

[J-263-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 53 W.D. Appeal Docket 1998
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court of Pennsylvania entered on
	:	December 8, 1997 at No. 61 Pittsburgh
v.	:	1997 affirming the Judgment of Sentence
	:	entered on December 30, 1996 in the
	:	Court of Common Pleas, Beaver County,
JOSEPH M. CLECKLEY, JR.,	:	at No. 552 of 1996, Criminal Division
	:	
Appellant	:	
	:	
	:	SUBMITTED: December 8, 1998
	:	
	:	

OPINION

MR. JUSTICE CAPPY

DECIDED: AUGUST 23, 1999

Appellant contends that a consensual search should be deemed valid under Article I, Section 8 of Pennsylvania Constitution only where it can be shown that the person subject to the search knew that he or she had the right to refuse such consent. For the reasons that follow, we disagree and, accordingly, affirm the decision of the Superior Court.

On December 23, 1995, Officer John Deluca of the Borough of Koppel Police Department went to Phil's Inn with an arrest warrant for one Andrew Pounds. Upon being arrested, Pounds informed the officer that appellant, who was inside the bar, had just sold drugs to Pounds' brother. He also told the officer that appellant had the drugs in a change purse that bore the name "Joe."

The officer went back into the bar and located appellant standing next to Ralph Pounds, brother of Andrew Pounds. After asking appellant to go outside with him, the officer informed appellant that he had been accused of selling drugs in the bar. When the officer then asked appellant if he could "pat him down," appellant responded, "Sure, I don't have anything on me." It appears that, at that time, appellant visibly possessed in his left hand a change purse which the officer took and unzipped. Inside the purse was some crack cocaine and ninety-eight dollars (\$98.00).

Appellant was ultimately charged with possession¹ and possession with intent to deliver.² Prior to trial, appellant filed a motion to suppress the cocaine. Finding that the search of appellant was consensual, the trial court denied the motion. Following a trial by jury, appellant was convicted of possession. On appeal, the Superior Court affirmed the judgment of sentence. We granted appellant's petition for allowance of appeal in order to address the issue of whether in consensual search cases, the courts should employ a "waiver" analysis and not simply a "voluntariness" analysis in determining whether under Article I, Section 8 of the Pennsylvania Constitution the consent was valid.³

Our review of suppression rulings is circumscribed. Where the record supports the factual findings of the court below, we may reverse the suppression ruling only if the legal conclusions drawn from those facts are in error. Commonwealth v. Cortez, 491 A.2d 111 (Pa. 1985).

Under both the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution, a search such as that at issue here, which is

¹ 35 P.S. §780-113(a)(16).

² 35 P.S. §780-113(a)(30).

³ Although appellant raised this issue below, neither the trial court nor the Superior Court directly addressed it.

conducted without a warrant, is deemed to be *per se* unreasonable. Commonwealth v. Williams, 692 A.2d 1031 (Pa. 1997). Certain specifically established exceptions, one of which is a valid consent may, however, render an otherwise illegal search permissible. Commonwealth v. Slaton, 608 A.2d 5, 8-9 (Pa. 1992). It is the state's burden to prove consent. Bumper v. North Carolina, 391 U.S. 543, 548 (1968); Commonwealth v. Silo, 389 A.2d 62 (Pa. 1978). This court, as well as the United States Supreme Court, has long adhered to the principle that for purposes of the Fourth Amendment, consent must have been given voluntarily. See Commonwealth v. Smith, 368 A.2d 272, 276 (Pa. 1977) and cases cited therein. At issue in the instant matter is whether, under Article I, Section 8 of the Pennsylvania Constitution, this test of "voluntariness" should include as well a finding that the subject of the search knowingly and intelligently waived his or her right to refuse to consent.

