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Commonwealth v Owens

COMMONWEALTH OF PENNSYLVANIA v. Kristi Lynn Owens, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 677-2012

HEADNOTES

Criminal Law; Warrantless Search

1. Under both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution, a search which is conducted without a warrant is per se unreasonable, unless it falls within a specific enumerated exception.

2. A "search," as applied to searches and seizures, is "an examination of an individual's house, buildings or person, for the purpose of discovering contraband or some evidence of guilt to be used in the prosecution of a criminal action."

Criminal Law; Warrantless Search; Consent

1. Consent provides one exception to the warrant requirement for a search.

2. The Commonwealth must prove that the consent was unequivocal, specific, and voluntary, for that consent to be valid.

3. The Court applies a totality of the circumstances analysis to determine whether consent was voluntarily given.

4. When a residence owner knows the reason why police are present in his house, failure to refuse access to the residence constitutes inferred consent to the police's presence.

Criminal Law; Substitution of Judges

1. Unless extraordinary circumstances exist which precludes the judge's presence, the same judge who presides at trial or received a plea shall impose sentence.

Appearances:

Franklin County District Attorney

Tony Miley, Esq., Counsel for Defendant

Kristi Lynn Owens, Defendant

OPINION

Before Van Horn, J.

STATEMENT OF THE CASE

The Defendant was formally arraigned in the above-captioned matter on June 6, 2012. On June 25, 2012, Defendant filed a Motion to Suppress, arguing that the charges in this matter arose from an unlawful search and seizure under Article 1, Section 8 of the Pennsylvania Constitution. This Court held a suppression hearing on August 6, 2012, and thereafter denied the Defendant's Motion by Order of Court.

On August 27, 2012, Defendant appeared with counsel before this Court for pretrial conference and a bench trial was scheduled for September 24, 2012 before the Honorable Angela R. Krom. Judge Krom then presided over the bench trial in this case on the assigned date. During that trial, the Defendant stipulated to the evidence offered at the August 6, 2012 suppression hearing. Specifically, the Defendant stipulated that on or about February 22, 2012, Officer Matthew Bietsch, of the Chambersburg Police Department, located a small amount of marijuana at the Defendant's residence and the Defendant admitted that the marijuana was hers. Judge Krom entered a guilty verdict against the Defendant and set the case for sentencing before this Court. By Order of Court dated October 2, 2012, this Court set the Defendant's sentencing

for November 7, 2012. On October 5, 2012, Defendant filed a Notice of Objection and Motion to Reassign Sentencing Judge Pursuant [sic] to Pa.R.Crim.P. Rule 700. This Court denied Defendant's Motion by Order dated October 9, 2012 and rescheduled Defendant's sentencing. On November 14, 2012, this Court sentenced the Defendant to 30 days of probation supervision which was suspended to allow the Defendant to file an appeal.

Defendant then filed a Notice of Appeal on December 10, 2012 and a Concise Statement of Errors Complained Of On Appeal ("Statement") on December 11, 2012. In her Statement, Defendant raises two issues. First, she argues that this Court "committed an abuse of discretion and error of law in denying Appellant's suppression motion." Second, she argues that this Court "committed an abuse of discretion and error of law in sentencing Appellant in violation of Rule 700 Pa.R.Crim.P, in that there was no "imperative necessity" substituting the trial judge with a different sentencing judge." The Court now responds to Defendant's Statements though this Opinion pursuant to Pa.R.A.P. 1925(a).

DISCUSSION

Issue One: Denial of Defendant's Suppression Motion

In her first issue on appeal, Defendant argues that the Court "committed an abuse of discretion and error of law in denying Appellant's suppression motion" because the evidence of marijuana use was obtained as a result of an illegal search. As discussed below, the Court found that no search of the Defendant's residence occurred. Alternatively, even if the Court had found that a search occurred, Mr. Owens, the Defendant's husband, consented to Officer Bietsch's entry into the residence. Therefore, the evidence was not obtained as a result of an illegal search and the Defendant's suppression motion was properly denied.

Under both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution, a search which is conducted without a warrant is per se unreasonable, unless it falls within a specifically enumerated exception. *Commonwealth v. Wright*, 742 A.2d 661, 664 (Pa. 1999) citing *Katz v. United States*, 389 U.S. 347, 357 (1967). As applied to searches and seizures, the Superior Court has defined the term "search" as "an examination of an individual's house, buildings or person, for the purpose of discovering contraband or some evidence of guilt to be used in the prosecution of a criminal action." *Commonwealth v. Gibson*, 638 A.2d 203, 205 (Pa. Super. 1994) citing *Commonwealth v. Anderson*, 222 A.2d 495 (1966).

