2015 IL App (4th) 130206-U

NO. 4-13-0206

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 19, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
CHRISTINA M. KNOX,	)	No. 11CF346
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's consent to a search of her residence was not the product of an unreasonable seizure of her person, nor was her consent coerced.

¶ 2 In a stipulated bench trial, the trial court found defendant, Christina M. Knox, guilty of count I of the information, unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2010)), and count II, unlawful possession of drug paraphernalia (720 ILCS 600/3.5(a) (West 2010)). The court sentenced her to two years' probation and fines.

¶ 3 Defendant appeals, arguing that the trial court erred by denying her motion for the suppression of evidence. Because the facts are undisputed, our standard of review is *de novo*. See *People v. Jackson*, 335 Ill. App. 3d 313, 315 (2002). In our *de novo* review, we are unconvinced by defendant's arguments that her consent to a search of her residence (1) was the

product of an unreasonable seizure of her person and (2) was coerced. Therefore, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 A. The Motion To Suppress Evidence

¶ 6 On June 28, 2012, defendant filed a motion to suppress evidence. In this motion, defendant alleged that on August 27, 2011, officers of the Fairbury police department searched her residence, even though they had no warrant, and that, in the course of this search, they found and seized smoking pipes, straws, and containers with suspected drug residue in them. She claimed the search of her residence and the seizure of these items were unreasonable, in violation of the fourth amendment (U.S. Const., amend. IV), and she sought the suppression of these items in her upcoming trial.

¶ 7 B. The Hearing on the Motion To Suppress Evidence

¶ 8 On July 11, 2012, the trial court held a hearing on the motion to suppress evidence. Two witnesses testified in the hearing, Evan Henkel and Jason Graves. They both were called by the defense.

¶ 9 1. *The Testimony of Even Henkel*

¶ 10 a. His Request to Benway, and Then to Defendant, for Consent To Search Their Residence

¶ 11 Even Henkel testified he was a police officer for the city of Fairbury and that he was employed in that capacity on August 27, 2011, when, around 5 p.m., he arrived with his partner, Jason Graves, at 301 East Watson Street in Forrest (we note that Forrest is 10 miles east of Fairbury). Henkel's purpose in going there was to search the residence of Jeremy Benway. He knew Benway was on probation, and someone—Henkel could not remember who it was—

told him two weeks earlier that Benway had been missing a lot of work lately, possibly because Benway was using drugs.

¶ 12 Upon arriving at 301 East Watson Street, Henkel got out of the squad car. Graves either stayed in the squad car for the time being or stood 5 to 20 feet behind Henkel. Benway and defendant were sitting on the front porch. Henkel walked into the front yard and stopped about 10 feet away from them, without, as of yet, setting foot on the front porch. He first addressed Benway. Defense counsel asked Henkel:

> "Q. Okay. Upon arrival what did you do?
>
> A. Spoke with Mr. Benway on his front porch. Advised him that he was on probation, that part of his probation was to consent to searches of his vehicles, residences, person. And I advised him I was requesting consent to search his residence, which he stated we could.
>
> * * *
>
> Q. All right. Then what happened?
>
> A. I spoke with Christina Knox and advised her that we were requesting her consent to search her residence because it was my understanding they both lived together. And she stated, 'Yeah. I don't care.'
>
> Q. And where did that conversation take place?
>
> A. On the front porch where I spoke to Mr. Benway.
>
> Q. Now, what were your exact words when you asked for consent, if you recall, from my client?

A. [']I am requesting your consent to search your residence.[']"

¶ 13 Defense counsel asked Henkel if he said anything to defendant about Benway's probation:

"Q. Did you inform her at all that this was a search pursuant or that this was a search related to Jeremy being on probation?

A. No, it wasn't a search related to Jeremy being on probation from what I recall.

Q. Okay. What was this search then for?

A. It was a search for—

Q. I mean, you told—you just testified you told Jeremy that [']this is part of the terms of your probation, we want to search.['] Correct?

A. Correct.

Q. All right. Did you tell the same thing to Christina?

A. No."

¶ 14 Likewise, on cross-examination, the prosecutor confirmed that Henkel said nothing to defendant about probation:

"Q. Now, [defense counsel] asked you some questions about Ms. Knox and any—questions about probation. As far as you knew, she was not on probation at that time; correct?