Appellant acknowledges that the United States Supreme Court, in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), decided this precise issue for Fourth Amendment purposes adversely to the position he is here espousing. He maintains, however, that given the enhanced privacy rights recognized under Article I, Section 8 of our state constitution, we should adopt a "constitutional waiver" standard for determining whether a consensual search is valid in Pennsylvania. According to appellant, a waiver standard similar to that adopted by the United States Supreme Court in Johnson v. Zerbst, 304 U.S. 458 (1938)⁴, is appropriate here since by consenting to a warrantless search, one is

⁴Zerbst involved the issue of the denial of counsel in a federal criminal trial. Significantly, the Court there held that under the Sixth Amendment, a criminal defendant is entitled to the assistance of counsel and that if he or she is unable to afford counsel, it is the government's obligation to provide counsel for that defendant. Johnson v. Zerbst, 304 U.S. 458, 462 (1938). In discussing a defendant's asserted waiver of counsel, the Court explained that in order to preserve the fairness of the trial process, the government should bear the heavy burden of establishing that the defendant intentionally and knowingly abandoned the right to counsel before a valid waiver thereof would be found. *Id.* at 464.

waiving the right to be free from a warrantless search. Appellant argues, at certain points in his brief, that the police should be required to expressly advise the subject of the search that he or she has the right to refuse the search.

In Schneckloth, the Court held that where the subject of the search is not in custody and the state purports that the search was consensual, the Fourth and Fourteenth Amendments dictate that, to be valid, the consent be voluntarily given and not the product of coercion or duress. Significantly, the Court held that a consent search is valid if it meets the test of "voluntariness." That test involves consideration of whether the confession was the product of an essentially free and unconstrained choice. 412 U.S at 225. According to the Court, "voluntariness" is a question of fact to be determined from the totality of the circumstances and while knowledge of the right to refuse consent is a factor to consider in determining whether consent to search was voluntarily and knowingly given, it is not dispositive. In so holding, the Court reasoned that such a requirement would not only be impractical but it would also hamper legitimate police investigation. Two competing concerns - the legitimate need for consent searches and the assurance that the subject of the search not be coerced - dictated the Court's decision. *Id.* at 227-28.

The Court in Schneckloth explicitly rejected the idea of applying the Zerbst "waiver" analysis to consent searches, essentially finding that analysis appropriate to preserving those constitutional rights guaranteed a criminal defendant in order to assure a fair trial, but not to those rights encompassed in the Fourth Amendment. Appellant nevertheless maintains that our case law supports the notion that under an independent state analysis, we would require an intelligent waiver. In support thereof, he cites to this court's decisions

in Commonwealth v. Gibson, 638 A.2d 203 (Pa. 1994) and Commonwealth v. Melendez, 676 A.2d 226 (Pa. 1996).⁵

In Gibson, the police arrived at an apartment building to investigate a party in a second floor apartment. By that time, the party in the second floor unit was already over. The police proceeded to the first floor apartment which was rented by Steven Fifoot. There were no noises emitting from this apartment nor were there people entering and leaving this apartment. Indeed, the police did not even possess knowledge of a party or underage drinking at this apartment. Nevertheless, one of the officers engaged Mr. Fifoot in conversation in the foyer of the apartment while the other two officers entered the apartment. No warrant had been obtained permitting entry into any unit in the building. The appellants, who were guests at this apartment, were ultimately cited for underage drinking.

On appeal to this court, appellants maintained that the police conducted an illegal search of this apartment and, therefore, all evidence obtained during that search should be suppressed. One of the contentions of the Commonwealth on appeal was that the owner of the unit, Mr. Fifoot, had consented to the search of the apartment. In rejecting that contention, this court, after noting that consent can validate an otherwise illegal search only where that consent is unequivocal, specific, and voluntary, stated that:

⁵ In Comonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991), we created a four-part methodology to aid in the analysis of state constitutional claims. Specifically, the court will look at:

- 1) the text of the Pennsylvania constitutional provision;
- 2) the history of the provision, including Pennsylvania case law.
- 3) related case-law from other states; and
- 4) policy considerations unique to Pennsylvania.

Edmunds 586 A.2d at 895.

It is only where there is an intentional relinquishment or abandonment of a known right or privilege that an effective waiver can be found. United States v. Blalock, 255 F.Supp. 268 (E.D.Pa. 1966). The subject of the search must be made aware of his rights against a warrantless search for a waiver to be intelligent. *Id.*

Gibson, 638 A.2d at 207. It is this language in Gibson on which appellant in the instant matter relies. Significantly, Blalock was decided prior to Schneckloth, and thus, any implication therein which would dictate a requirement that the subject of a search must be specifically warned that he or she has a right to refuse consent to the search is of limited value. Moreover, appellant takes the quoted language out of context. Significantly, the Gibson court went on to hold that the search there could not be justified on the theory of consent since not only did the police fail to announce that it was their intent to search the apartment, but also because Mr. Fifoot never expressly consented to the police entry. *Id.* In other words, there was no consent to even evaluate.

