STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED November 29, 2012
v	No. 306647 Oakland Circuit Court
ANDREW JOSEPH BREWART, Defendant-Appellee.	LC No. 2010-233653-FH

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

The prosecution appeals as of right the trial court's order dismissing all of the charges brought against defendant, which included manufacture of marijuana, MCL 333.7401(2)(d)(*iii*), felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court dismissed the charges after previously ruling in favor of defendant on his motion to suppress the evidence obtained in a warrantless search of defendant's house. Parole agents acting as part of an absconder recovery team with the Michigan Department of Corrections (MDOC) went to defendant's house in an effort to locate defendant's brother, an alleged parole absconder who had given the MDOC defendant's home address as the brother's place of residence. The parole agents testified that defendant gave them consent to search the home for his brother; defendant testified that no consent was given. Marijuana and firearms were discovered during the search, and defendant was arrested. The trial court ruled that "[t]he testimony presented [did] not demonstrate by clear and positive evidence that the MDOC agents asked for permission to enter or that [d]efendant gave his consent unequivocally, freely, voluntarily, intelligently, specifically and in the complete absence of express or implied duress or coercion." We affirm.

The prosecutor first argues that the trial court erred in concluding that the testimony failed to demonstrate a constitutionally-adequate consent to the search by defendant and in failing to make a credibility determination regarding the testimony of defendant and the parole agents prior to ruling on the consent issue. We disagree.

We review for clear error a trial court's factual findings at a suppression hearing, but the application of constitutional standards concerning searches and seizures to uncontested facts receives less deference, and the court's ultimate ruling on the motion to suppress is reviewed de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). The Fourth Amendment

of the United States Constitution and Article 1, § 11, of the Michigan Constitution guarantee a person's right to be free from unreasonable searches and seizures. *People v Slaughter*, 489 Mich 302, 310; 803 NW2d 171 (2011). The touchstone of the constitutional analysis regarding searches and seizures is reasonableness. *Williams*, 472 Mich at 314. Searches conducted absent a warrant are per se unreasonable aside from a few well-delineated exceptions, which the prosecution has the burden of establishing. *Katz v United States*, 389 US 347, 357; 88 S Ct 507; 19 L Ed 2d 576 (1967); *People v Reed*, 393 Mich 342, 362; 224 NW2d 867 (1975); *People v Chowdhury*, 285 Mich App 509, 521; 775 NW2d 845 (2009). These established exceptions to the warrant requirement include a search that is performed pursuant to consent. *Florida v Jimeno*, 500 US 248, 250-251; 111 S Ct 1801; 114 L Ed 2d 297 (1991); *In re Forfeiture of $176,598*, 443 Mich 261, 266; 505 NW2d 201 (1993). Courts "have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Jimeno*, 500 US at 250-251.

Consent to a search must be unequivocal, specific, and freely and intelligently given, and consent cannot be deemed voluntary if the consent resulted from duress or coercion. *Chowdhury*, 285 Mich App at 524. A prosecutor who wishes to rely on consent in order to justify a warrantless search must prove that the consent was indeed freely and voluntarily given by the defendant; showing mere acquiescence to a claim of lawful authority does not discharge the prosecutor's burden. *Id.* The question whether consent was given or obtained primarily turns on credibility determinations. *People v Roberts*, 292 Mich App 492, 503; 808 NW2d 290 (2011). A court's resolution of a factual issue upon which conflicting testimony is presented is entitled to deference, and this is especially true when the factual issue entails the credibility of witnesses. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). We defer to a court's assessment of credibility because it has a superior opportunity relative to observing the witnesses and evaluating their credibility. *Roberts*, 292 Mich App at 503-504.

Contrary to the prosecutor's argument, the trial court did make credibility determinations. It is implicit, yet overwhelmingly evident, from the language in the trial court's opinion and order that the court found, at least in part, defendant's testimony to be credible while finding, at least in part, the testimony of the parole agents to be lacking in credibility. The trial court's ruling can be viewed as a finding that either defendant did not grant permission to the agents to search the house or that a coercive environment existed such that it rendered involuntary or negated any consent that defendant may have given, despite the agents' testimony suggesting a non-coercive environment in which consent was freely given. Either way, underlying credibility assessments necessarily played a role in the court's ruling.