A. Correct.

Q. And so, therefore, you didn't ask her about probation or telling her what is a part of her probation?

A. I did not."

¶ 15 Henkel further testified he had seen the forms used in Livingston County to impose probation. He was "pretty sure" these forms were "all uniform" and that they did not "give law enforcement the right to go search people's houses." He testified: "It is pretty much all based on a probation officer being there. It doesn't apply to law enforcement in any way that I have read."

¶ 16 b. The Manner in Which Henkel and Graves Interacted With Benway and Defendant

¶ 17 The prosecutor asked Henkel:

"Q. So you are speaking with them, having a conversation with them. When you are talking to them was there any yelling going on?

A. No.

Q. You yelling at them or them yelling at you?

A. No.

Q. Any raising of voices?

A. No.

Q. Describe the tone of the conversation.

A. Similar to the one we are having now.

Q. At any point did you display your weapon?

A. No.

Q. At any point did Officer Graves display his weapon?

A. Not that I am aware of."

¶ 18 c. The Search of the Residence

¶ 19 After receiving verbal consent from both Benway and defendant to search the residence, Henkel and Graves entered the residence. Benway and defendant showed them the bedroom, where Henkel and Graves found smoking pipes. Somewhere in the house—it is unclear where—they found plastic containers, which appeared to have "bath salts" in them. They found a straw and another smoking pipe in the kitchen.

¶ 20 Henkel and Graves seized these items and told Benway and defendant the items would be sent to the crime laboratory in Morton and that if chemical analysis revealed the presence of narcotics, Benway and defendant either would be arrested on a warrant or they would be given a court date.

¶ 21 Defense counsel then asked Henkel:

"Q. Then what happened?

A. Mr. Benway spoke about using bath salts and how it was similar to cocaine and how he was high for like 16 hours. And Mrs. Knox stated that the black smoking pipe and the straw from the kitchen were hers and that she snorts pills. And we left."

¶ 22 2. *The Testimony of Jason Graves*

¶ 23 Graves testified that as Henkel walked up to the house, he stayed in the squad car for a while. He saw Henkel standing in the yard, talking with Benway, who was sitting on the "front stoop." Eventually, Graves decided to get out of the squad car and walk up to the house. When he got to where Henkel was standing, Henkel told him they had consent to search the house.

¶ 24 3. *A Stipulation*

¶ 25 The parties stipulated that if Benway's probation officer, Eric Mund, were called as a witness, he would testify that "he did not request the Fairbury Police Department to search the residence nor supply them with any information to form the basis of the search."

¶ 26 4. *The Trial Court's Decision*

¶ 27 After hearing the arguments of counsel, the trial court found, first, that there was no seizure of defendant prior to the search. Parsing through the factors that, in *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), the Supreme Court said were indicative of a seizure, the trial court noted there was no "threatening presence of several officers" (Graves was in the squad car when defendant gave her consent), neither of the police officers displayed his weapon or touched defendant, and Henkel did not use a threatening or peremptory tone. When testifying, Henkel came across to the court as "somewhat of a soft-spoken individual," who was "pretty laid back and calm." The court found he had done nothing that could have been reasonably interpreted as seizing defendant, or taking away her freedom to leave.

¶ 28 As for the further question of whether defendant's consent was voluntary, the trial court said:

> "There was a considerable amount of time spent discussing whether or not Officer Henkel somehow crossed the line by suggesting this was a parole or/probation search. I am not sure that is really relevant to Ms. Knox because the testimony was that she freely agreed to the consent because—or let me rephrase that. She wasn't told, ['W]ell, Benway is on probation and he has to consent to [a] search, so you have to consent. That—none of that came out

> in the evidence. So from a factual standpoint, after consent was secured from Benway, the officers asked Knox, ['C]an we search[?'] And Knox said, ['Y]es, you can.[']
>
> *** There is really nothing to suggest that this was anything but a voluntary consent to search the residence. There was no duress, no coercion."

¶ 29 Therefore, the trial court denied the motion for suppression.

