

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

State of Delaware,	:	Cr.A. No. 08-01-0308
	:	Case No. 0801001035
vs.	:	
	:	
Patricia A. Westfall,	:	
	:	
Defendant.	:	

**Decision upon Defendant's Motion to Suppress**

**Date of Hearing: April 14, 2008**

**Final Submission: April 22, 2008**

**Defendant's Motion to Suppress is denied.**

**Kenneth Haltom, Esquire, Department of Justice, 102 West Water Street, Dover, Delaware 19901, attorney for the State.**

**Kathryn J. Garrison, Esquire, Schmittinger & Rodriguez, 414 South State Street, Dover, Delaware 19901, attorney for Defendant.**

**Trader, J.**

In this case the defendant, Patricia A. Westfall, is charged with animal cruelty in violation of 11 *Del. C.* §1325(b)(2) and she has filed a motion to suppress evidence on the grounds of an illegal search and seizure in violation of both the Fourth Amendment to the United States Constitution and of Article I §6 of the Delaware Constitution. I hold that the defendant consented to the presence of the animal control officer on her property and that there was probable cause to seize her Lhasa Apso named “Red.” Accordingly, the defendant’s motion to suppress is denied.

The relevant facts are as follows: on December 31, 2007, Animal Control Officer Robert Shank went to the defendant’s property as a result of an anonymous complaint that the dogs on the defendant’s property were in bad shape. Upon his arrival, Officer Shank knocked on the defendant’s door and stated to her that he had received a complaint and needed to conduct a kennel inspection. Officer Shank had previously been to her property in October of 2007 to conduct another kennel inspection. The defendant recognized Officer Shank when she opened the door. She invited him inside and he went to the back yard to observe the dogs in the kennel. The kennel, a chain-link enclosure with a concrete floor, was not attached to the house.

Officer Shank observed that the defendant’s dog, “Red,” was dirty and its hair was severely matted. Another animal control officer arrived at the scene and the officers were able to further examine the dog. They observed that there was fecal material inside the matted fur, and “Red’s” eyes were red. Because of “Red’s” condition, Officer Shank seized the dog, took it to the SPCA, and the defendant was charged with the offense of animal cruelty under 11 *Del. C.* §1325(b)(2).

The defendant contends that the search of her premises and seizure of the dog were unreasonable under the Fourth Amendment of the United States Constitution and Article I §6 of the Delaware Constitution. The State contends that the animal control officer entered the defendant's premises with her consent. The State's contention is correct.

The parallel mandates of the Fourth Amendment and Article I §6 are that people shall be secure against "unreasonable searches and seizures." U.S. CONST. Amend. IV; Del. Const. art. I, § 6; *See Jones v. State*, 745 A.2d 856, 860 (Del. 1999)("An individual's right to be free of unlawful searches and seizures in Delaware is secured by two independent, though correlative sources."). "The Fourth Amendment, absent exigent circumstances, prohibits any intrusion upon a person's privacy without prior judicial determination that the intrusion is justified." *United States v. Burch*, 432 F. Supp. 961, 964 (D.Del. 1977), *aff'd*, 577 F.2d 729 (3d Cir. 1978). Generally, absent such circumstances, "[s]earches and seizures are *per se* unreasonable . . . unless authorized by a warrant supported by probable cause." *Scott v. State*, 672 A.2d 550, 552 (Del. 1996) (citing *Hanna v. State*, 591 A.2d 158,162 (Del. 1991)).

A recognized exception to the warrant requirement is for searches that are conducted pursuant to a valid consent. *Scott*, 672 A.2d at 552. (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973)); *See McAllister v. State*, 807 A.2d 1119, 1124 (Del. 2002). The key element in establishing a waiver of fundamental rights is whether the defendant voluntarily and intelligently consents to official intrusion into the protected realm. *United States v. Morton Prod. Co.*, 294 F. Supp. 385,392 (D.Del. 1968)(citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)(*overruled in part on other grounds by Edwards*

*v. Arizona*, 451 U.S. 477, 482 (1981)(applying a different standard to right to counsel cases))). Furthermore, the “touchstone of the Fourth Amendment is reasonableness.” *State v. Rizzo*, 634 A.2d 392, 397 (Del. Super. Ct. 1993).

In Delaware, consent is a question of fact and not of law. *State v. Cutrona*, 1971 WL 125418, at \*1 (Del. Super. 1971)(citing *Schaffer v. State*, 194 A.2d 689, 693 (Del. 1962)). The burden is upon the State to establish consent to a warrantless search by a preponderance of the evidence. *See Rizzo*, 634 A.2d at 395-96; *State v. Harris*, 642 A.2d 1242, 1245 (Del. Super. Ct. 1993)(citing *Schneckloth*, 412 U.S. at 222). When the State attempts to justify a search on the basis of consent, it is required to:

demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all circumstances, and while the subject’s knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

*Schneckloth*, 412 U.S. at 248-49. Further,

the State does not meet its burden of showing consent to enter merely from the defendant’s failure to object to the entry, since this would in essence shift the burden from the state to the defendant to show unequivocal objection to a police entry. The burden remains squarely on the State to show that an unequivocal and specific consent to enter was granted to the police.

