2017 IL App (1st) 160916-U

No. 1-16-0916

Order filed September 26, 2017

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 20078
	)	
BRIAN MONTGOMERY,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Neville and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction over his contention that the circuit court erred in denying his motion to quash arrest and suppress evidence. Where defendant consented to the search, the search did not exceed the scope of the search warrant.

¶ 2 Following a bench trial, defendant Brian Montgomery was convicted of unlawful use or possession of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2010)) and possession of a controlled substance with intent to deliver (between 30 and 500 grams of cannabis) (720 ILCS 550/5(d) (West 2010)) and sentenced to concurrent prison terms of three and two years,

respectively.[1] On appeal, defendant argues the circuit court erred in denying his motion to quash arrest and suppress evidence where the search exceeded the bounds of the search warrant and no exceptions to the warrant requirement apply. We affirm.

¶ 3 Defendant was charged by information with four counts of UUWF and one count of possession of a controlled substance with intent to deliver stemming from a search executed on November 11, 2011, pursuant to a warrant. The warrant commanded the search of defendant and the single family house located at 6936 South Aberdeen Street, Chicago, Cook County, Illinois. It authorized the seizure of cannabis, documents proving residency, drug paraphernalia, and any money or records used in illegal drug transactions, which constitute evidence of manufacture/delivery of cannabis.

¶ 4 Defendant filed a motion to quash arrest and suppress evidence. In the motion, defendant argued, *inter alia*, that the officers took the keys to a Ford vehicle parked on the street and searched it without defendant's permission. Defendant asserted the warrant did not cover the vehicle, and no voluntary consent was given to conduct a search of the vehicle. As a result, defendant's constitutional rights to be free from unreasonable search and seizure under the fourth amendment of the United States Constitution and Article I, Section 6 of the Illinois Constitution were violated.

¶ 5 At the hearing on defendant's motion, Officer Edward James Johnson testified that, on November 4, 2011, he executed a search warrant on the residence at 6936 South Aberdeen Street. Defendant was detained inside the residence and searched. Johnson received a set of keys recovered from defendant, who he identified in court. The set included a key that opened the

[1] Counts 4 and 5 of the information, the mittimus, and defendant's written motion for a new trial are not included in the record on appeal.

residence as well as a key for a Ford vehicle. Johnson was aware that there was a large Ford vehicle—either an Excursion or Expedition—parked directly outside the residence. Johnson admitted that the warrant did not provide for a search of any vehicle.

¶ 6 As a result of items recovered in the residence, defendant was placed in custody. Johnson provided defendant with his *Miranda* warnings in the presence of Officer Crisp, and defendant stated that he understood them. Defendant admitted the Ford key belonged to the Ford vehicle parked in front of the residence. Defendant stated the Ford vehicle contained "tools and junk." Johnson asked defendant whether he had any objection to Johnson searching the vehicle. Defendant stated he had no objection. Johnson did not threaten defendant or promise him anything in return for permission to search the vehicle. Further, no weapons were drawn at defendant to effectuate the consent to search.

¶ 7 Johnson used the Ford key to unlock and search the vehicle. He recovered a loaded .40 caliber Ruger pistol from an unzipped child's backpack behind the driver's seat. Johnson stated the vehicle was registered to Milton Taylor, who the record indicates is defendant's father.

¶ 8 The trial court denied the motion to quash arrest and suppress evidence. It found Johnson's testimony credible. It noted the Ford vehicle was parked sufficiently close to the residence to "pique[] [Johnson's] curiosity" after noticing the Ford key recovered from defendant's person. The key was with the key that opened the front door to the house, which the court found "heightens this connection to the house."

¶ 9 The court noted that consent can be oral and did not need to be in writing or otherwise recorded in any way. It found: "[t]he car was searched pursuant to that consent. That obviates the

need for a warrant. It obviates the need for probable cause pursuant to the well established exception to such established by the United State's Supreme Court[] ***."

¶ 10 The case later proceeded to a bench trial where the court convicted defendant of four counts of UUWF and possession of a controlled substance with intent to deliver. The State relied on Johnson's testimony that, pursuant to a search, he recovered cannabis and a loaded Glock pistol from the house and a loaded .40 caliber Ruger pistol from the Ford vehicle outside the residence after receiving defendant's consent to search the vehicle.

¶ 11 The court denied defendant's motion for a new trial. After merging the counts, the trial court imposed sentence on one count of UUWF and one count of possession of cannabis. Defendant was sentenced to concurrent prison terms of three and two years, respectively. Defendant filed a timely notice of appeal.

¶ 12 On appeal, defendant argues the circuit court erred in denying his motion to quash arrest and suppress evidence where the search of the Ford vehicle exceeded the bounds of the search warrant, there were no exigent circumstances present to justify the search, and defendant lacked authority to consent to the search. The State agrees that the search warrant did not authorize the search of the vehicle and that there were no exigent circumstances present. However, it contends the search was valid because defendant consented to the search of the vehicle for which he had a key on his person.