¶ 30 C. Defendant's Motion for Reconsideration

¶ 31 Defendant filed a motion to reconsider the denial of her motion for suppression. She cited, among other authorities, *People v. Daugherty,* 161 Ill. App. 3d 394, 400 (1987), which held: "Where *** the law enforcement officer without a warrant uses his official position of authority and falsely claims that he has legitimate police business to conduct in order to gain consent to enter the premises when, in fact, his real reason is to search inside for evidence of a crime, *** this deception under the circumstances is so unfair as to be coercive and renders the consent invalid." According to defendant, Henkel made a deceptive statement by asserting it was a condition of Benway's probation that he consent to the proposed search of the residence.

¶ 32 On September 11, 2012, the trial court held a hearing on the motion for reconsideration, and the court was unconvinced by the theory of coercive deception. The court reasoned that although Henkel's statement to Benway was "perhaps a little misleading" in that a probation officer had to request the consent to search and that, in reality, a probation officer had not done so, Henkel had made the statement to Benway rather than to defendant. The statement was not "used in any fashion to acquire [defendant's] consent." Thus, the court adhered to its decision denying the motion for suppression.

¶ 33 D. The Stipulated Bench Trial

¶ 34 On January 22, 2013, there was a stipulated bench trial. The trial court first admonished defendant on the rights she would be giving up by having a stipulated bench trial. After questioning her, the court found she was knowingly and voluntarily waiving these rights.

¶ 35 The prosecutor then told the trial court:

> "[PROSECUTOR]: [H]aving discussed it with Counsel, I would ask you to take judicial notice of the testimony taken at the motion to suppress hearing which was held in this cause on July 11th of this year before Your Honor the only addendums to which would be that the officers would further testify that the item alleged in Count 2 of the information, the black metal smoking pipe, is an item of drug paraphernalia within his training and experience, that it was possessed with the intent to use that same item to ingest or inhale cannabis or illicit substance, a controlled substance rather, into the human body in addition to which the substances, the items discovered during the search were sent to the Morton Forensic Science Laboratory operated by the Illinois State Police and that the results were that they were positive for the substance alleged in Count I, that being MDPV, a Schedule I controlled substance.
>
> THE COURT: All right. Any additional—well, first of all, any objection to the proffer on the stipulation, Mr. [Defense Counsel]?

[DEFENSE COUNSEL]: No.

THE COURT: Any additional evidence to proffer?

[DEFENSE COUNSEL]: No.

THE COURT: All right. Okay. Based upon the proffer and the stipulated facts, the Court does find the Defendant guilty of unlawful possession of a controlled substance and unlawful possession of drug paraphernalia."

¶ 36 E. The Sentence

¶ 37 On March 5, 2013, after denying posttrial motions, the trial court held a sentencing hearing, in which the court entered a judgment of conviction on counts I and II and sentenced defendant to 24 months' probation plus fines and costs.

¶ 38 F. Supplementation of the Record

¶ 39 On August 7, 2014, defendant moved to supplement the record on appeal with the probation order in People v. Benway, Livingston County case No. 10-CF-63 (although the probation order was not presented in either the suppression hearing or the stipulated bench trial). We granted the motion on August 15, 2014.

¶ 40 The probation order, entered on October 5, 2010, sentences Benway to 2 years' probation for driving while his driver's license was revoked. The order is a preprinted fill-in-the-blank form, and on the reverse side of the form, one of the preprinted conditions of probation is that Benway "[a]gree to submit to searches of [his] person, residence, papers, automobiles, and/or effects any anytime [*sic*] requested by the Probation Officer when there is reasonable suspicion to request it."

¶ 41 II. ANALYSIS

¶ 42 A. The Purported Seizure of Defendant Before the Search

¶ 43 The fourth amendment of the United States Constitution, an amendment made applicable to the states by the due process clause of the fourteenth amendment (U.S. Const., amend. XIV; *People v. James*, 163 Ill. 2d 302, 311 (1994)), guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. Under the fourth amendment, a seizure of the person must be reasonable, even if the seizure is so brief that it does not amount to an arrest. *People v. Smithers*, 83 Ill. 2d 430, 434 (1980). Reasonableness depends on a balancing of "the public's interest" against "the individual's right to personal security free from arbitrary interference by law officers." *Id.* If a consent to search was "tainted" by an unreasonable seizure of the person (*People v. Brownlee*, 186 Ill. 2d 501, 521 (1999)) in the sense that the consent was a "product" of the unreasonable seizure (*People v. Gherna*, 203 Ill. 2d 165, 187 (2003)), evidence discovered in the search is inadmissible and must be suppressed (*id.*)

