2015 IL App (2d) 131281-U
No. 2-13-1281
Order filed October 27, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-2261
DAVID CAPPADORA,	)	Honorable John A. Barsanti,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's motion to suppress: defendant's consent to the search of his basement did not preclude the subsequent voluntary conversation during which he gave additional consent; his additional consent was voluntary, as the police procured that consent by way of a legally accurate statement, *i.e.*, that if he did not consent they could secure the premises (including searching for occupants) to prevent the destruction of evidence while they sought a search warrant from a judge.

¶ 2 Defendant, David Cappadora, appeals from the judgment of the circuit court of Kane County denying his motion to suppress evidence seized from his home. He contends that the search was beyond the scope of his original consent and that his subsequent consent was

involuntary. Because defendant's subsequent consent to search was not limited by the scope of his original consent and was not otherwise involuntary, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of unlawful possession of cannabis with the intent to deliver (720 ILCS 550/5(g) (West 2010)) and one count of unlawful possession of cannabis (720 ILCS 550/4(g) (West 2010)). Defendant filed a motion to suppress the cannabis seized in his home and his subsequent statements related to the cannabis.

¶ 5 The following facts are taken from the hearing on defendant's motion to suppress and his jury trial.[1] On September 13, 2011, Deputy Ron Hain of the Kane County sheriff's department received an e-mail from a supervisor in the Kane County sheriff's department's narcotics unit. The e-mail stated that the supervisor had received an e-mail from a local police chief who, in turn, had received an anonymous complaint that cannabis was being grown in the basement of a house on Old State Road. The e-mail added that defendant and his wife, Tabitha, lived at the house. According to the e-mail, their daughter, who attended a local high school, had told the informant that she would take some of her parents' cannabis and smoke it. After receiving the e-mail, Deputy Hain conducted a criminal-history check on defendant and learned that he had been charged previously with a cannabis-related offense.

¶ 6 On September 16, 2011, at approximately 8:55 a.m., Deputy Hain went to defendant's house. Deputy Catich of the Kane County sheriff's department arrived in a separate squad car. Both deputies were in uniform.

[1] In reviewing a ruling on a motion to suppress, a court may consider the entire record, including the trial evidence. *People v. Robinson*, 391 Ill. Ap. 3d 822, 830 (2009).

¶ 7 As he pulled into the driveway of the two-story farmhouse, Deputy Hain saw that the interior side door of the house was open but the storm door was closed. As the deputies approached the side door, Deputy Hain saw the interior door being shut.

¶ 8 When the deputies walked onto the small patio outside the side door, Deputy Hain, who had training and experience in narcotics investigations, including at least 150 to 200 cases involving cannabis, smelled both raw and burnt cannabis. Deputy Hain opened the storm door and knocked on the interior door. After about a minute, defendant answered the door.

¶ 9 Deputy Hain told defendant that they were there to investigate a complaint. Defendant, who was dressed only in boxer shorts, stepped onto the patio and closed the interior door. Deputy Hain explained the e-mail concerning cannabis being grown in the house and that he was concerned about defendant's daughter having access to it and potentially supplying it to students at the high school.

¶ 10 According to Deputy Hain, defendant had labored breathing, was sweating profusely, had a flushed face, and was "obviously in distress." Defendant told the deputies that he had heart and other health issues. Deputy Hain admitted to being concerned about defendant's health. However, when he asked defendant if he needed medical assistance, he declined.

¶ 11 After Deputy Hain described to defendant the information that he had regarding cannabis being grown in the basement, defendant insisted that there was no cannabis in the house. Deputy Hain asked defendant if he would escort him to the basement to see if there was cannabis being grown there. According to Deputy Hain, defendant said "let's go," and he admitted both deputies into the house. The deputies did not have either a search or an arrest warrant.