¶ 13 As an initial matter, the State argues defendant waived the argument that he lacked authority to consent to the search because he failed to raise the issue in the trial court in his motion to quash arrest and suppress evidence. However, we find that defendant's claim in his motion that he did not voluntary consent to the search of the vehicle is sufficient to preserve the

issue. In any event, "[b]ecause defendant's challenge to the trial court's ruling on his motion to quash arrest and suppress evidence is of constitutional dimension, we will review his argument on the merits." *People v. Miller*, 355 Ill. App. 3d 898, 900 (2005); accord *People v. Cregan*, 2014 IL 113600, ¶ 20.

¶ 14 When reviewing a ruling on a motion to suppress, we give deference to the trial court's findings of fact and will only reverse if they are against the manifest weight of the evidence. *People v. Burns*, 2016 IL 118973, ¶ 15. We review the ultimate legal issue of whether the trial court should have granted the motion to quash arrest and suppress evidence *de novo*. *Id.* ¶ 16.

¶ 15 The fourth amendment to the United States Constitution provides the "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. Aside from a few exceptions, warrantless searches are *per se* unreasonable under the fourth amendment. *Cregan*, 2014 IL 113600, ¶ 25.

¶ 16 A search conducted without a warrant but pursuant to defendant's voluntary consent is one such exception and therefore does not violate the fourth amendment. *People v. Anthony*, 198 Ill. 2d 194, 202 (2001) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973)). Under this exception, "[t]he validity of a consent search depends on the voluntariness of the consent." *Id.* Whether consent to search was voluntary is a question of fact determined from the totality of the circumstances. *Id.* Factors to be considered in making the determination of voluntariness include whether coercion, intimidation, or deception was used to secure consent to search. *People v. Buschauer*, 2016 IL App (1st) 142766, ¶ 38. The fact that a defendant was in lawful custody at

the time he consented to a search does not render his consent involuntary. *People v. Shinohara*, 375 Ill. App. 3d 85, 97 (2007).

¶ 17 Here, we find the trial court's finding that defendant voluntarily consented to the search of the Ford vehicle was not against the manifest weight of the evidence based on the totality of the circumstances. Officer Johnson's testimony at the suppression hearing established the voluntariness of defendant's consent. Johnson testified that, while executing the search warrant at 6936 South Aberdeen Street, he noticed a large Ford vehicle parked directly in front of the residence. Defendant admitted the Ford key found with his house key belonged to that Ford vehicle, and told Johnson he had no objection to Johnson's search of the vehicle. Defendant gave his consent after receiving his *Miranda* warnings and confirming he understood them. No weapons were drawn at the time, and Johnson did not threaten defendant or promise him anything in order to obtain the permission to search the Ford. The trial court found Johnson to be credible and that defendant had consented to the search of the Ford vehicle. Credibility of witnesses is for the trier of fact to determine. *People v. Faber*, 2012 IL App (1st) 093273, ¶ 54. Accordingly, given that Johnson's credible testimony supports a finding that defendant gave voluntary consent, the trial court properly denied defendant's motion to quash arrest and suppress evidence. See *People v. Pitman*, 211 Ill. 2d 502, 527 (2004) (holding that the question of whether consent has been given is one of fact and a reviewing court will not undergo its own assessment of the credibility of witnesses who testified at a suppression hearing).

¶ 18 Defendant argues he lacked authority to consent to the search of the Ford vehicle because it was not registered to him, but was instead registered to Taylor, who the record indicates is defendant's father. We disagree. Consent to search may be obtained from the individual whose

property is searched or from a third party who possesses common authority over the premises. *People v. Bull*, 185 Ill. 2d 179, 197 (1998) (citing *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990)). Further, "a warrantless search based on the consent of a person having apparent, though not actual, authority to give consent is lawful if, at the time of the search, the police reasonably believe that person to have common authority over the place or item to be searched." *Id.* at 198.

¶ 19 Here, even if defendant lacked actual authority to consent, he nevertheless had apparent authority to consent based on the facts contained in the record. Johnson testified that a Ford vehicle was parked directly in front of the residence named in the search warrant and a search of defendant inside that residence recovered a key to a Ford vehicle, along with a key to the residence. Defendant admitted the Ford key belonged to the vehicle parked outside the residence. He told Johnson that he had no objection to a search of the Ford vehicle and the vehicle only contained "tools and junk." Johnson was then able to gain entry to the vehicle with this key.

¶ 20 The burden lies with the State to show the officers were objectively reasonable in their belief that the person who consented to the search had the authority to consent. *People v. James*, 163 Ill. 2d 302, 317 (1994). Given the fact defendant possessed the key to the Ford vehicle parked outside his home and his knowledge that the vehicle contained "tools and junk," we find it was reasonable for Johnson to believe defendant had authority to consent to the search of the Ford vehicle. See *People v. Burton*, 409 Ill. App. 3d 321, 330 (2011) (" 'the circumstances at the time of the entry control the determination whether the police reasonably believed they had obtained valid consent.' " (quoting *People v. Huffar*, 313 Ill. App. 3d 593, 597 (2000))). Accordingly, given defendant's apparent authority to consent to a search of the vehicle, a warrant

was not required to search the Ford. The trial court properly denied defendant's motion to quash arrest and suppress evidence on this basis.

¶ 21 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.