2019 IL App (1st) 181078-U

No. 1-18-1078

Order filed on May 28, 2019.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re C.W., a Minor,	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Cook County.
	)	
Petitioner-Appellee,	)	No. 18 JD 000137
	)	
v.	)	
	)	
C.W.,	)	The Honorable
	)	Cynthia Ramirez,
Respondent-Appellant).	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied respondent's motion to suppress evidence because the warrantless search of her apartment was lawful. Additionally, we affirm respondent's probation condition to avoid gang contact.

¶ 2 Minor respondent C.W. was adjudicated delinquent for committing the offenses of armed robbery, robbery and aggravated battery when she stole food from a delivery driver by throwing

a bleach-like substance[1] in his face. After a dispositional hearing, she was sentenced to two years' probation and ordered to complete 30 hours of community service, among other conditions. On appeal, respondent contends that the trial court erroneously denied her pretrial motion to suppress evidence obtained as a result of an illegal search. In addition, she contends that the trial court's probation condition to avoid gang contact is unconstitutional as applied to her because it contains no limitations or exceptions for legitimate contact with gang members. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 24, 2018, the State filed a petition for adjudication of wardship based on offenses respondent allegedly committed the day before when she ordered, and then stole, more than $80 of food from a delivery driver by throwing a bleach-like substance in his face. Specifically, the petition alleged that respondent committed armed robbery (720 ILCS 5/18-2(a)(1) (West 2016)), robbery (720 ILCS 5/18-1 (West 2016)), and aggravated battery (720 ILCS 5/12-3.05(c) (West 2016)). Meanwhile, respondent filed a motion to quash arrest and suppress evidence.

¶ 5 At the hearing on her motion, respondent presented the testimony of Chicago Police Lieutenant Martin Loughney and Nathaniel Hunter, as well as a series of videos, which were captured by the police body cameras in this case and generally reflected the following events.

¶ 6 In the evening on January 23, 2018, the victim, Percy Brown, flagged down a nearby police vehicle around the 7700 block of South Kingston Avenue. Brown, who worked as a delivery driver for Captain Hook's Fish and Chicken (Captain Hook's), reported that he had just

[1]We note the record indicates that "Purex plus Clorox 2" detergent, containing "non-chlorine" bleach (see https://www.clorox.com/how-to/laundry-basics/bleach-101/chlorine-vs-non-chlorine-bleach), was thrown in Brown's face. See *People v. Davis*, 180 Ill. App. 3d 749, 753-54 (1989) (stating that courts may take judicial notice of facts which are readily verifiable from sources of indisputable accuracy).

been robbed while attempting to deliver a large order of food at an apartment building located at 7738 South Kingston Avenue, which was the address on the order receipt. Instead of paying, two teenage girls threw bleach in Brown's face and stole the food.

¶ 7 Lieutenant Loughney testified that he spoke to Brown at about 6:45 p.m. on the night in question. Brown "had *** liquid all over his face and *** smelled of bleach and *** couldn't see." According to Lieutenant Loughney, Brown described the offenders as "two girls about 18 to 20 years old, and they had on pajamas."

¶ 8 About ten minutes later, Lieutenant Loughney and other police officers searched for the offenders. Initially, Lieutenant Loughney went to 7740 South Kingston, believing, albeit incorrectly, that it was 7738 South Kingston. Meanwhile, the other officers checked the surrounding buildings before ultimately arriving at 7734 South Kingston. Lieutenant Loughney testified that when he approached 7734 South Kingston, he noticed "a strong smell of bleach" and then saw "liquid all over the glass front door and liquid spilled on the floor on the little stoop." He further testified that just inside the building, there was "a plastic cup, maybe 16, 20-ounce cup that had bleach in it laying on the ground." Consequently, Lieutenant Loughney and the other officers began knocking on each of the six apartment units inside the building, asking the residents whether they had two teenage girls that just ordered food or whether two teenage girls lived in the building.