¶ 12 The side door led directly into the kitchen. After entering the kitchen, defendant said "come on, the basement is down here." Before entering the basement, however, Deputy Hain

asked defendant to sign a consent-to-search form. Defendant responded that he "did not want to consent to anything." Deputy Hain explained to defendant that he was not comfortable searching a home without either a search warrant or a signed consent. He then told defendant that while in the kitchen he could smell both raw and burnt cannabis. He added that, along with the complaint, the smell of cannabis gave him "cause to believe [there was] cannabis in [the] house" and that he would "have to procure a search warrant for [the] house without [defendant's] consent." Defendant asked Deputy Hain to confirm that he wanted to search only the basement, and Deputy Hain answered yes. Deputy Hain then completed a consent-to-search form, expressly limiting the search to the basement. He and defendant signed the consent form.

¶ 13 After signing the consent form, defendant escorted the deputies into the basement. Because the basement was small, the deputies could readily see that there was no evidence of cannabis cultivation. Therefore, they exited the basement and reentered the kitchen, whereupon Deputy Hain continued to smell cannabis. While in the kitchen, Deputy Hain asked defendant where the odor was coming from if there was no cannabis in the house. Defendant disagreed that there was an odor of cannabis and insisted that there was no cannabis in the house.

¶ 14 According to Deputy Hain, because defendant had been cooperative, he did not want to inconvenience defendant and his wife by requiring them to exit the house while he obtained a search warrant. Instead, he opted to discuss with defendant further whether there was cannabis in the house. He considered obtaining defendant's consent to be the "least disruptive route for [defendant]."

¶ 15 Deputy Hain and defendant were seated at the kitchen table, while Deputy Catich stood in the kitchen near the side door. Deputy Hain reiterated to defendant his concern about there being cannabis in the house and defendant's daughter having access to it. He told defendant that

defendant could continue to cooperate or he would have to "stop [the] conversation *** [and] secure the house." He explained to defendant that securing the house meant that he would need to locate and remove any occupants. To do so, he would need to go through the entire house and look anywhere that a person might be, including closets. He added that he would do so because he would need to "prepare a search warrant to bring before a judge." Deputy Hain denied that his explanation about obtaining a search warrant and securing the house was conveyed as a threat. He acknowledged, however, that it would have been more accurate to say that he would prepare an application for a search warrant as opposed to a search warrant itself. He testified that, had he not obtained consent, he would have sought a search warrant based on the complaint and the smell of cannabis. According to Deputy Hain, defendant never told them to leave.

¶ 16 According to Deputy Hain, had defendant and Tabitha continued to be cooperative, he would have allowed them to remain in the kitchen or just outside on the patio while a warrant was being sought. Although Deputy Hain had no specific evidence that anyone in the house might be violent, he was concerned that someone might destroy any evidence while he obtained a warrant.

¶ 17 When Deputy Hain told defendant that Deputy Hain would need to locate defendant's wife as part of securing the house, defendant said that he would get her. When Deputy Hain said that that would be fine, provided that one of the deputies accompanied defendant, defendant sat down at the kitchen table. Deputy Hain then knocked on the first-floor bedroom door, which was about 18 feet from the kitchen, and Tabitha exited. Deputy Hain then explained to her why the deputies were in the house. He described Tabitha as cooperative. As Deputy Hain explained to Tabitha why they were there, defendant said "okay, let's talk."

¶ 18 When Deputy Hain asked Tabitha if she could explain the cannabis odor, she and defendant looked at each other, and then she looked at the floor. Deputy Hain stressed to defendant that he was interested in a juvenile having access to cannabis, that he wanted to identify the source of the cannabis odor, and that he wanted to "close out the investigation." When defendant asked if he was going to take him to jail, Deputy Hain told him that that "was not [his] intention at that time." When defendant asked if he would put that in writing, Deputy Hain wrote on the bottom of the consent form that he "[did] not intend to charge [defendant or his wife] with possession of cannabis at [that] time." Deputy Hain denied ever telling defendant that he would never be charged with a cannabis offense.

