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Commonwealth v. Selner

COMMONWEALTH OF PENNSYLVANIA v. DELLA SELNER, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 1586-2010

Search and Seizure; Consent to Search; Voluntary Consent

1. The Fourth Amendment to the United States Constitution protects the right of people in this country to be secure against "unreasonable searches and seizures." U.S. Const. Amend. IV.
2. For entry into a residence, a search warrant is not required where a person with the proper authority unequivocally and specifically consents to the search by law enforcement.
3. . A person has authority to consent to a search if the person has a possessory or privacy interest in the area to be searched or the person has either explicitly or implicitly been granted permission to give consent by a person with a possessory or privacy interest in the area to be searched.
4. To establish a valid consensual search, the prosecution must first prove that the consent was given during a legal police interaction or, if the consent was given during an illegal seizure, that it was not a result of the illegal seizure, and second, that the consent was given voluntarily.
5. A valid consent was not obtained where an adult daughter residing in the house, with a possessory interest in the home to be searched: (1) had her small child inside the home, (2) witnessed a physical and verbal altercation between the owners of the home, the defendant [her mother], her step-father and the state police, (3) witnessed the defendant being handcuffed, (4) witnessed the defendant passing out and requiring medical assistance, (5) witnessed her step-father being handcuffed and placed in the back of a police cruiser, (6) and then was directed by the police to enter the home and retrieve the firearm.

Appearances:

Franklin County District Attorney's Office

Megan Schanbacher, Esq., *Counsel for Defendant*

MEMORANDUM OPINION

Meyers, J., March 1, 2011

The Defendant, Della Selner, is charged with one count Prohibited Offensive Weapons (M1), 18 Pa.C.S.A. §908(a)(1); one count Resisting Arrest (M2), 18 P.S. §5104; and two counts Disorderly Conduct (M3), 18 P.S. §5503(a)(2). In an Omnibus Pre-Trial Motion to Suppress Evidence, raised by defense counsel, the issues before the Court are whether a firearm was seized pursuant to a warrantless entry into the home of the Defendant, and whether the State Troopers had consent to search and seize the firearm without a warrant. This Court finds that the firearm was seized illegally and therefore is suppressed.

Facts

On July 5, 2010, Pennsylvania State Police Troopers responded to call from 757 Mickey Inn Lane, Chambersburg, Franklin

County, Pennsylvania. The Troopers were dispatched pursuant to two separate phone calls. The first phone call was made by the Defendant's husband, Boyd O'Hara, regarding trespassing on his property. The second call came from someone claiming a man was pointing a gun at two people fishing. Both these calls referred to the area of 757 Mickey Inn Lane.

Troopers Jobses and Falcone arrived first at the address and made contact with Mr. O'Hara. The Troopers were told that Mr. O'Hara had looked out his window, saw two individuals on his property, contacted the police, and then desired to confront the trespassers so he retrieved his pistol. During the course of the discussion, Mr. O'Hara referred to the firearm as a gun and then as a shotgun. Trooper Jobses testified it was standard police procedure to request to see the firearm in this instance, and she requested Mr. O'Hara produce the firearm.

Mr. O'Hara made several offers to retrieve the weapon, but the Troopers refused his request out of concern for officer safety. The Defendant, Della Selner, then came to the door and was verbally combative and refused to let the Troopers into the house. The Defendant indicated to the Troopers that they would not be allowed in the house without a warrant. Trooper Jobses testified that the parties continued to have a verbal discussion on the stairs and landing outside the enclosed porch. At some point, Mr. O'Hara tried to retire into the house, and he was detained by Corporal Anderson.

Trooper Jobses testified that the Defendant lunged towards Corporal Anderson and Mr. O'Hara. Trooper Jobses grabbed the Defendant and tried to take her into custody but she was physically and verbally combative. Finally, the Defendant was cuffed in the front and the Defendant's adult daughter brought out a wheelchair for the Defendant to sit in.^[1] Trooper Falcone indicated that he put the Defendant on the ground to handcuff her because she was resisting arrest. Trooper Jobses recalled that at some point the Defendant fell out of her wheelchair. The Defendant began to complain of injuries and an ambulance was called.

Mr. O'Hara was taken into custody and placed in the back of a police cruiser. The Troopers indicated that they would secure the property and obtain a search warrant for the firearm. Trooper Jobses indicated that she wanted to make sure the firearm was not stolen. The Defendant's daughter, Lauren Kirkpatrick, indicated that she would retrieve the firearm because she feared for her mother's safety. She spoke briefly with Mr. O'Hara, who was detained in the police car, to determine the location of the gun in the house. Corporal Anderson then directed her to retrieve it. When Ms. Kirkpatrick returned, she placed the gun on the threshold of the door between the outside steps and the enclosed porch. Corporal Anderson then retrieved the weapon, a twelve-gauge shotgun. At no time was a search warrant issued for the home.

The issue before the Court is whether the firearm should be suppressed because the Troopers did not have valid consent to search and seize any items. If valid, the second question is whether Corporal Anderson illegally seized the firearm pursuant to a warrantless entry into the home when the gun was placed on the threshold of the door between the house and the outside stairs.

The Court determines that Ms. Kirkpatrick's retrieval of the firearm from the house was not voluntarily consented to under the totality of the circumstances. Therefore, whether Corporal Anderson violated the Fourth Amendment by retrieving the firearm from the threshold of the door is irrelevant. As a result, the firearm is suppressed.