¶ 9 Eventually, Lieutenant Loughney reached the sixth apartment where an officer was speaking to Hunter, who was later identified as respondent's stepfather. Hunter had informed the officer that two teenage girls lived there, including a "16-year-old girl," who was inside. According to Lieutenant Loughney, when he asked to speak to her, Hunter replied, "[w]ell, come." He followed Hunter "into the back bedroom" of the apartment where Hunter informed

respondent that the "police wanted to talked to her." There, Lieutenant Loughney saw "bags of food" with a receipt "stapled to one of the bags that was [*sic*] delivered," as well as a bottle of bleach. He subsequently took respondent to the front of the apartment while the other officers searched for the other teenage girl, who was found hiding behind a large mirror inside a closet. About twenty minutes later, Lieutenant Loughney took respondent and the other teenage girl outside of the apartment building where Brown positively identified respondent and the other girl as the individuals who stole the food and threw bleach in his face.

¶ 10 In contrast, Hunter testified that he agreed to let the police speak to respondent, but wanted them to wait at the door while he retrieved her. We note that a video showed the police informing Hunter there had been an incident outside the building involving a couple of teenage girls. It further showed that when the police asked Hunter if they could speak to respondent, he said, "Hold on one second, hold on," left the door open and walked down the hallway inside the apartment. Hunter testified that he never closed the door because an officer "stuck his foot in [it]." At some point, Hunter went inside his bedroom and called respondent's mother while the police continued their search for the other teenage girl. At no point, however, did Hunter ask the police to leave. Moreover, the police never drew their weapons or implied that Hunter would be in trouble if he did not cooperate. We further note that a video showed the police asking for Hunter's permission before searching his bedroom for the other girl.

¶ 11 The trial court reviewed the video evidence and found that while Hunter testified he did not consent to the entry, "[h]is conduct throughout the video indicates to this Court that he was consenting to the officers' entry into the home and their continued presence within the home." Specifically, the court noted that Hunter did not appear to be fearful or intimidated and that he "is observed walking throughout the home freely." The court also noted that Hunter did not

"articulate any statements indicating that he [did] not wish them to be in the home, *** to remain in the home, *** to question the minor or seek out the other individual." Rather, Hunter watched the officers enter different rooms inside the apartment and was "conversing with them and answering questions." Accordingly, the court denied respondent's motion and proceeded to a bench trial.

¶ 12 At trial, Brown testified that when he arrived at the delivery address, he called the number listed on the order receipt and a "young lady" answered the phone, stating she would come down. When she did, Brown started "handing her the bag 'cause she was acting like she was gonna [*sic*] hand [him] some money." She did not have enough money, however, and "called upstairs to another young lady." Brown testified that a second girl came downstairs and "acted like she was gonna [*sic*] hand [him] some money." Instead, she threw bleach in his eyes. The girls then took the food and ran upstairs. Immediately thereafter, Brown "flagged the police down," described the offenders and provided the delivery address. Brown testified that the police took him to the delivery address where he positively identified respondent and the other teenage girl.

¶ 13 Lieutenant Loughney's testimony generally consisted of his prior testimony from the suppression hearing, but he testified in further detail about the evidence found in respondent's bedroom, stating, "the first thing I saw, *** was a burger and French fries on the floor, and there was a receipt next to that and the bleach in front of the bed when I looked in."

¶ 14 The trial court found Brown's testimony to be credible and determined that respondent was "accountable for the actions of her cohort." Accordingly, the court found respondent guilty on all counts, but also found the robbery and aggravated battery counts merged into the armed robbery count.