Consent provides one such exception to the warrant requirement for a search. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, (1973); *Commonwealth v. Griffin*, 785 A.2d 501, 505 (Pa. Super. 2001) ("Absent consent or exigent circumstances, private homes may not be constitutionally entered to conduct a search or to effectuate an arrest without a warrant, even where probable cause exists."). For a consent to be valid, the Commonwealth must prove that the consent was unequivocal, specific, and voluntary. *Commonwealth v. Gibson*, 638 A.2d 203, 207 (Pa. 1994).

To determine whether consent was voluntarily given, the Court applies a totality of the circumstances analysis. *Id.* Among the factors that the Pennsylvania Superior Court has found to favor a finding that consent was voluntary include: (1) the defendant's background indicates his understanding of investigating procedures or his understanding of constitutional rights; (2) the suspect has aided an investigation or search; (3) the consenter believed the evidence to be so well concealed that it probably would not be found; (4) the fact of some prior cooperation by the consenter which produced no incriminating evidence; (5) the suspect felt that the best course of conduct was cooperation given that he was caught "red-handed"; (6) the presence of probable cause to arrest or search the suspect. See *Commonwealth v. Danforth*, 576 A.2d 1013, 1022 (Pa. Super. 1990) citing *Commonwealth v. Mancini*, 490 A.2d 1377, 1383 (Pa. Super. 1985). Additionally, the Danforth court found that the following factors work against a finding of voluntary consent: (1) the defendant was interrogated numerous times while in custody over a period of hours; (2) the police used express or implied threats to obtain consent; (3) the defendant acquiesced to an order, suggestion, or request of the police; and (4) the police lacked probable cause to arrest or search the subject. See *id.*

A) No Search of the Defendant's Residence Occurred

First, the Court found that no search of the Defendant's residence occurred. The Defendant argued that a search occurred because Officer Bietsch did not know where the marijuana was inside the house, he commanded that Mr. Owens and the Defendant go retrieve it, and that if Mr. Owens and the Defendant had refused to do so, he would have to get a search warrant or supply an exception to the warrant requirement. Conversely, the Commonwealth argued that no search occurred because there was no examination of the residence. Rather, Officer Bietsch simply followed Mr. Owens and the Defendant into the residence. The Court agreed with the Commonwealth's assessment of the situation.

The Superior Court, as the defense noted, defines a "search" as "an examination of an individual's house... for the purpose of discovering contraband... to be used in the prosecution of a criminal action." *Commonwealth v. Gibson*, 638

A.2d 203, 205 (Pa. Super. 1994) citing *Commonwealth v. Anderson*, 222 A.2d 495 (1966). In the instant case, there was no examination of the Defendant's home. Officer Bietsch did not have to look through the different parts of the Defendant's home to find the contraband in question. Instead, Mr. Owens and the Defendant led him directly to the marijuana. At no point did Officer Bietsch look for marijuana or other contraband elsewhere in the Owens' home. The Defendant makes the argument that, had Mr. Owens and the Defendant refused to show Officer Bietsch where the marijuana was, Officer Bietsch would have had to get a search warrant or supply an exception to the warrant requirement. While the Defendant's argument is factual, it's not applicable to this case. Mr. Owens and the Defendant did not refuse to show Officer Bietsch the location of the marijuana. Officer Bietsch did not need to conduct a search of the house because Mr. Owens and the Defendant showed him where the marijuana was located. Therefore, because the Court found that no "search" of the Defendant's residence occurred, the Fourth Amendment to the U.S. Constitution and Article I, Section 8 of the Pennsylvania Constitution were not implicated and the Defendant's suppression motion was properly denied.

B) Mr. Owens Consented to Officer Bietsch's Entry into the Residence

Even had the Court found that a search did occur, it would not have been unlawful. A totality of the circumstances analysis results in the Court's determination that a valid consent was obtained prior to the Officer's entry into the Defendant's residence. Therefore, the Defendant's suppression motion was properly denied under Defendant's alternative argument.