Similarly, in Melendez there was no evidence that the defendant expressly consented to police entry into her home. In that case, police had Melendez's house under surveillance and were in the process of applying for a search warrant when Melendez was seen leaving her home. Police immediately stopped the vehicle which she was driving, removed her from the vehicle, and searched her purse whereupon they discovered a .25 caliber handgun, a large amount of cash and a drug tally sales sheet. The police then informed Melendez that they were getting a search warrant for her home and asked that she accompany them to her home whereupon they then gained entry to the home by using her keys.

In rejecting the Commonwealth's contention that Melendez had consented to the search of her home, this court relied upon the fact that there had been no express consent given by Melendez to the search. Indeed, the court found specifically that Melendez's conduct demonstrated acquiescence only and not consent. Appellant in the instant matter

points to the following excerpt from Melendez, arguing that it evidences that Pennsylvania law requires intelligent waiver in order for consent to be deemed valid:

In this case, Melendez was not informed of her right to refuse to accompany police or her right to refuse their entry into her house. Clearly, she waived nothing, and she *certainly* did not freely and voluntarily consent to the police entry into her home.

Melendez, 676 A.2d at 230 (emphasis in the original). However, given the absence of any express consent in Melendez, this excerpt is of no avail to appellant's argument.

As appellant so notes, this court, in analyzing particular provisions of our state constitution, is not bound by the decisions of the United States Supreme Court that interpret similar provisions of the United States Constitution. Commonwealth v. Edmunds, 586 A.2d 887, 894 (Pa. 1991).⁶ However, we are not precluded from applying a like standard to our state constitutional provisions where our own independent state analysis does not suggest a distinct standard. Certainly this court has accorded greater protection to the citizens of this state under Article I, section 8 of our constitution under certain circumstances. *See, e.g., Edmunds, supra* (declining to adopt the "good faith" exception to the exclusionary rule as articulated by the United States Supreme Court in United States v. Leon, 468 U.S. 897 (1984); Commonwealth v. Sell, 470 A.2d 457 (Pa. 1983)(holding that Article I, Section 8 guarantees a defendant accused of a possessory crime automatic standing to challenge the admissibility of evidence alleged to be the fruit of an illegal search notwithstanding the United States Supreme Court's rejection of such standing for Fourth Amendment purposes); and Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979)(recognizing under Article I, Section 8 an expectation of privacy in bank records).

⁶ In Edmunds, this court recognized that the wording of Article I, Section 8 is similar to that of the Fourth Amendment. Edmunds, 586 A.2d at 895-896.

However, in other instances we have found that the protections of the Fourth Amendment and Article I, Section 8 of our state constitution are coextensive. *See, e.g., Commonwealth v. Waltson*, 724 A.2d 289 (Pa. 1998)(declining to find greater protection under Article I, Section 8 of our state constitution that would dictate that a warrant is overbroad if it permits a search to occur in any area of a single unit residence for which there is no probable cause); *Commonwealth v. Williams*, 692 A.2d 1031 (Pa. 1997)(Article I, Section 8 provides a parolee no greater protection than the Fourth Amendment with regard to the search of his or her bedroom).

As noted above, our prior case law in this area of consensual searches has been confined to an analysis of the Fourth Amendment. *See Smith, supra*. We have not, however, directly spoken to the issue of whether Article I, Section 8 of our state constitution provides greater protection in this area. A number of our sister states have analyzed specifically whether to adopt the Schneckloth voluntariness standard as the appropriate standard under their own state constitutions. Those states that have addressed this issue, however, have, for the most part, rejected the notion that knowledge of one's right to refuse consent to a warrantless search is required under the applicable state constitution, opting instead to follow the federal voluntariness standard which focuses on the totality of the circumstances as opposed to any one factor. *See, e.g., State v. Knaubert*, 550 P.2d 1095 (Ariz. Ct. App. 1976); *People v. Hayhurst*, 571 P.2d 721 (Colo. 1997); *State v. Berry*, 526 S.W.2d 92, 98 (Mo. Ct. App. 1975); *State v. Osborne*, 402 A.2d 493 (N.H. 1979); *State v. Robinette*, 685 N.E.2d 762 (Ohio 1997); *Oregon v. Flores*, 570 P.2d 965 (Or. 1977); *State v. Contrel*, 886 P.2d 107, 111-12 (Utah 1994); *State v. McCrorey*, 851 P.2d 1234 (Wash. Ct. App. 1993); and *State v. Buzzard*, 461 S.E.2d 50 (W. Va. 1995). Consistent with the pronouncements of the United States Supreme Court in Schneckloth, these cited decisions recognize that such knowledge on the part of the subject of the search may be a factor in

ascertaining whether consent was voluntarily given, but decline the invitation to render such a factor determinative of that issue.

