DIVISION ONE
FILED: 01/24/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 11-0063
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)
SCOTT PRENTISS HARDY, Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-005359-001DT

The Honorable Roger E. Brodman, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Angela Corinne Kebric , Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Terry Reid, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Scott Hardy appeals his conviction and sentence for one count of burglary in the third degree. Hardy seeks reversal

and remand for a new trial asserting that all DNA evidence should be suppressed and excluded from use at trial. For the reasons stated below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On April 18, 2009, while performing services for her congregation, a full-time pastor was informed that her car had been burglarized in the church parking lot. She immediately called the police and they responded. During a cruise of the vicinity, Officer K. found Hardy in the area but several blocks away from the church. Hardy's clothing matched an eyewitness description of the clothing worn by the perpetrator of the burglary. Officer K. took Hardy into custody and brought him back to the scene for identification. Officer K. noticed that Hardy had cuts on his hands when he handcuffed him.

¶3 Another responding officer, Officer B., noticed a fresh blood smear and a broken window on the pastor's vehicle. Officer W., a certified DNA officer, was called to the scene to take DNA samples from the car and Hardy. Furthermore, Hardy was given his *Miranda*[1] warnings shortly before being asked to offer a DNA sample. Officer K. recorded the conversation with Hardy, Officer W., and himself concerning Hardy's voluntariness to submit to a buccal swab test.

[1] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

¶4 The transcript of the recorded conversation is as follows:

[Officer K.] Q: Hey Scott, so you're consenting to a DNA testing?

[Hardy] A: Yes.

[Officer K.] Q: Yes?

[Hardy] A: Yes.

[Officer K.] Q: Ok.

[Officer W.] Q: Do you understand what that entails?

[Hardy] A: Yes. That entails that if I had anything up on me. Any blood or anything like that . . .

[Officer W.] Q: Yeah. What we want to do is take a buccal swab inside your mouth . . . a little Q-Tip . . . we're going to go on the inside and get some saliva and they're going to do a DNA test and compare it to some blood that we found on the scene. We found some evidence on scene. We just want to make sure it's not you. Well hold on. We just want to make sure that you're okay with that.

[Hardy] A: I didn't do anything.

[Officer W.] Q: So you're okay with us just taking a . . . no . . . I . . . I got to go get the swab . . . I just got to make sure that you okay with that.

[Hardy]	A: No. I don't want it done, but I'm obviously . . . it's like I ain't got a choice right here.
[Officer K.]	Q: Are we good, or . . . uh?
[Officer W.]	Q: Well this is how we are able to determine that it wasn't you. You see we got a lot of people saying that it was you, and you're saying that it's not. What we'd like to do is take a DNA sample to ensure that it's not you. This is how we clear things up.
[Hardy]	A: Alright. Well get it over with.
[Officer W.]	Q: So . . . uh . . . okay . . . so you're okay with that? Alright. Alright.

¶5 Prior to trial, Hardy filed a motion to suppress the DNA evidence collected by a buccal swab the night Hardy was arrested. The court heard testimony from the two officers that spoke with Hardy about the DNA test during the suppression hearing. The court also heard counsels' arguments for and against suppressing the DNA sample. Additionally, the court listened to an audio recording of the exchange between Hardy and the two officers regarding whether Hardy was voluntarily consenting to the buccal swab.

¶6 After reviewing the testimony and exhibit (audio recording) from the suppression hearing, the court made the

following determinations:

1) Hardy was properly detained by police;

2) A witness identified Hardy's clothing as the clothing worn by the perpetrator;

3) There was blood on the scene;

4) Officers' asked permission to take Hardy's DNA by buccal swab;

5) Hardy consented twice by saying "yes";

6) Hardy's tone in the audio recording indicated consent;

7) The DNA certified officer explained the processes and procedures for the test after Hardy waivered in his consent;

8) The secondary officer explained the reasons for the test;

9) Hardy then responded "alright, get it over with," further offering his consent to the test;

10) The entire recorded conversation took less than two minutes; and

11) Hardy was in custody but neither officer pressured or threatened him by force or otherwise.

¶7 Hardy was ultimately convicted by a jury for one count of burglary in the third degree. Hardy timely appeals and we have jurisdiction pursuant to Arizona Constitution Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-

120.21 (2003), 13-4031 (2010), and 13-4033(A) (2010).[2]

ANALYSIS

¶8 Hardy contends that the trial court abused its discretion by denying the motion to suppress Hardy's DNA evidence because Hardy did not unequivocally consent to provide the buccal swab sample. The State argues that Hardy voluntarily consented to give a DNA sample, or in the alternative, that Hardy's DNA would have come into evidence anyway based on the inevitable discovery exception. We conclude the trial court did not abuse its discretion in denying the motion to suppress based on its determination that Hardy voluntarily consented to the buccal swab procedure. We need not address the State's alternative argument concerning the inevitable discovery exception.