¶ 15 Subsequently, the trial court ordered a social investigation report (report) for respondent from the juvenile probation department. Briefly stated, the report stated that no one in respondent's family had ever been arrested or treated for drug, alcohol or mental abuse. Respondent, however, admitted to smoking marijuana daily since she was 13 years' old and stated that her friends smoked marijuana. She also admitted that she took Xanax without a prescription and drank alcohol when she was 15 years' old. Furthermore, the report indicated that respondent failed most of her high school classes during the year prior to her arrest and that she was not employed or engaged in any community organizations. She denied that she or her friends were involved in a gang, but admitted to starting "papers on fire because she was bored." Additionally, respondent's co-offender was her brother's girlfriend. When asked about her crime, respondent stated:

> "We called the man to deliver food from Captain Hook's. The man came and we went down there and threw bleach on his face. We took the food upstairs [then]."

Based on the foregoing, the probation officer recommended that respondent be sentenced to two years' probation, 30 hours of community service, mandatory school and drug treatment evaluation, as well as a "clinical referral, due to the seriousness of the *** offense." We note that the trial court also reviewed a gang information report for respondent; however, that report is not included in the record on appeal.

¶ 16 At the dispositional hearing, the trial court heard from respondent's probation officer, who emphasized respondent's marijuana use. Similarly, the court further addressed respondent's marijuana and Xanax use, and noted respondent's habit of posting her drug use on social media. The court stated, "it appears that the drug usage is escalating from marijuana to more

serious drugs." In addition, the court was concerned that respondent had prior issues with "inappropriate behavior," and lacked an understanding of the dangerousness of her actions.

¶ 17 The trial court then sentenced respondent to two years' probation and ordered her to complete 30 hours of community service. The court stated, "[m]andatory school, every day, every class, no excuses; no gangs, guns or drugs." Respondent acknowledged that she understood those terms and the court entered a written sentencing order. The written sentencing order, which is a standard form order, contains a checkmark next to the "no gang contact *or* activity" subsection. Additionally, respondent's probation order includes the following handwritten statement by the trial court: "mandatory school; no gangs, guns, drugs." Respondent now appeals.

¶ 18 II. ANALYSIS

¶ 19 A. Suppression Motion

¶ 20 Initially, respondent asserts that the trial court erred in denying her motion to suppress evidence because the police conducted a warrantless search of her apartment without probable cause, consensual entry or exigent circumstances to justify the absence of a warrant. Respondent contends that because the search of her apartment was illegal, the trial court was required to suppress the evidence subsequently recovered.

¶ 21 Under the fourth amendment and the Illinois Constitution of 1970, individuals have the right to be free from unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6; *People v. Almond*, 2015 IL 113817, ¶ 56. Reasonableness in this context generally requires a warrant supported by probable cause. *People v. Johnson*, 237 Ill. 2d 81, 89 (2010). Additionally, a warrantless entry is unlawful unless there exists probable cause and either consensual entry or exigent circumstances. *People v. Gross*, 166 Ill. App. 3d 413, 423 (1988);

People v. Calhoun, 126 Ill. App. 3d 727, 735 (1984). Probable cause is a reasonable belief that a search of a particular place will disclose evidence or the fruits of the crime. *Gross*, 166 Ill. App. 3d at 423. To determine whether probable cause existed, we consider the totality of facts and circumstances known to an officer at the time of entry. *People v. Ferral*, 397 Ill. App. 3d 697, 706 (2009).

¶ 22 To prevail on a motion to suppress evidence at the trial level, the defendant bears the burden of establishing that the search and seizure were unlawful. *Gross*, 166 Ill. App. 3d at 423. If the defendant makes a *prima facie* showing of an illegal search and seizure, the burden then shifts to the State to produce evidence justifying the intrusion. *People v. Brooks*, 2017 IL 121413, ¶ 22. The ultimate burden, however, remains with the defendant. *Id*.

¶ 23 When reviewing a trial court's ruling on a motion to quash arrest and suppress evidence, we apply a two-part standard of review. *Almond*, 2015 IL 113817, ¶ 55. The trial court's findings of fact are afforded significant deference and we will reverse those findings only if they are against the manifest weight of the evidence, *i.e.*, when an opposite conclusion is clearly apparent from the record. *Id*; *People v. Lomax*, 2012 IL App (1st) 103016, ¶ 19. In contrast, we review the trial court's ultimate legal ruling as to whether suppression was warranted *de novo*. *People v. Burns*, 2016 IL 118973, ¶ 16. Furthermore, in reviewing the denial of a motion to suppress, we may consider trial evidence in addition to the evidence presented at the hearing on the motion to suppress. *People v. Hopkins*, 235 Ill. 2d 453, 473 (2009).