The Defense uses *Commonwealth v. Gibson* in support of its position that Mr. Owens' consent was not unequivocal, specific, and voluntary. In *Gibson*, the Pennsylvania Supreme Court found that the alleged consent given was not unequivocal because while the owner of the residence did not give his express consent for the police to enter the residence, he also did not refuse to let the police into the residence. *Commonwealth v. Gibson*, 638 A.2d 203, 207 (Pa. 1994). The Supreme Court reasoned that the police had not announced why they were present and that it is not the law in Pennsylvania to require a residence owner to order the police out of his apartment without knowing why they were there. See *id.* However, the Supreme Court said, "[h]ad the police announced their purpose, we could then infer consent had the owner failed to refuse access." *Id.* at 207-208. In the instant case, there is no debate that Mr. Owens knew Officer Bietsch's purpose when he consented to the Officer's entry into the residence. Mr. Owens testified that Officer Bietsch told him that he wanted the rest of the marijuana that was inside the house. Based on the rationale in *Gibson*, because Mr. Owens knew the purpose of the Officer's presence at the residence and why he wanted to enter, his failure to refuse access once he saw Officer Bietsch following him into the house and into the basement made his consent for Officer Bietsch to enter his residence unequivocal. In a similar manner, the Court found that Mr. Owens' consent was specific, as he led Officer Bietsch directly into the basement and directly to the marijuana.

The Mancini factors, as outlined above, indicate that Mr. Owens' consent was voluntary. In coming to this determination, the Court considered both the factors that favor a finding of voluntary consent and those which weigh against a finding of voluntary consent.

First, no evidence was presented at the hearing regarding the Defendant's or Mr. Owens' backgrounds which indicates an understanding of investigating procedures or an understanding of constitutional rights. This factor does not weigh either in favor or against a finding of voluntary consent.

Second, both Mr. Owens and the Defendant aided Officer Bietsch in his investigation and in retrieving the marijuana. Upon being asked whether he had been smoking marijuana, Mr. Owens admitted that he had been. Mr. Owens then led the Officer into the residence, down the stairs, and into the basement, where the marijuana was located. The Defendant, seeing her husband leading the Officer through the house and into the basement, followed them into the basement and handed the Officer an ashtray with burnt marijuana joints in it, telling the Officer that they were hers. This factor weighs in favor of a finding of voluntary consent.

Third, no evidence was presented regarding whether Mr. Owens or the Defendant believed the marijuana to be so well concealed that it probably would not be found; therefore, this factor does not weigh either way in a finding of voluntary consent.

Fourth, prior to consenting to the Officer's entrance into the residence, Mr. Owens cooperated with the Officer's investigation of an incident that occurred at Jiffy Lube, an investigation which produced no incriminating evidence. Officer Bietsch testified, and Mr. Owens confirmed, that the Officer had originally gone to the Owens' residence for the purpose of discussing with Mr. Owens a situation involving his vehicle being involved in an incident at Jiffy Lube. Mr. Owens was cooperative with the Officer's investigation of that incident, ultimately leading Officer Bietsch to conclude that "most of that was cleared up and everything was okay with that incident." Mr. Owens' prior cooperation with the Jiffy Lube incident

weighs in favor of a finding of voluntary consent to the Officer's subsequent entry into the residence.

Fifth, Mr. Owens testified that when Officer Bietsch asked whether he had been smoking marijuana, the question "kind of threw [him] off." Mr. Owens went on to testify that, in response to Officer Bietsch's request that he retrieve the remaining marijuana, he stated "it didn't enter my mind to not obey. I mean, he was telling me to do something. So I went to, you know, not get in trouble." Based on Mr. Owens' own testimony, it appears that he felt that cooperation, consenting to the Officer's entry into the residence, was the best course of conduct when he was "thrown off" by the Officer's inquiry as to the marijuana. This factor, therefore, weighs in favor of a finding of voluntary consent.

Sixth, probable cause existed to arrest or search Mr. Owens. Probable cause to arrest exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution in the belief an offense has been committed. See *Commonwealth v. Dommel*, 885 A.2d 998, 1002 (Pa. Super. 2005). Probable cause for a warrantless arrest is determined from the totality of the circumstances, taking into account the "factual and practical certainties of everyday life." *Id.* Here, Officer Bietsch testified that he smelled marijuana on Mr. Owens' breath and clothing as soon as he came out of the house. Even if the Officer's observations were insufficient to provide the probable cause to arrest Mr. Owens, then surely Mr. Owens' own admission to the officer that he had smoked marijuana after finishing work provided the probable cause necessary for an arrest. Therefore, this factor weighs in favor of a finding of voluntary consent.

