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2015 IL App (4th) 130535-U

NO. 4-13-0535

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 12, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JEREMY L. BENWAY, Defendant-Appellant.	)	Appeal from Circuit Court of Livingston County No. 11CF345 Honorable Jennifer H. Bauknecht, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Pope and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed, concluding the police officer's deceptive statements rendered defendant's consent involuntary.

¶ 2 In December 2011, the State charged defendant, Jeremy L. Benway, with unlawful possession of a controlled substance and unlawful possession of drug paraphernalia. In August 2012, defendant filed a motion to suppress evidence, which the trial court denied the following month. In March 2013, after a bench trial, the court found defendant guilty of both offenses and, in May 2013, sentenced him to 24 months' probation.

¶ 3 Defendant appeals, arguing the trial court erred by denying his motion to suppress evidence where (1) his consent to search was obtained by police deception and (2) he was unlawfully seized. We reverse.

¶ 4 I. BACKGROUND

¶ 5 A. Livingston County Case No. 10-CF-63

¶ 6 During the relevant time period, defendant was subject to an order of probation entered following his conviction in Livingston County case No. 10-CF-63 for driving while his license was revoked (625 ILCS 5/6-303 (West 2010)). As a condition of his probation, defendant agreed "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."

¶ 7 B. The Charges in this Case

¶ 8 In December 2011, the State charged defendant by information with unlawful possession of a controlled substance, a Class 4 felony (720 ILCS 570/402(c) (West 2010)) (count I), and unlawful possession of drug paraphernalia, a Class A misdemeanor (720 ILCS 600/3.5(a) (West 2010)) (count II). In count I, the State alleged defendant knowingly possessed a substance containing methylenedioxypyrovalerone (MDPV), commonly known as bath salts, which is a controlled substance under the Illinois Controlled Substances Act (720 ILCS 570/100 to 603 (West 2010)). In count II, the State alleged defendant knowingly possessed a glass smoking pipe with the intent to use it to ingest or otherwise introduce a controlled substance into his body.

¶ 9 C. Defendant's Motion To Suppress Evidence

¶ 10 1. *Defendant's Written Motion*

¶ 11 In August 2012, defendant filed a motion to suppress evidence. Defendant's motion asserted officers from the Fairbury police department went to his residence without a search warrant and improperly told him they were going to search the residence because he was on probation. Defendant's motion sought the suppression of all physical and testimonial

evidence obtained following the officers' unlawful entry into his home, including the MDPV and paraphernalia.

¶ 12 2. *The Hearing*

¶ 13 In August 2012, a hearing on defendant's motion commenced and the following evidence was presented.

¶ 14 a. The Testimony from the Hearing on Christina Knox's Motion To Suppress

¶ 15 Before the parties presented testimony, the trial court, on motion of defendant, admitted into evidence the transcript from the July 2012 hearing on a motion to suppress filed by defendant's codefendant, Christina Knox. At the hearing on Knox's motion, Officer Brian Henkel of the Fairbury police department testified, on August 27, 2011, he and another Fairbury officer, Jason Graves, arrived at defendant and Knox's residence around 5 p.m. Officer Henkel's purpose to be at the residence was "[t]o request consent to search the residence." Officer Henkel requested defendant's consent to search because he "was on probation." Additionally, Officer Henkel had received a tip about two weeks earlier that defendant had been using heroin and missing work, but he could not remember from whom he received that information.

¶ 16 When Officer Henkel arrived, he exited the car and approached defendant and Knox, who were sitting on their front porch. Officer Henkel first spoke with defendant and "[a]dvised him that he was on probation, that part of his probation was to consent to searches of his vehicles, residences, [and] person. And I advised him I was requesting consent to search his residence, which he stated we could." He could not recall whether defendant's probation officer, Eric Mund, had requested the search of defendant's residence. Officer Henkel then asked Knox whether she would consent to a search of the residence and she stated, " 'Yeah. I don't care.' "

¶ 17 After obtaining consent from both defendant and Knox, Officers Henkel and Graves entered the residence and were directed toward a bedroom shared by defendant and Knox. In the bedroom, the officers recovered "numerous pieces of drug paraphernalia," as well as three plastic containers, two of which contained MDPV. At the conclusion of the evidence, defendant and the State stipulated "if Officer Mund would testify, he would testify that he did not request the Fairbury [p]olice [d]epartment to search the residence nor supply them with any information to form the basis of the search."