Our research reveals only three state appellate court decisions which have departed from the Schneckloth standard when analyzing the issue on independent state grounds. Mississippi, for example, has held that where the defendant raises a claim that his or her consent was not knowingly given, a determination of whether that consent was voluntary requires a finding that the defendant is cognizant of his or her right to refuse the request to search. Graves v. Mississippi, 708 So.2d 858 (Miss. 1997). The Supreme Court of New Jersey, too, has rejected, for state constitutional purposes, the holding of Schneckloth. In State v. Johnson, 346 A.2d 66 (N.J. 1975), it was held that where the state seeks to justify a warrantless search on the basis of consent, the state must prove that the person consenting knew, or was told by the police, of his or her right to refuse consent to the search. The Supreme Court of Hawaii has ruled as well that the subject of an allegedly consensual encounter and/or search must be informed of his or her right to refuse to participate in the encounter or to refuse the search. State v. Trainor, 925 P.2d 818 (Haw. 1996).

Finally, our decision in Edmunds directs that we review policy considerations unique to Pennsylvania jurisprudence in an effort to ascertain whether greater protections should be extended under our state constitution. Appellant essentially argues that to require an intelligent waiver of the right to refuse one's consent to an illegal search would protect and enhance one's privacy rights under our state constitution without any significant impact upon law enforcement. Appellant likens this issue to that of requiring Miranda warnings prior to obtaining a confession, noting that the giving of Miranda warnings has resulted in no significant reduction in the number of confessions. We are unpersuaded by appellant's argument. In short, we find no policy issues unique to Pennsylvania such as widespread police misconduct infringing upon our citizens' rights against unreasonable searches and

seizures, that would cause us to depart from the federal standard. Indeed, consideration of all the Edmunds factors leads us to conclude that the federal voluntariness standard as enunciated in Schneckloth adequately protects the privacy rights obtained under Article I, Section 8 of our state constitution. It is important to remember that even under the federal standard, one's knowledge of his or her right to refuse consent remains a factor to consider in determining the validity of consent; it simply is not a determinative factor since other evidence is oftentimes adequate to prove the voluntariness of a consent.⁷

In the instant matter, it would serve no useful purpose to suppress the evidence obtained on the sole basis that there was no showing that appellant was aware of his right to refuse consent since it is clear that appellant voluntarily consented. After informing appellant that he had been accused of selling drugs, the officer asked appellant if he could "pat him down" whereupon appellant immediately responded in the affirmative, expressly disclaiming that he possessed any drugs. There is no evidence that the officer exerted any pressure upon appellant to submit to the search or exerted any force.

For all the foregoing reasons, we conclude that while the Pennsylvania Constitution provides greater privacy rights than the Fourth Amendment in certain respects, regarding the test for determining whether consent was freely and voluntarily given, those privacy

⁷ Evaluation of the voluntariness of a defendant's consent necessarily entails consideration of a variety of factors, factors which, of course, may vary depending on the circumstances. Accordingly, no hard and fast rule can be gleaned that would dictate what factors must be considered in each instance. We find instructive, however, the following factors considered by the Supreme Court of Appeals of West Virginia when evaluating the voluntariness of a defendant's consent: 1) the defendant's custodial status; 2) the use of duress or coercive tactics by law enforcement personnel; 3) the defendant's knowledge of his right to refuse to consent; 4) the defendant's education and intelligence; 5) the defendant's belief that no incriminating evidence will be found; and 6) the extent and level of the defendant's cooperation with the law enforcement personnel. Buzzard, 461 S.E.2d at 57.

rights are sufficiently protected where the federal standard of "voluntariness" has been met. Accordingly, we affirm the order of the Superior Court.

Mr. Justice Nigro files a Dissenting Opinion.