¶9 When the trial court denies a motion to suppress, our standard of review on appeal is for abuse of discretion. *See State v. Prince*, 160 Ariz. 268, 272, 772 P.2d 1121, 1125 (1989). "We restrict our review to consideration of the facts the trial court heard at the suppression hearing." *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996); *see also State v. Zamora*, 220 Ariz. 63, 67, ¶ 7, 202 P.3d 528, 532 (App. 2009). However, "we review *de novo* the trial court's ultimate legal

[2] We cite to the current versions of applicable statutes when no revisions material to this decision have occurred since the events at issue.

determination. *State v. Gonzalez-Guiterrez*, 187 Ariz. 116, 118 927 P.2d 776, 778 (1996).

¶10 Hardy argues that he did not unequivocally consent to the DNA test because he waivered during one point in the discussion with police. Hardy stated: "No, I don't want it done, but obviously um, it's like I ain't got a choice right here." Hardy contends that the officers should have told him that he did have a choice to refuse the DNA test.

¶11 Pursuant to the Fourth Amendment, a search lacking a warrant based on probable cause is per se unreasonable, except for a few delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). "Using a buccal swab to procure a DNA sample . . . constitutes a search under the Fourth Amendment." *Mario W. v. Kaipio*, ___ Ariz. ___, ¶ 18, 265 P.3d 389, 2011 WL 5104618 (App. 2011) (citations omitted).

¶12 It is well established that consent is an exception to the warrant requirement. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973); *State v. Davolt*, 207 Ariz. 191, 203, ¶ 29, 84 P.3d 456, 468 (2004). The State carries the burden to show that consent was given voluntarily. *See State v. Monge*, 173 Ariz. 279, 281, 842 P.2d 1292, 1294 (1994). "Voluntariness is a question of fact to be determined from the totality of the circumstances." *Davolt*, 207 Ariz. at 203, ¶ 29, 84 P.3d at 468.

¶13 The courts assess voluntariness by using a number of

factors including: whether the suspect was in custody; whether the suspect was advised of his right to refuse a search and; whether the officer(s) oppressed the suspect -- including the presence of a large number of officers or officers having their guns drawn on the suspect. *See State v. Laughter*, 128 Ariz. 264, 265, 625 P.2d 327, 329 (App. 1980); *but see United States v. Drayton*, 536 U.S. 194, 206-07 (2002) (discussing that the Court "has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search") (citations omitted). Furthermore, other factors include: whether the suspect denied guilt and whether the suspect was handcuffed or already arrested. *See State v. Wilkerson*, 117 Ariz. 143, 144, 571 P.2d 289, 290 (App. 1977). The Ninth Circuit also relies on whether the suspect was advised of his constitutional rights and whether the suspect was told that a search warrant could be obtained. *See, e.g., United States v. Washington*, 490 F.3d 765, 775 (9th Cir. 2007); *United States v. Soriano*, 361 F.3d 494, 502 (9th Cir. 2004).

¶14 Here, the trial court concluded based on the evidence from the suppression hearing, including the audio recording, that in the totality, Hardy voluntarily consented to the buccal swab test. Hardy said yes to the test twice, and after further explanation, he said "Alright. Well get it over with." The

record indicates that Hardy was in custody because he was brought back to the scene for identification purposes. An officer *Mirandized* Hardy shortly before requesting the buccal swab, thus, Hardy was apprised of his constitutional rights. Furthermore, only two officers spoke to Hardy concerning the DNA test and there is nothing in the record indicating that their guns were drawn. Based on the audio recording, the officers' tone with Hardy was professional. One officer asked for Hardy's initial consent, then asked again to make sure. The DNA certified officer asked Hardy if he was okay with the test several times. Nothing in the recording demonstrates any form of coercion by the officers and Hardy offers no evidence stating otherwise.

¶15 Hardy denied any criminal wrongdoing and was not told that a search warrant could be obtained if he declined the buccal swab. Nor was Hardy told that he could refuse the DNA test. Yet according to the United States Supreme Court in *Drayton*, officers are not required to tell suspects that they have a right to refuse a search, and it is only one factor of many that courts should consider. *Drayton*, 536 U.S. at 206 ("The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search.").

¶16 We conclude, after reviewing the totality of the circumstances, that the trial court's findings of fact are supported by the evidence, the court did not abuse its discretion, and no legal error was committed by the trial court in denying the motion to suppress.

CONCLUSION

¶17 Based on the legal principles and analysis outlined above, we affirm Hardy's conviction and sentence.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
JON W. THOMPSON, Presiding Judge

_____/s/_____
MAURICE PORTLEY, Judge