¶ 18 b. The Testimony on Defendant's Motion To Suppress

¶ 19 Defendant testified he was sitting on the front porch with his live-in girlfriend, Knox, when two officers with the Fairbury police department arrived at his residence. The officers arrived in a Fairbury police squad car and both approached defendant's residence at the same time. According to defendant, Officer Graves spoke first and told him they were there "to do a probation search" at the request of Officer Mund. In response, defendant told the officers they could search the residence. Defendant provided consent because he felt, under the terms of his probation order, he would be arrested if he did not cooperate with the police. He did not believe he had the right to withhold his consent. In fact, defendant would not have consented to a search had the officer not made reference to his probation and obligation to consent to a search.

¶ 20 Knox testified, on August 27, 2011, she was sitting on her front porch with defendant when two police officers arrived. When the officers arrived, "they came up to [defendant] and said, [defendant], you're on probation, right[?]" Defendant replied in the affirmative. The officer then told defendant "[Officer] Mund had ordered a probation search to search the house." The officer told Knox she was also required to consent as a result of defendant's probationary status. Knox would not have consented to a search had the officer not

mentioned defendant's probation or the fact Officer Mund had requested the search. Knox acknowledged she did not mention the fact the officers told defendant that Officer Mund requested a search during the hearing in her case.

¶ 21 Officer Graves testified, on August 27, 2011, he accompanied Officer Henkel to defendant's residence "to gain consent to search [defendant's] residence." Officer Graves testified, upon their arrival at defendant's residence, he remained in the car while Officer Henkel approached defendant and Knox. At some point, Officer Henkel motioned for him to come toward the house. Officer Henkel advised him both defendant and Knox had consented to a search of the residence. Officer Graves further testified he never told defendant the request to search was ordered by Officer Mund. In fact, Officer Graves did not speak with either defendant or Knox while he was at their residence.

¶ 22 c. The Trial Court's Findings and Ruling

¶ 23 In September 2012, the trial court orally pronounced its findings and ruling regarding defendant's motion to suppress. The court found this was a consensual encounter and not a seizure under the fourth amendment because the *Mendenhall* factors were not present. See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). As part of this finding, the court noted (1) defendant was at his own residence; (2) only two officers were present on the scene; and (3) Officer Henkel did not use "a commanding tone or one that demanded compliance[,]" which was based on the court's observation he always appeared to have a laid-back demeanor when testifying before the court, and no evidence suggested the same was not true on the day in question. Simply put, the court found no evidence to suggest defendant felt compelled to comply.

¶ 24 The trial court then analyzed whether defendant's consent was voluntary. The court found no evidence suggested the police coerced, forced, or threatened defendant into giving his consent.

¶ 25 The trial court next considered whether Officer Henkel's statements to defendant—advising defendant he was on probation, that as a condition of his probation he was required to consent to a search, and then asking for consent—amounted to deception which would vitiate defendant's consent. The court found the police did not "actually misstate [defendant's] probation order. It just[,] as was acknowledged by the State[,] *** left out some information." Further, no evidence suggested the request was repeated multiple times or that the officer's statement alone caused defendant to consent. The court determined defendant's testimony lacked credibility and found Officer Henkel, not Officer Graves, approached the house and did most of the talking. The court found neither police officer told defendant Officer Mund had ordered the search. Additionally, the court found, despite defendant's testimony he did not feel he could refuse Officer Henkel's request, a reasonable person under the circumstances would have felt free to decline consent.

¶ 26 Finally, the trial court found Officer Henkel's failure to state whether probation had in fact ordered the search of defendant's residence was a misrepresentation that did not rise to the level of deception so as to negate defendant's consent. In making this finding the court considered the totality of the circumstances, including the fact "it was only said one time by Henkel to [defendant,] who immediately consented but also because *** defendant ought to know his own probation order." Accordingly, the court found defendant voluntarily consented to the search of his residence.

¶ 27 Having found defendant was not seized and his consent was voluntarily given, the trial court denied defendant's motion to suppress. However, the court encouraged "the State to talk to Fairbury about their consensual encounters and to be very careful when these types of consent searches are requested."

¶ 28 d. Defendant's Motion To Reconsider

¶ 29 In October 2012, defendant filed a motion to reconsider the trial court's order denying his motion to suppress. In his motion to reconsider, defendant maintained the officers' use of deception to obtain his consent rendered the circumstances so unfair as to be coercive, thus invalidating his consent. In November 2012, following a hearing, the court denied defendant's motion to reconsider.