¶ 19 After Deputy Hain wrote on the consent form that he did not intend to charge defendant or his wife at that time, defendant admitted that he had cannabis in the house but that it was not a "class X felony" amount. According to Deputy Hain, defendant told the deputies that they were going to be happy, because this would be their "bust of the year." Defendant then led the deputies to a padlocked closet in the first-floor bedroom. After defendant unlocked the door, opened it, and turned on the closet light, Deputy Hain observed numerous clear plastic bags with cannabis inside. Deputy Hain seized the cannabis, along with empty plastic bags, scales, and about $8,000 in cash.

¶ 20 The trial court denied defendant's motion to suppress. The jury found defendant guilty of both offenses. In his posttrial motion, defendant contended, among other things, that he was entitled to a mistrial, because he kept falling asleep during the trial, and that the court erred in denying his motion to suppress. The court granted defendant a new trial, because it found him unfit due to his sleeping during the trial. At the new trial, the jury again found defendant guilty of both offenses. Defendant filed another posttrial motion in which he again raised, among other

things, the issue of the denial of his motion to suppress. The court denied the posttrial motion in its entirety.

¶ 21 The trial court sentenced defendant to six years' imprisonment on his conviction of possession of cannabis with the intent to deliver. After the denial of his postsentencing motions, defendant filed a notice of appeal. Because the State subsequently filed a motion to reconsider the court's ruling that defendant's bond be returned to the surety, which motion was granted on January 10, 2014, defendant filed an amended notice of appeal.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant raises the following contentions: (1) that the cannabis and his statements related thereto should be suppressed because he disclosed the presence and location of the cannabis only after the deputies had exceeded the authority and scope of his consent to enter the home; and (2) that, even if the deputies were properly in the house when he disclosed the cannabis, such disclosure was involuntary, because he was merely acquiescing to the purported police authority to secure the home and obtain a search warrant.

¶ 24 A trial court's ruling on a motion to suppress is reviewed under a two-part standard. *In re D.L.H.*, 2015 IL 117341, ¶ 46. The court's factual findings will be reversed only if they are against the manifest weight of the evidence. *In re D.L.H.*, 2015 IL 117341, ¶ 46. The court's ultimate legal ruling on whether suppression is warranted is reviewed *de novo*. *In re D.L.H.*, 2015 IL 117341, ¶ 46.

¶ 25 The chief evil against which the fourth amendment is directed is the physical entry into the home. *People v. Wear*, 229 Ill. 2d 545, 562 (2008). Thus, warrantless searches of, and seizures within, the home are presumptively unreasonable. *Wear*, 229 Ill. 2d at 562. However, consent to search is one of the exceptions to the warrant requirement. *People v. Davis*, 398 Ill.

App. 3d 940, 956 (2010). To be effective, the consent must be voluntary. *Davis*, 398 Ill. App. 3d at 956. That is, it must be given absent any coercion, express or implied, and not be the product of any intimidation or deception. *People v. Prinzing*, 389 Ill. App. 3d 923, 932 (2009). The voluntariness of any consent depends on the totality of the circumstances, and the State bears the burden to demonstrate that consent was voluntary. *Davis*, 398 Ill. App. 3d at 956.

¶ 26 The standard for assessing the scope of consent requires the consideration of what a reasonable person would have understood by the exchange between the officer and the person giving consent. *People v. Kats*, 2012 IL App (3d) 100683, ¶ 27. The scope of the search is defined by its expressed object and purpose. *Kats*, 2012 IL App (3d) 100683, ¶ 27. By indicating to the suspect the intended object and purpose of the search, an officer not only apprises the suspect that his constitutional rights are being impacted, but he also informs the suspect of the reasonable parameters of the consent to search. *Kats*, 2012 IL App (3d) 100683, ¶ 27. Indeed, the scope of any consent to search is limited not only to a particular area but also to a specific purpose. *People v. Dawn*, 2013 IL App (2d) 120025, ¶ 40.

¶ 27 In this case, it is undisputed that defendant voluntarily consented to the deputies entering the home for the purpose of searching the basement. That consent included the authority to enter the kitchen, as it was necessary to do so to access the basement. Therefore, the deputies' initial presence in the kitchen was within the scope of the consent to enter the home and search the basement. Although the consensual authority to search the basement expired once the deputies looked there, found no evidence, and exited, it was still necessary for them to reenter the kitchen upon exiting the basement. Therefore, they had continued authority to be in the kitchen, at least for the purpose of exiting the basement and leaving the home. Thus, their presence in the

kitchen after searching the basement did not exceed the scope of defendant's consent to enter the home and search the basement.