Discussion

The Fourth Amendment to the United States Constitution protects the right of people in this country to be secure against "unreasonable searches and seizures." U.S. Const. amend. IV. Thus, pursuant to the protections of the Fourth Amendment, before a police officer may conduct a search, he must generally obtain a warrant that is supported by probable cause and authorizes the search. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). A search warrant is not required, however, where a person with the proper authority unequivocally and specifically consents to the search. Commonwealth v. Strickler, 757 A.2d 884, 888 (Pa. 2000). A person has authority to consent to a search if the person has a possessory or privacy interest in the area to be searched or the person has either explicitly or implicitly been granted permission to give consent by a person with a possessory or privacy interest in the area to be searched. Commonwealth v. Reid, 811 A.2d 530, 544 (Pa. 2002).

To establish a valid consensual search, the prosecution must first prove that the consent was given during a legal police interaction or, if the consent was given during an illegal seizure, that it was not a result of the illegal seizure, and second, that the consent was given voluntarily. Strickler, supra, 757 A.2d 888-901. The following factors are relevant in assessing whether an encounter during which police asked for consent to search was consensual or amounted to a seizure: existence and nature of any prior seizure; whether there was a clear and expressed endpoint to any such prior detention; the character of police presence and conduct in the encounter under review; geographic, temporal, and environmental elements associated with the encounter; and the presence or absence of express advice that the citizen-subject was free to decline the request for consent to search. Id.

In determining whether a consent to a search or seizure was voluntary, the focus is generally on the characteristics and condition of at the time of the consent, and the details of the setting in which the consent was obtained. Commonwealth bears the burden of establishing that a consent to search, as an exception to Fourth Amendment's warrant requirement, under the totality of the circumstances is the product of an essentially free and unconstrained choice, not the result of duress or coercion, express or implied, or a will overborne. Id. at 901. No one factor is determinative. Accordingly, various factors must be considered, such as the time and place of the encounter, the number of officers present, the degree to which the officers emphasized their authority, the degree of hostility, whether weapons were displayed, whether consent was requested, whether the consenter initiated contact with the police, and whether promises were made. Id.; Commonwealth v. Cleckley, 738 A.2d 427, 432 (PA. 1999).^[2]

Here, Ms. Kirkpatrick did not voluntarily consent to the retrieval of the firearm from the house. The Troopers were originally dispatched to the Defendant's home regarding a trespassing violation and a subsequent call regarding a person with a firearm. When the Troopers arrived at the Defendant's home, they repeatedly asked for Mr. O'Hara to produce the firearm to determine whether "it was stolen," but refused to allow Mr. O'Hara to retreat into the home to retrieve the firearm. The Defendant and Mr. O'Hara, the owners of the home, then indicated to the Troopers that they would not be permitted into the residence without a search warrant. At this point, the Defendant and the Troopers engaged in a physical and verbal altercation. The Troopers handcuffed Mr. O'Hara and placed him in the back of a police car while the Defendant was forced to the ground by a Trooper and also handcuffed. The Defendant complained of pain and injuries, and an ambulance was called. Corporal Anderson communicated to Ms. Kirkpatrick that he was going to secure the residence and get a search warrant. At this point, Corporal Anderson asked Ms. Kirkpatrick to enter the home and produce the firearm. Ms. Kirkpatrick testified that she did not know the location of the gun. The Troopers allowed her to ask Mr. O'Hara where the weapon was located. By this time, EMS had arrived on the scene and was tending to the Defendant. Corporal Anderson escorted Ms. Kirkpatrick to the police cruiser to speak with Mr. O'Hara who was handcuffed in the back of the vehicle. Mr. O'Hara told Ms. Kirkpatrick the gun was in his bedroom. Corporal Anderson then permitted Ms. Kirkpatrick to enter the house, retrieve the gun, bring it outside, and lay it on the ground. Ms. Kirkpatrick further testified that she retrieved the firearm because she had witnessed two Troopers "attack" her mother. Additionally, Corporal Anderson testified that Ms. Kirkpatrick offered to retrieve the weapon because her small child was inside the home. Further, Ms. Kirkpatrick, while an adult resident of the house, was directed by Corporal Anderson to retrieve the firearm after he specifically had been denied access to the firearm and the house without a search warrant. Ms. Kirkpatrick testified that when she came upon the altercation between the Defendant, Mr. O'Hara and the Troopers, her mother was in need of medical assistance. She had to procure a wheelchair for her mother to rest in while the ambulance was en route. At no point during this altercation did the Troopers request or apply for a search warrant of the home. Based on the totality of the circumstances, Ms. Kirkpatrick did not give voluntary consent to the retrieval of the firearm. The level of violence, police authority, and police direction at the time Ms. Kirkpatrick retrieved the firearm amounted to compulsion and coercion.

ORDER OF COURT

March 1, 2011, the Court having considered the Defendant's Omnibus Pre-Trial Motion to Suppress Evidence, the motion is granted.

^[1]The Defendant, although physically able to lunge at the Troopers, has a history of problems walking which resigned her intermittently to the use of a wheelchair.

^[2]In Cleckley, the Court stated in regard to determining voluntariness of consent, "We find instructive, however, the following factors considered by the Supreme Court of Appeals of West Virginia when evaluating the voluntariness of a defendant's consent: 1) the defendant's custodial status; 2) the use of duress or coercive tactics by law enforcement personnel; 3) the defendant's knowledge of his right to refuse consent; 4) the defendant's education and intelligence; 5) the defendant's belief that no incriminating evidence will be found; and 6) the extent and level of the defendant's cooperation with the law enforcement personnel. State v. Buzzard, 461 S.E.2d 50, 57 (W. Va. 1995)."