¶ 44 Defendant argues that Henkel seized her by speaking with Benway about his probation and by requesting his consent to a search of the residence. Alternatively, if Henkel did not seize defendant at that point, she argues he seized her immediately afterward by turning to her and requesting her own consent to a search of the residence. According to defendant, this alleged seizure of her person was unreasonable in that it was unsupported by any "reasonable, articulable suspicion of criminal activity" (*Terry v. Ohio*, 392 U.S. 1, 27 (1968)), and because her consent—and, in turn, the discovery of the contraband—was a product of this unreasonable seizure of her person, the trial court should have granted her motion to suppress the contraband.

¶ 45 We decide *de novo* whether a seizure occurred. *In re Kendale H.*, 2013 IL App (1st) 130421, ¶ 29. "In Illinois, the test for determining whether a seizure has occurred is an

objective one, namely, whether a reasonable person would have believed that he was free to leave under the circumstances." *People v. Jones*, 190 Ill. App. 3d 416, 421 (1989); see also *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988) ("This 'reasonable person' standard *** ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.").

¶ 46 The following circumstances could lead a reasonable person to believe he or she is not free to leave: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554. Only one police officer, Henkel, stood in the front yard and requested permission to search the house. Neither Henkel nor Graves displayed a weapon. Nor did they touch defendant or Benway. Although Henkel, *when addressing Benway*, used language suggesting that *he* was legally required to consent to a search of the residence as a condition of his probation, Henkel, when subsequently addressing defendant and requesting *her* separate consent to a search the residence, never suggested that *she* was legally required to consent. See *Florida v. Bostick*, 501 U.S. 429, 437 (1991) ("As we have explained, no seizure occurs when police *** request consent to search his or her luggage—so long as the officers do not convey a message that compliance with their requests is required."). Henkel testified that, when talking with Benway and defendant, he used the same tone of voice he was using in the courtroom, which according to the trial court was a civil, respectful tone. Thus, the *Mendenhall* factors do not support the argument that Henkel seized defendant either before or when he requested her permission to search the residence.

¶ 47 Defendant insists, however, that "a reasonable person in her position would not have felt free to get up, ignore the police presence, and walk away," because "[w]ere she to withhold consent, in the face of a valid probation search request, it could have caused [Benway]"—"her domestic partner and the father of her children"—"to face a probation violation."

¶ 48 Actually, no reasonable person would think that his or her *own* conduct could violate *someone else's* probation. The commonly used phrase "he violated his probation" implies that the continuation of probation depends on what the probationer does, not on what anyone else does. To suppose that Benway's probation depended on defendant's consenting to a search would be illogical. Benway has no control over defendant, and no reasonable person would assume that the legal system is so arbitrary and unfair as to penalize Benway on the ground that his co-occupant, who is not on probation, insisted on the sanctity of her home. The prototypical reasonable person in defendant's circumstances, knowing that her own refusal to allow a search could not possibly endanger Benway's probation, would have felt free to say no to Henkel and to walk away.

¶ 49 Defendant argues, to the contrary, that "a person in [her] situation, like a passenger in a stopped vehicle, would have felt obligated to remain and not move around in ways that could jeopardize Officer Henkel's safety." See *Brendlin v. California*, 551 U.S. 249, 258 (2007). She argues: "It is completely unreasonable to suggest that someone in [her] situation would have felt free to simply get up, ignore the execution of an apparent probation search, and walk away." But her consent created these supposedly restricting circumstances. If, as defendant argues, the execution of the search made her an unintended object of detention like a passenger in a traffic stop (see *id.* at 258), then her consent was not a product of her detention

(see *Gherna*, 203 Ill. 2d at 187), but, rather, her detention was a product of her consent. In other words, even assuming, for the sake of argument, that defendant was seized during the search in the sense that she felt obligated to be present while the police officers were rummaging through her personal property and she felt inhibited from moving around in ways that might cause the officers to worry about their safety during the search, we still return to the fact that there would have been no search, and hence no seizure of her person during the search, if, in the first place, she simply said no to Henkle when he requested her consent to a search. See *Georgia v. Randolph*, 547 U.S. 103, 120 (2006) ("[A] warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident."). Thus, assuming the search itself detained defendant in any way, it would make no sense to call her consent a fruit of this detention. Instead, it was the other way around: this detention was a fruit of her consent.