¶ 30 D. The Bench Trial

¶ 31 In March 2013, the matter proceeded to a bench trial. Following the presentation of evidence and argument, the trial court found defendant guilty of both offenses. The court thereafter set the matter for sentencing.

¶ 32 E. Defendant's Posttrial Motion

¶ 33 Later that month, defendant filed a posttrial motion seeking a new trial and other relief. Therein, defendant asserted, *inter alia*, he was entitled to a new trial because the trial court improperly admitted the evidence that was the subject of his motion to suppress. In May 2013, after hearing argument from the parties, the trial court denied the motion.

¶ 34 F. Defendant's Sentencing Hearing

¶ 35 After denying defendant's motion for a new trial, the trial court immediately proceeded to defendant's sentencing hearing. Following this hearing, the court sentenced defendant to 24 months' probation with 180 days' periodic imprisonment, which was stayed

pending his compliance with the terms of probation, and 60 hours of community service. Later that month, defendant filed a motion to reconsider sentence, which the court denied following a June 2013 hearing.

¶ 36 This appeal followed.

¶ 37 II. ANALYSIS

¶ 38 On appeal, defendant argues the trial court erred when it denied his motion to suppress evidence. Specifically, defendant argues the police obtained his consent to search as a result of deception, which rendered his consent involuntary. Alternatively, defendant argues he was unlawfully seized when Officer Henkel approached his residence and informed him he was required to consent to a search due to his probation status. We will begin by discussing the standard of review.

¶ 39 A. The Standard of Review

¶ 40 "When reviewing a trial court's ruling on a motion to suppress evidence, a reviewing court utilizes a two-part test, under which the court's factual findings may be rejected only if they are against the manifest weight of the evidence." *People v. Woods*, 2013 IL App (4th) 120372, ¶ 20, 995 N.E.2d 539. In light of those established facts, however, a reviewing court may draw its own conclusions in deciding what relief, if any, should be granted. *Id.* Accordingly, we review *de novo* the court's ultimate ruling as to whether suppression is warranted. *Id.*

¶ 41 B. Whether Police Deception Rendered Defendant's Consent Involuntary

¶ 42 Defendant argues he did not voluntarily consent to the police's search. Specifically, defendant argues Officer Henkel's statements—that defendant was on probation and

was required to consent to a search as a condition thereof—were deceptive and misleading, which rendered his consent involuntary. We agree.

¶ 43 The fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const., amend. IV; see *People v. James*, 163 Ill. 2d 302, 311, 645 N.E.2d 195, 200 (1994) ("The principles of the fourth amendment are applicable to the States through the due[-]process clause of the fourteenth amendment."). It is well settled, subject to a few well-delineated exceptions, warrantless searches are *per se* unreasonable. *People v. Cregan*, 2014 IL 113600, ¶ 25, 10 N.E.3d 1196. One exception to the warrant requirement is when an individual gives consent to search. *People v. Pitman*, 211 Ill. 2d 502, 523, 813 N.E.2d 93, 107 (2004) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)). Consent to search one's residence must be voluntarily given. *People v. Anthony*, 198 Ill. 2d 194, 202, 761 N.E.2d 1188, 1192 (2001). Consent is involuntary if obtained as a result of acquiescence or submission to the assertion of lawful police authority. *People v. Davis*, 398 Ill. App. 3d 940, 956, 924 N.E.2d 67, 83 (2010). Consent obtained by means of deception may be invalid. *People v. Prinzing*, 389 Ill. App. 3d 923, 932, 907 N.E.2d 87, 96 (2009). "While some forms of deception may not invalidate the consent, we must review the voluntariness of the consent in light of traditional notions of fairness and society's needs for effective police investigations." *Id.* Whether consent is voluntarily given is a question of fact determined from the totality of the circumstances, and the State bears the burden of proving consent was truly voluntary. *Anthony*, 198 Ill. 2d at 202, 761 N.E.2d at 1193.

¶ 44 Defendant argues this case is analogous to *People v. Daugherty*, 161 Ill. App. 3d 394, 514 N.E.2d 228 (1987). In *Daugherty*, a police officer went to the defendant's residence

under the guise of investigating a theft that had been reported by the defendant and his wife a few days earlier. *Id.* at 396, 514 N.E.2d at 230. However, the police had already solved the theft case and, in the course of their investigation, learned marijuana was present inside the home. *Id.* The police officer obtained the defendant's wife's consent to enter the home and talk about the theft case. *Id.* When the defendant's wife led the officer into the kitchen, he observed marijuana on the counter. *Id.* Thus, the officer used the theft investigation as a ruse to obtain the defendant's wife's consent to search the home for marijuana. In affirming the trial court's order granting the defendant's motion to suppress, the court concluded:

> "Where, as here, 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, we find that this deception under the circumstances is so unfair as to be coercive and renders the consent invalid." *Id.* at 400, 514 N.E.2d at 233.