Furthermore, and contrary to the prosecutor's position, the record sufficiently supports both a conclusion that no consent was given and a conclusion that any consent that may have been obtained was involuntary and not freely given, resulting from duress and/or coercion. According to defendant, the MDOC agents arrived at his home in the early morning hours, pounded loudly on the door, and informed a cold and scantily-clad defendant that they had an arrest warrant for defendant's brother. The agents, according to defendant, proceeded to barge into defendant's house absent any permission, closed the door behind them, and escorted defendant to the kitchen. Defendant testified that he did not consent to the agents' entry into the house, nor to the subsequent search of his home. Even the testimony by the parole agents could lead one to conclude that defendant's purported consent did not appear to be freely given, but

rather was the result of duress or a coercive environment, where they indicated that defendant was shaking and appeared nervous. Giving the proper deference to the trial court, and considering the existence of supporting evidence for the court's findings, there was no clear error in regard to the court's consent-related determinations and there was no error in granting the motion to suppress the evidence discovered in the search. The prosecutor does not argue that the exclusionary rule should not be invoked, not do we find any good-faith basis not to invoke the exclusionary rule. See *Davis v United States*, __ US __; 131 S Ct 2419, 2427-2429; 180 L Ed 2d 285 (2011); *People v Goldston*, 470 Mich 523, 542-543; 682 NW2d 479 (2004). Accordingly, the motion to dismiss the charges was properly granted.

Next, the prosecutor argues that, regardless of consent, the parole agents did not need a warrant to search the house in light of 1999 AC, R 791.7735(2), which provides, in part, that a parole agent may conduct a warrantless search of "a parolee's person or property" when the agent has reasonable cause to believe that a parole violation occurred. The prosecutor failed to raise this issue or argument below; therefore, testimony at the evidentiary hearing was not elicited with the administrative rule in mind. In *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010), our Supreme Court observed:

> The preliminary issue in this case is whether the prosecution or defendant properly raised and preserved the traditional common law affirmative defenses of self-defense and duress before the trial court. Although the Court of Appeals analyzed the availability of both affirmative defenses in its decision and the parties addressed both defenses in their arguments before this Court, our review is necessarily limited by the specific issue preserved below. We have "long recognized the importance of preserving issues for the purpose of appellate review." *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); see also *People v Brott*, 163 Mich 150, 152; 128 NW 236 (1910) ("This court has often held that it will not review questions that have not been raised in the trial court, and such is the rule according to the great weight of authority."). In accordance with the general rule of issue preservation, "issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances." *Grant*, 445 Mich at 546.

The prosecutor has not presented us with compelling nor extraordinary circumstances that are deserving of appellate review of an issue that could easily have been raised below. As reflected in R 791.7735(2), it extends to a search of the "parolee's . . . property," yet the record is essentially silent regarding whether the search at issue concerned defendant's brother's property. Throughout the evidentiary hearing, counsel for both parties and the witnesses repeatedly spoke in terms of and referred to "defendant's" house or home. And defendant claims on appeal that his brother no longer lived in defendant's home at the time of the search. Moreover, the record of the evidentiary hearing reflects that it was *defendant's* basement bedroom wherein firearms and marijuana were discovered. That said, we are not rendering a substantive ruling on the applicability of R 791.7735. Rather, we are merely declining to address the substantive issue because of the preservation failure, considering that, had the prosecutor raised below the argument under R 791.7735, the record necessary to properly resolve the question of the rule's applicability could have been developed. Again, no compelling or extraordinary circumstances exist that justify substantive review, assuming it even possible to engage in a substantive review

of the matter given the record. We also conclude that no compelling or extraordinary circumstances exist that would justify remanding the case for further factual development in relationship to the administrative rule. We are not prepared to burden the trial court with conducting a second evidentiary hearing where the prosecutor, absent any legitimate excuse, failed to take advantage of the first evidentiary hearing to formulate an argument under R 791.7735.

Finally, we note that the prosecutor also references R 791.7735(1)(d), which allows warrantless searches by a parole agent of a "parolee's . . . property" with "the consent of the parolee or a third party having mutual control over the property to be searched." We have already rejected a consent argument as to defendant's alleged consent, and, once again, the record was simply not adequately developed on the issue of property interests. Moreover, there was no specific evidence showing that defendant's brother consented to the search. Reversal is unwarranted.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ William C. Whitbeck