¶ 50 B. The Voluntariness of Defendant's Consent

¶ 51 1. *Did Henkel Deceive and Coerce Defendant into Consenting to the Search?*

¶ 52 Defendant argues that deception vitiated her consent to the search. According to her, Henkel resorted to deception by falsely characterizing the proposed search as a "probation search" rather than a "general search." In reality, the proposed search was not a "probation search" because the probation officer, Mund, never requested the search. The appellate court has held that the "[u]se of subterfuge or deception to gain a consent not otherwise available can render a consent invalid." *People v. Daniels*, 272 Ill. App. 3d 325, 335 (1994) (citing *Daugherty*, 161 Ill. App. 3d at 400). The case that *Daniels* cites, *Daugherty*, says that deception can be "so unfair as to be coercive." *Daughterty*, 161 Ill. App. 3d at 400.

¶ 53 In *Daugherty*, the police officer requested to come into the defendant's residence, and he gained the defendant's wife's consent by falsely telling her he had come to investigate a theft she had reported, whereas he really wanted to discover the cannabis a babysitter had reported the defendant as having. *Id.* at 396. The appellate court concluded that the defendant's wife's consent was invalid because the deception that induced her consent was "so unfair as to be coercive." *Id.* at 400. *Daugherty* might have reached the right result. It is difficult to see, though, how the ruse of a theft investigation coerced, pressured, or intimidated the defendant's wife into letting the police officer into her residence. Fooling or tricking someone into doing something willingly is different from coercing someone.

¶ 54 In any event, *Daugherty* is distinguishable because in that case the misrepresentation was made to the person who gave the consent. The police officer made a misrepresentation to the defendant's wife with the intention that she detrimentally rely on that misrepresentation by letting the officer into her house. In the present case, by contrast, Henkel made no representation at all to defendant. He neither said nor implied that the conditions of Benway's probations were binding on her. He made no statement of fact to her. All he did was request her consent to a search of the residence. In the absence of any *Mendenhall* factors, her consent likely was voluntary. See *People v. Leach*, 2011 IL App (4th) 100542, ¶ 16.

¶ 55 2. *"The Totality of the Circumstances"*

¶ 56 The supreme court has held: "The voluntariness of the consent is a question of fact determined from the totality of the circumstances ***." *People v. Anthony*, 198 Ill. 2d 194, 202 (2001). Defendant argues we should take into account her youth, her 10th grade education, and her lack of advice regarding her constitutional rights. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

¶ 57 For her age and education, defendant cites the presentence investigation report, which, of course, did not exist before the finding of guilt. When reviewing the ruling on a motion for suppression, we consider the evidence presented in the suppression hearing as well as the evidence presented in the trial, but we do not consider evidence presented after the finding of guilt. *People v. Williams*, 62 Ill. App. 3d 874, 880 (1978).

¶ 58 As for the lack of advice regarding her constitutional rights, defendant does not specify which constitutional rights she needed elucidated to her. That she had the right to refuse her consent was evident from the request itself. Unlike a command, a request can be refused. Consent can be withheld. One does not need a primer on constitutional law to know that. As far as we can see from the record, Henkel did nothing to convey to defendant that her compliance was mandatory and that, by making the request to her, he was giving her a politely worded command. See *Bostick*, 501 U.S. at 437 ("As we have explained, no seizure occurs when police *** request consent to search his or her luggage—so long as the officers do not convey a message that compliance with their requests is required."). We see no reason to construe Henkel's request *to her* as anything other than a request, to which, self-evidently, there could have been either of two responses: yes or no. If the mere act of requesting consent to a search were coercive, there would be no such thing as a consensual search.

¶ 59 III. CONCLUSION

¶ 60 For the foregoing reasons, we affirm the trial court's judgment, and we award the State $75 in costs.

¶ 61 Affirmed.