In terms of the Mancini factors against a finding of voluntary consent, the first doesn't apply to the instant case, as neither Mr. Owens or the Defendant were interrogated numerous times over a period of hours while in custody. Second, there is no evidence that Officer Bietsch used express or implied threats to obtain consent to enter the residence; therefore, this factor does not weigh against a finding of voluntary consent. Third, Mr. Owens acquiesced to Officer Bietsch's request that they enter the residence to retrieve the marijuana. This factor does weigh against a finding of voluntary consent. Fourth, as discussed above, the police did not lack probable cause to arrest or search Mr. Owens. Therefore, of these four factors, only one, the third, weighs against a finding of a voluntary consent to enter the residence.

Based on the entirety of the Mancini factors, this Court found that a voluntary consent was obtained from Mr. Owens for Officer Bietsch to enter the residence. Additionally, as described above, the Court also found that Mr. Owens' consent was unequivocal and specific. Therefore, Mr. Owens' consent was valid and even if the Court had found that a search of the Defendant's residence did occur, it would have been a lawful search because consent is an exception to the warrant requirement.

Issue Two: Judge Substitution

In her second issue on appeal, Defendant argues that the Court "committed an abuse of discretion and error of law in sentencing Appellant in violation of Rule 700 Pa.R.Crim.P, in that there was no "imperative necessity" substituting the trial judge with a different sentencing judge." The Court disagrees.

Rule 700 of the Pennsylvania Rules of Criminal Procedure provides that the same judge who presided at trial or received a plea shall impose sentence, unless "extraordinary circumstances" exist which precludes the judge's presence. In an effort to address the increased demand for criminal trials in this jurisdiction, this Court met with both prosecuting and defense counsel to develop a process to address the need for additional judge days. It was decided to implement a system for handling a backlog of cases in the last trial term of 2012 that provided for this Court to administratively handle its assigned cases, decide pre-trial motions, and conduct sentencing where convictions were obtained. Senior judges and other judges not regularly assigned to the criminal division were employed to provide the needed judge-power to preside over trials. This process was discussed prior to implementation with both the District Attorney and the Chief Public Defender for Franklin County with no objection raised.

The instant case was one of many handled in the manner developed to address the extraordinary demands for court time in the criminal division. This court handled the case as assigned, presided over the Omnibus Pre-Trial Motion hearing, managed the case at pre-trial conference, and scheduled it for Defendant's requested trial without jury before Judge Krom. At the Bench trial on September 24, 2012, the transcript from the prior hearing over which this Court presided was entered into evidence by stipulation. Judge Krom found the Defendant guilty and informed the parties that a sentencing date would be established by this Court. An Order was subsequently entered to which Defendant's counsel, an Assistant Public Defender, objected under Pa.R.Crim.P. 700. After a denial of the objection, sentencing was held on November 14, 2012, and the Defendant received a probationary sentence.

The current criminal climate in this jurisdiction qualifies as extraordinary times calling for extraordinary measures. The objection to the process developed to address the demands of attorneys, purportedly on behalf of their clients, for court

time far in excess of historical demand is evidence of the dilemma this Court is required to resolve. The process employed was fair to all concerned and particularly so in this case where the evidence that was presented at the bench trial by stipulation was the very evidence this Court heard at pre-trial hearing. There is no claim that the Defendant was prejudiced in any way by her receiving a 30-day probationary sentence from the Judge who was not the one to enter the finding of guilty on a stipulated record at a bench trial. There is no abuse of discretion or error of law as a result of the process developed to handle this and many other criminal cases, and the objection based on Pa.R.Crim.P. 700 is disingenuous at best.

CONCLUSION

In light of the foregoing reasons, this Court did not err in denying the Defendant's suppression motion nor in sentencing the Defendant after another judge presided over the Defendant's bench trial. The Court determined that a search of the Defendant's residence did not occur, but even if it had, that Mr. Owens had consented to Officer Bietsch's entry into the residence. Additionally, the increased demand for court time in the criminal division is an "extraordinary circumstance" warranting the use of different judges for criminal trials and sentencing. Therefore, this Court respectfully requests that the Superior Court dismiss the appeal of the Defendant.

IT IS HEREBY ORDERED THAT the Clerk of Courts of Franklin County shall promptly transmit to the Prothonotary of the Superior Court the record in this matter along with the attached Opinion sur Pa.R.A.P. 1925(a).

Pursuant to Pa.R.Crim.P. 114, the Clerk of Courts shall immediately docket this Opinion and Order of Court and record in the docket the date it was made. The Clerk shall forthwith furnish a copy of the Opinion and Order of Court, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.