her that they had received a tip that she and Thaiss were growing marijuana on the premises, and asked her if they could conduct a search of the outbuildings on the property. Britton consented and then accompanied the officers on their search.

The officers searched all of the buildings on the property except the upper level of a garage, which was locked. Britton looked for a key and called Thaiss about it, but was unable to produce one. The officers then asked Britton if they could force open the garage doors. A discussion ensued, which an officer described as follows:

> We talked about her concerns if—when the last time she was in the white building. She told us that she'd been in

> there the day before and I asked her, did you see anything what I would construe to be illegal in the building and she said no. I asked her what her biggest fears were if we did find something in the building and she said reputation and publicity and I told her that there wasn't much I could do about that but what I could do is if she would consent to give us a search of the white building that we would not arrest her that day, nor would we arrest her husband [Thaiss] if we would find any illegal substance in the white building. That we would serve a summons and complaint on her and she could appear in court on her own.

Earlier, the officers had succeeded in opening the doors slightly and had noticed a strong marijuana odor coming from the locked area. Based on that and other observations from their search, the officer also told Britton that he believed they would be able to obtain a search warrant, "but that if she would cooperate with us, consent to search that she would not be arrested." According to the officer, Britton then orally consented. She also signed the following statement drafted by the officer:

> This consent to search was filled out after officers found my workshop locked and I could not find a key. This is my farm and I do have the right to give officers permission to enter this locked building. [Signed] Cheryl Britton
>
> The officers have informed me that because of my cooperation with them that they will not arrest me today if any illegal items are found. They told me that they would talk to the D.A. and then would be served a summons and complaint to appear in court at a later date. [Signed] Cheryl Britton 9-15-95.

Britton also signed a form entitled "Permission to Search" in which she acknowledged that the officers had informed her of her constitutional right to refuse to consent to a warrantless search. The officers were aware that Britton was ill with spinal meningitis at the time of the search.

Britton offered a substantially different version of the officers' visit to her home. She testified that she was very ill when they came and that they led

her to believe that she had no choice but to consent. She testified that to obtain her written consent to breaking the lock, an officer physically intimidated her. The officer also told her:

> If I didn't allow them to break open my door he would leave a police officer with me and drive all the way to Prairie du Chien and come back and when he got back and found anything illegal that I would be handcuffed and this would be in full view of my children because they would be home at that time. I would be arrested and I would be taken to jail.

In any event, the officers searched the locked area, using a crowbar to spring the lock on the door, but without measurably damaging it. Once inside they discovered a substantial quantity of marijuana, which resulted in these prosecutions. The officers complied with their promise not to arrest Britton, however, and she and Thaiss were later served with a summons and complaint.

A consent is voluntary if given in the absence of coercive, improper police practices designed to overcome a defendant's resistance. ***State v. Xiong***, 178 Wis.2d 525, 532, 504 N.W.2d 428, 430 (Ct. App. 1993). The issue is resolved by examining the totality of the circumstances. ***Id***. On review, we uphold the trial court's findings of historical facts unless they are clearly erroneous. ***Id***. at 531, 504 N.W.2d at 430. We independently apply constitutional principles to those findings to determine whether the consent was voluntary. ***Id.***

Under the circumstances as found by the trial court, Britton voluntarily consented to a search of the locked area of the garage. Britton and Thaiss principally argue that Britton's consent was involuntary because the officers exploited her weakened condition by physically intimidating her and threatening to arrest and handcuff her in front of her children. However, the trial court expressly found credible the officer's testimony that no such conduct

occurred. That credibility determination is not subject to review. *See* ***Turner v. State***, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977). As for Britton's ill health at the time, the trial court noted that she had been up and moving around the property the day of the search and two days earlier, and reasonably inferred that she was not so ill that she could not intelligently weigh her choices. The appellant's principal contention therefore fails.

Britton and Thaiss allege several other circumstances pointing, in their opinion, to an involuntary consent. These are: (1) the officers' false claim of authority to search regardless of her consent, (2) the officers' show of unnecessary and unreasonable force, (3) Britton's previous refusal to consent, (4) the threat to obtain a warrant, and (5) the officer's prior illegal entry onto the premises two days before. No evidence exist in the record of the suppression hearing, however, to support the first three alleged circumstances described above. As for the officer's "threat" to obtain a warrant, the officer did nothing more than inform Britton that he believed he had probable cause to obtain a search warrant, a statement that appears both reasonable and true at the time it was made, based on what the officers had already discovered. As for the allegedly illegal prior entry, two officers had, two days earlier, approached and inspected the premises from the adjacent open fields. "[A]n individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." ***Oliver v. United States***, 466 U.S. 170, 181 (1984).

By the Court.—Judgments affirmed.

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