¶ 28 During the brief time that they were in the kitchen, nothing precluded the deputies from continuing their conversation with defendant regarding consent to search other parts of the home. Defendant did not ask them to leave the kitchen. Nor was there any other indication that defendant desired to terminate the conversation. Rather, he chose to continue the discussion, including voluntarily sitting down at the kitchen table with Deputy Hain. Although defendant's original consent to enter the home did not expressly include the conversation in the kitchen, such an expressed consent was unnecessary, as it is clear that he voluntarily spoke to the deputies while in the kitchen. Therefore, the voluntariness of defendant's subsequent consent to search the bedroom closet was not limited by the scope of defendant's original consent to enter the home and search the basement.

¶ 29 We therefore turn to the issue of whether defendant's subsequent consent to search the bedroom closet was otherwise involuntary. As discussed, consent is not voluntary where it is the product of official coercion, intimidation, or deception. *People v. Kratovil*, 351 Ill. App. 3d 1023, 1030 (2004). Where an officer expresses his intent to engage in a certain course of conduct, that communication does not vitiate a person's consent to search, so long as the officer has actual grounds for carrying out the intended course of conduct. *Davis*, 398 Ill. App. 3d at 956. Here, defendant contends that his consent was involuntary because Deputy Hain falsely asserted that he could secure the home while obtaining a search warrant and that he would obtain, as opposed to merely seek, a search warrant.

¶ 30 Deputy Hain's assertion that he could secure the home while he obtained a search warrant was neither incorrect nor deceptive. The police do not violate the fourth amendment when they

have probable cause that contraband or evidence of a crime is present in a home, they reasonably believe that an occupant of the home, if left unrestrained, could destroy the evidence, and they secure the home to prevent destruction of the evidence while they diligently seek a search warrant. See *Illinois v. McArthur*, 531 U.S. 326, 330-37 (2001); *Kratovil*, 351 Ill. App. 3d at 1032 (citing *Segura v. United States*, 468 U.S. 796, 810 (1984)).

¶ 31 Here, Deputy Hain had probable cause to believe that there was cannabis in the home based on the complaint, defendant's actions in closing the interior door when stepping onto the patio, defendant's prior criminal charge for a cannabis offense, and the pervasive smell of cannabis both in and outside the home. See *People v. Cohen*, 146 Ill. App. 3d 618, 623 (1986) (the smell of burnt cannabis provides probable cause that the substance is present in the home). Based on his training and extensive experience, Deputy Hain was clearly qualified to recognize the smell of cannabis. See *People v. Smith*, 2012 IL App (2d) 120307, ¶¶ 13-14 (training and experience of officer is alone sufficient to identify presence of cannabis based on smell). Further, he had reason to believe that defendant's wife was present in the home and that, if left unrestrained, she might destroy the cannabis. Because Deputy Hain had probable cause to believe that there was cannabis in the home, and a reasonable belief that an unrestrained occupant might destroy the evidence while he was seeking a search warrant, he was authorized to secure the home for a reasonable period of time while he sought to obtain a search warrant. Therefore, his assertion to defendant to that effect was not deceptive or incorrect and did not render defendant's consent involuntary. See 3 Wayne R. LaFave, Search and Seizure § 6.5(c), at 432 (4th ed. 2004) (consent is not involuntary merely because the person has been advised that in the absence of such consent a search warrant will be sought and the home impounded).