¶ 24 On appeal, respondent does not claim that the police lacked probable cause to enter the building or knock on the apartment unit doors. Instead, she asserts the police lacked probable cause to enter and search her apartment. We disagree.

¶ 25 In this case, the police were searching for two teenage girls who had just robbed Brown while throwing a bleach-like substance in his face. Lieutenant Loughney testified that at 7734 South Kingston, there was "liquid all over the glass front door." Inside the building, there was a cup "that had bleach in it *** on the ground." Furthermore, that building was in close proximity to the delivery address provided on the Captain Hook's order receipt. Given those circumstances, it was reasonable to believe the offenders were inside that building, which contained six apartment units. Since the offenders were not inside the first five apartment units, it was also reasonable to believe they were inside respondent's apartment, particularly after Hunter informed the police at least one teenage girl was inside. While that girl was not between the ages of 18 and 20, as Brown had suggested, this small discrepancy did not undermine the officers' reasonable belief that the offenders were inside the apartment. Accordingly, we conclude the police had probable cause to enter and search respondent's apartment.

¶ 26 We also reject respondent's claim that Hunter did not give the police consent to enter and search the apartment, or that any consent was involuntary. A warrantless search does not violate the fourth amendment when a defendant or third party who has control over the defendant's premises, voluntarily consents to the search. *People v. Anthony*, 198 Ill. 2d 194, 202 (2001); *People v. Columbo*, 118 Ill. App. 3d 882, 928 (1983). The validity of a consensual search depends on whether consent was in fact given, and whether it was given voluntarily. *People v. Parker*, 312 Ill. App. 3d 607, 616 (2000). In addition, it is well-settled that consent may be conveyed through conduct, as opposed to words. *People v. Lozano*, 316 Ill. App. 3d 505, 511 (2000). The circumstances must have been such that the police could have reasonably believed they had been given consent to enter. *People v. Williams*, 383 Ill. App. 3d 596, 626 (2008). Furthermore, whether consent was given voluntarily is a question of fact to be determined by the

trial court based on the totality of facts and circumstances. *Gross*, 166 Ill. App. 3d at 423; *People v. Hernandez*, 278 Ill. App. 3d 545, 551 (1996). As such, when a trial court is faced with conflicting testimony, we will not reverse its determination unless it is clearly unreasonable. See *Hernandez*, 278 Ill. App. 3d at 551 (stating that since a reviewing court is not in a position to observe the witnesses testify, questions of credibility must be left largely in the trial court's discretion).

¶ 27 Here, it was reasonable for the police to believe they had been given consent to enter because Hunter initially agreed to let them speak to respondent and did not close the door or ask them to leave when they entered the apartment. And, while Hunter testified that he never closed the door because an officer "stuck his foot in [it]," there was no video evidence corroborating that testimony and the trial court was not required to accept it. Furthermore, we note that Hunter's testimony stating he was asleep when the police arrived was contradicted by video evidence, which showed Hunter stating he had been watching television when the police arrived. The trial court, presented with conflicting testimony, ultimately determined that Hunter's demeanor, as depicted in the body camera videos, indicated that he consented to "the officers' entry into the home and their continued presence within the home." In reaching its conclusion, the trial court noted that Hunter did not appear to be fearful or intimidated and that he "is observed walking throughout the home freely." Moreover, Hunter never indicated that he wanted the police to leave or stop searching for the other teenage girl. Instead, the videos showed Hunter "conversing with [the police] and answering questions." Based on the foregoing, we cannot say the trial court's determination was clearly unreasonable. Accordingly, we conclude that Hunter voluntarily consented to the search of respondent's apartment.