¶ 45 *Daugherty* is distinguishable. The police officer in *Daugherty* told the defendant's wife he was there to investigate a theft, which had already been solved, when, in fact, he was there to investigate the presence of marijuana in the home. Here, on the other hand, Officer Henkel did not make any misrepresentations of fact to defendant; rather, he (1) simply mentioned defendant's probationary status and one of the conditions thereof, but (2) made no representation as to whether defendant's probation officer had ordered the search.

¶ 46 However, this does not mean Officer Henkel's statements were not deceptive, nor does it render *Daugherty*'s ultimate holding—in certain circumstances, police deception can be

so unfair as to be coercive, rendering a person's consent invalid—inapplicable. In this case, Officer Henkel's sole purpose for going to defendant's residence was to request his consent to search so Henkel could obtain evidence of a crime. He had no other reason to be there other than to obtain evidence to charge defendant with possession of drugs. He then deceived defendant by failing to state whether he was requesting consent at the direction of the probation officer or of his own volition. See Merriam-Webster's Collegiate Dictionary 297 (10th ed. 2000) (defining "deceive" as "to give a false impression"). By mentioning defendant's probationary status and the requirement he consent to searches, Officer Henkel intimated he was at the residence at the request of defendant's probation officer. Officer Henkel would have had no reason to make these statements unless he was trying to trick defendant into consenting to a search that was not even supported by reasonable suspicion, much less probable cause and a warrant.

¶ 47 Further, the false impression given by Officer Henkel—that he was present at defendant's residence and requesting consent on behalf of defendant's probation officer—deceived defendant into believing the officer possessed legal authority for the search. At that point, contrary to the trial court's finding, defendant could have reasonably believed he had two choices: (1) either consent to a search or (2) refuse to consent and violate the terms of his probation. Additionally, defendant could have reasonably believed if he chose the latter, he would be facing resentencing on the offense underlying his probation order, which could include additional loss of liberty. When met with this possible loss of liberty, defendant reasonably believed he had no choice but to consent to Officer Henkel's request.

¶ 48 Under the circumstances presented in this case, we conclude Officer Henkel's deceptive statements were so unfair as to be coercive, which rendered defendant's consent involuntary. See *Daugherty*, 161 Ill. App. 3d at 400, 514 N.E.2d at 233. What exacerbates

Officer Henkel's conduct is the fact he used this deception to enter into defendant's residence. It is well established "the home is first among equals" when it comes to the fourth amendment. *Florida v. Jardines*, 569 U.S. ___, 133 S. Ct. 1409, 1414 (2013). At the core of the fourth amendment is a person's right to retreat into their home and be free of unreasonable government intrusion. *People v. Lampitok*, 207 Ill. 2d 231, 242, 798 N.E.2d 91, 99 (2003). Indeed, physical entry into a home "is the chief evil against which the fourth amendment is directed." *People v. McNeal*, 175 Ill. 2d 335, 344, 677 N.E.2d 841, 846 (1997) (citing *Payton v. New York*, 445 U.S. 573, 585 (1980)). Here, Officer Henkel's deceptive statements left defendant with a reasonable belief he could not retreat into his home and be free of unreasonable government intrusion.

¶ 49 Accordingly, we conclude the trial court erred by denying defendant's motion to suppress. Without the evidence that should have been suppressed, the State cannot prove defendant guilty of possession of a controlled substance and possession of drug paraphernalia. Therefore, because we have reversed the court's decision on defendant's motion to suppress and the State cannot prevail on remand, we reverse defendant's convictions and vacate his sentence. See *People v. Smith*, 331 Ill. App. 3d 1049, 1056, 780 N.E.2d 707, 713 (2002) (reversing defendant's conviction and vacating defendant's sentence where the State could not prevail on remand without the suppressed evidence).

¶ 50 In closing, we note our decision in this case validates the trial court's concern regarding the Fairbury police department's conduct with regard to defendant. If the State has not already spoken with the Fairbury police department about its conduct, we trust our order will cause it to do so.

¶ 51 III. CONCLUSION

¶ 52 For the reasons stated, we reverse the trial court's judgment.

¶ 53 Reversed.