*Rizzo*, 634 A.2d at 396 (citing *United States v. Shaibu*, 920 F.2d 1423, 1427-28 (9th Cir.

1990)). Lastly, “[i]n examining all the surrounding circumstances to determine if in fact

the consent to search was coerced, account must be taken of subtly coercive police

questions, as well as the possibly vulnerable subjective state of the person who consents.”

*Harris*, 642 A.2d at 1246 (citing *Schneckloth*, 412 U.S. at 228-29).

On April 14, 2008, the Court conducted an evidentiary hearing to determine whether the evidence in this case should be suppressed as a result of an illegal search and

seizure. The Court must make two separate and distinct determinations. First, the Court must determine the credibility of the witnesses and second, the weight and value of their testimony. Stated otherwise, the Court must determine if the State's evidence is true, and if the Court finds it to be true, the Court must determine if the weight of the evidence establishes that the defendant gave an intelligent and voluntary consent to the search of her property.

When the Court sits as the trier of fact, it is the job of the Court to determine the credibility of the witnesses and to assign the weight and value of their testimony. *See Barks v. Herzberg*, 8 Storey 162, 164, 206 A.2d 507, 508 (Del. 1965). In determining the credibility of the witnesses, the Court must consider each witness' means of knowledge, the reasonableness of unreasonableness of his testimony, the motives actuating him, his bias, prejudice or interest, if any, and his manner or demeanor on the witness stand. It is the Court's duty to accept testimony most worthy of belief and disregard testimony unworthy of belief. *See Del. P.J.I. Civ. '23.9* (2000) (Credibility of Witnesses). After listening to the testimony, observing the demeanor of the witnesses, and their apparent fairness in giving their testimony, I conclude that the State's version of the facts is correct.

Upon knocking on the defendant's door, Officer Shank stated his reason for coming to the defendant's house and the defendant invited him into her property. Since Officer Shank had inspected the defendant's kennels on a previous visit, the defendant knew the animal control officer's purpose for conducting an inspection. The defendant also testified that she had no objection to his entering her property to inspect the dog because she had recently trimmed and brushed the dog. The exchange between Officer

Shank and the defendant at the defendant's door did not result in duress or coercion, express or implied. The State has established, by a preponderance of the evidence, that the defendant intelligently and voluntarily consented to the search on her property.

Both parties cite 7 *Del. C.* § 1703(b), which states, “a dog warden may enter into a dwelling house or other structure only with permission of the owner or occupant thereof or with a duly issued search warrant,” to support their contentions. Therefore, even without a search warrant, under the statute, the officer may enter the defendant's property with her consent.

The defendant next contends that, although she may have consented to his presence on her property, the officer lacked probable cause to seize her dog. I disagree. The officer was given permission to be on her property and inspect the dogs. She testified that the dog had been groomed and she had no objection to his examining the dog. Once lawfully present on the defendant's property, the animal control officer was able to corroborate the anonymous tip that he had received. When Officer Shank examined the dog, he observed that the dog's fur was severely matted. When the other officer arrived, both of them observed that there was fecal matter in the matted fur and the dog's eyes were red.

In order to seize the dog, the animal control officer must have probable cause to believe that the offense of animal cruelty was committed. *See generally Young v. State*, 339 A.2d 723, 725 (Del. 1975)(at time of seizure, officers need to have probable cause to believe an offense has been committed). The United States Supreme Court has defined “probable cause” as follows:

[p]robable cause exists where ‘the facts and circumstances within their (the officers’) knowledge and of which they had reasonably trustworthy

information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Brinegar v. United States*, 338 U.S. 160, 175-75 (1949)(citing *Carroll v. United States*, 267 U.S. 132, 162 (1925)); *See State v. Maxwell*, 624 A.2d 926, 929-30 (Del. 1993)(citing *Clendaniel v. Voshell*, 562 A.2d 1167, 1170 (Del. 1989) (quoting *Garner v. State*, 314 A.2d 908, 910 (Del. 1973)))(probable cause defined as when the officer possesses "information which would warrant a reasonable man in believing that [such] a crime had been committed").

Based on the evidence, I conclude that the animal control officer had reasonable grounds to believe that there was a fair probability that a crime was committed. Accordingly, he was justified in seizing the animal.

Based on these findings of fact and conclusions of law, the defendant's motion to suppress on the grounds of illegal search and seizure is denied.

**IT IS SO ORDERED.**

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**Merrill C. Trader**  
**Judge**