¶ 28 In light of our determination, we need not address respondent's claim that no exigent circumstances were present in this case because the warrantless search of her apartment was lawful. Nonetheless, we do find that exigent circumstances were present because the police were investigating a grave offense that had just been committed, *i.e.*, armed robbery (see *People v. Wimbley*, 314 Ill. App. 3d 18, 29 (2000)), and there was a known risk of evidence destruction since the stolen food could have been consumed. *Cf. People v. Smock,* 2018 IL App (5th) 140449, ¶¶ 23, 25 (finding no exigent circumstances were present where a non-grave offense had been committed, *i.e.*, disorderly conduct, and there was no known risk of evidence destruction). Moreover, our determination precludes respondent's claim that the evidence found inside her apartment, as well as Brown's show-up identification, should be suppressed under the exclusionary rule. See *People v. Sutherland*, 223 Ill. 2d 187, 227 (2006) (stating that the exclusionary rule applies to evidence obtained as a result of an illegal search).

¶ 29 B. Probation Condition

¶ 30 As stated, respondent asserts that the trial court's probation condition to avoid gang contact is unconstitutional as applied to her because it contains no limitations or exceptions for legitimate contact with gang members at work, home or school. Consequently, respondent asks this court to vacate that condition.

¶ 31 At the forefront, we must address the State's argument that because respondent failed to raise her as applied constitutional challenge before the trial court, it is improper for this court to consider her claim. Specifically, respondent failed to develop the record with respect to her particular circumstances and the trial court made no findings of fact in that regard.

¶ 32 It is well-settled that an as applied constitutional challenge is, by definition, dependent on the specific facts and circumstances of the party raising the challenge. *People v. Harris*, 2018 IL

121932, ¶ 39. As such, it is critical that the record be sufficiently developed with respect to those facts and circumstances for purposes of our review. See *id*. (stating that a reviewing court is unable to make an as applied finding of unconstitutionality absent findings of fact by the court below). Moreover, if the record is insufficient to show error, it is surely insufficient to show plain error. *Cf. In re Omar F.*, 2017 IL App (1st) 171073, ¶¶ 62-63 (reviewing the respondent's as applied challenge for plain error, where the parties and trial court sufficiently developed the record below, despite the respondent's failure to raise the issue before the trial court).

¶ 33 To the extent respondent asserts that *Harris* does not apply because, unlike the defendant in *Harris*, she is not challenging the constitutionality of a statute, we find her claim implicitly challenges the constitutionality of the Juvenile Court Act of 1987 (705 ILCS 405/5-715 (West 2016)). That act specifically permits the trial court to require, as a condition of probation, that a minor "refrain from having any contact, directly or indirectly, with certain specified persons or particular types of persons, including but not limited to members of street gangs and drug users or dealers." 705 ILCS 405/5-715(2)(s) (West 2016);[2] see also *In re Omar F*., 2017 IL App (1st) 171073, ¶ 61.

¶ 34 Even if respondent was solely challenging the probation condition itself, she would not be relieved of her burden to make a record showing the condition violates her due process rights. See *Harris*, 2018 IL 121932, ¶ 39. Respondent does not identify what legitimate contact she has, if any, with gang members at work, home or school. We also note that the report states she has never been employed. Furthermore, respondent has failed to include the gang information report on appeal. Ill. S. Ct. R. 323 (eff. July 1, 2017); see also *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (stating that an appellant bears the burden of presenting a sufficiently complete record

[2]The act also allows the trial court to modify a sentencing order as necessary until final closing and discharge of the proceedings. 705 ILCS 405/5-710(3) (West 2016).

to support her claims of error). For the reasons set forth above, we cannot consider respondent's as applied challenge.

¶ 35 III. CONCLUSION

¶ 36 Based on the foregoing, we affirm the trial court's judgment denying respondent's motion to suppress evidence. In addition, we affirm respondent's probation condition.

¶ 37 Affirmed.