¶ 32 Deputy Hain's assertion that he could look for occupants in the home was an integral part of securing the home under the facts of this case. Even if the deputies otherwise secured the home, anyone who remained inside and unrestrained, such as defendant's wife, might destroy the cannabis before the deputies obtained a warrant. See *Kratovil*, 351 Ill. App. 3d at 1032 (police authority to secure the home pending a warrant includes preventing the destruction of evidence). Indeed, defendant's wife was in the bedroom in which the cannabis was ultimately found. Therefore, it was reasonable under the circumstances for Deputy Hain, in securing the home, to look for occupants, such as defendant's wife, by cursorily examining those places, including closets, in which a person might reasonably be found. That being the case, Deputy Hain did not incorrectly or falsely inform defendant regarding the deputies' authority to look in the home for other occupants. Therefore, that assertion did not render involuntary defendant's consent to search the bedroom closet.

¶ 33 We next address defendant's contention that his consent was involuntary because Deputy Hain essentially told him that, absent his consent, obtaining a search warrant would be a foregone conclusion. Deputy Hain did not, however, tell defendant that definitely he would obtain a search warrant. Although an assertion by the police that they would definitely get a search warrant is *per se* coercive, it is not coercive to merely inform a defendant that they would seek and possibly obtain such a warrant. *Kratovil*, 351 Ill. App. 3d at 1031. Although Deputy Hain misspoke slightly when he told defendant that he would submit a search warrant, as opposed to an application for a search warrant, he qualified that assertion by saying that he would submit it to a judge. That reasonably implied that Deputy Hain would need the authorization of the judge before obtaining a valid warrant. Beyond that slight misstatement,

there is nothing in Deputy Hain's statement to defendant that would suggest that he would definitely get the warrant. Therefore, his statement to defendant was not coercive.

¶ 34 Nor were there any other circumstances that, in their totality, rendered defendant's consent involuntary. His initial refusal to consent, although not necessarily causing his subsequent consent to be involuntary, is an important factor in assessing whether the consent was voluntary. See *People v. Cardenas*, 237 Ill. App. 3d 584, 587-88 (1992). Although defendant initially refused to consent to a search of the home, he then did allow the search of the basement. He does not contend that that consent was coerced. His voluntary consent to search the basement lessens the import of his initial refusal to consent to search any part of the home. Moreover, there are no other facts that suggest that his subsequent consent to search the bedroom closet was involuntary. For instance, there is no indication that the deputies, although in uniform, threatened defendant or exhibited any show of authority. Even though defendant was experiencing some health issues, he declined the offer of medical assistance. There is nothing in the record to suggest that his health condition affected his mental or emotional capacity or interfered with his ability to voluntarily consent. Further, defendant was informed, via the consent form that he signed, that he had the right to prohibit any search and to refuse consent. Based on the totality of the circumstances, defendant's consent to search the bedroom closet was not involuntary.[2]

[2] Because the search of the closet was based on voluntary consent, defendant's related statements regarding the cannabis found therein were not rendered inadmissible. Defendant does not contend that his statements to the deputies regarding the cannabis were otherwise inadmissible under *Miranda v. Arizona*, 384 U.S. 436 (1966). Thus, we need not decide that issue.

¶ 35 Defendant's reliance on *People v. Dawn*, 2013 IL App (2d) 120025, is misplaced, as that case is distinguishable from our case. In *Dawn*, a homeowner gave the police consent to enter the first floor of her home for the limited purpose of speaking to her. *Dawn*, 2013 IL App (2d) 120025, ¶ 40. The police, however, without any subsequent consent, searched the basement. This court held that the search of the basement exceeded the scope of the consent to enter the home. *Dawn*, 2013 IL App (2d) 120025, ¶¶ 44-45. Our case is different, because here defendant subsequently consented to a search of the bedroom closet.

¶ *36* Likewise, *People v. Dale*, 301 Ill. App. 3d 593 (1998), provides no support for defendant. In *Dale*, the defendant consented to the police entering his motel room and frisking him. *Dale*, 301 Ill. App. 3d at 595. The police, without any subsequent consent by the defendant, searched his clothing that was hanging in the closet. *Dale*, 301 Ill. App. 3d at 595. Unlike in *Dale*, defendant provided additional consent that went beyond the scope of the original consent.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the judgment of the circuit court of Kane County denying defendant's motion to suppress. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 37 Affirmed.