IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ERICH WHITTEN PLATT, *Appellant*.

No. 1 CA-CR 15-0201
FILED 7-14-2016

Appeal from the Superior Court in Mohave County
No. S8015CR2013-00273
The Honorable Rick A. Williams, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By W. Scott Simon
Counsel for Appellee

Mohave County Legal Advocate's Office, Kingman
By Jill L. Evans
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Michael J. Brown delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma joined. Judge Maurice Portley dissented.

B R O W N, Chief Judge:

¶1 Erich Whitten Platt appeals from his convictions and sentences for possession of dangerous drugs and possession of drug paraphernalia, asserting the trial court erred in denying his motion to suppress. For the following reasons, we affirm.

BACKGROUND

¶2 In the early morning of January 30, 2013, Kingman Police Officer Kunert saw a car run a red light. Kunert, who was in a marked patrol car, decided to effect a traffic stop, however, the car accelerated and a high-speed chase followed. In a separate marked patrol car, Officer Clancy joined the pursuit. Kunert activated his lights and sirens and continued pursuing the car until it entered an apartment complex. Kunert lost sight of the car for a time, but then noticed it parked at an angle, with a flat tire, the driver's door closed but unlocked, and the passenger door open. Because the passenger door was open, Kunert testified he believed that two people may have been in the car; however, no occupants were in or around the car. Kunert traced the license plate and discovered the car was registered to Platt, with an address in the apartment complex.

¶3 Clancy joined Kunert at the scene and testified that based on the condition of the car, he was looking for one or two people.[1] Clancy

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[1] Clancy testified that "a lot of clothing items" were located inside the abandoned car and at that time, there was a "rash of storage container burglaries." Therefore, in addition to searching for the driver at Platt's apartment, Clancy testified he would have detained any passenger as an "investigative lead" because he was "trying to obtain any information that could possibly help out the investigators for those types of crimes." Platt asserts the officers' initial entry into his home was not justified by exigent circumstances because the officers were not chasing a fleeing felon, but a

immediately went to Platt's apartment, while Kunert stayed with the abandoned car. When Clancy arrived at the apartment, he noticed the door was ajar. After knocking, Platt's son Michael came to the door and stepped out of the apartment onto the landing. Michael was sweating and out of breath and admitted he was "running from the police." Because the apartment door was still open, Clancy could see another male inside, but only focused on Michael "due to his statements that he was driving the car." Clancy placed Michael under arrest and took him downstairs to his patrol car. Clancy did not return to the apartment.[2]

¶4 Meanwhile, Officer Hopper arrived to assist Officer Morris "inside the residence." Hopper learned there were possibly two people in the car; thus, he went to Platt's apartment "in part" to attempt to locate any other person that may have been in the car. When Hopper arrived at Platt's apartment, he entered through the open door after seeing Morris inside speaking with Platt. Hopper asked Platt for permission to search the apartment to "make sure there was nobody else inside," which Platt permitted.[3]

¶5 Platt accompanied Hopper to Platt's bedroom, where Hopper noticed an orange pill bottle on the floor. Responding to questions from Hopper, Platt admitted the bottle was his and told Hopper he could look at it. Inside the bottle, Hopper found a baggie containing a white crystal substance, which he recognized to be methamphetamine. Hopper also saw drug paraphernalia on a dresser in plain view. Hopper left the apartment

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passenger as an "investigative lead." Because we conclude that Platt's consent was sufficiently attenuated to purge the taint of the constitutional violation, we need not address whether the officers' entry was justified by exigent circumstances.

[2] Clancy testified that his training officer, Officer Hood, was with him when he arrived at Platt's apartment. However, because Clancy was focused on arresting Michael and escorting him to his patrol car, he was unaware of Hood's movements at the scene. There is no evidence Hood interacted with Platt in any manner or entered his apartment, nor does Platt argue such. Hood did not testify at the suppression hearing.

[3] Platt's brother-in-law was in the apartment when Hopper arrived. He was interviewed by another officer and determined not to be the passenger in the car.

and obtained a search warrant, which was executed later that morning by a different officer, leading to Platt's arrest.

¶6 Platt filed a motion to suppress, arguing that Morris and Hopper's entry into the apartment was illegal and tainted the subsequent consensual search and resulting search warrant; therefore, evidence obtained constituted fruit of the poisonous tree and should have been suppressed. Platt asserted the officers' entry was illegal because it was not justified by exigent circumstances nor did the officers obtain his consent. Following an evidentiary hearing, the trial court denied the motion, finding that the warrantless search of Platt's apartment was justified by both Platt's consent and exigent circumstances.

¶7 A jury found Platt guilty of possession of dangerous drugs and possession of drug paraphernalia. The trial court sentenced Platt to a term of 2.5 years on the possession conviction and nine months on the paraphernalia conviction, to be served concurrently. This timely appeal followed.

DISCUSSION

¶8 We review the trial court's denial of a motion to suppress for an abuse of discretion. *State v. Manuel*, 229 Ariz. 1, 4, ¶ 11 (2011). However, legal and constitutional issues are reviewed de novo. *State v. Moody*, 208 Ariz. 424, 445, ¶ 62 (2004). We look only to the suppression hearing evidence, viewing it in the light most favorable to sustaining the court's ruling. *State v. Brown*, 233 Ariz. 153, 156, ¶ 4 (App. 2013). We will affirm the court's ruling if it is legally correct for any reason supported by the record. *State v. Perez*, 141 Ariz. 459, 464 (1984).

¶9 At the suppression hearing, the State had the burden to prove the constitutionality of the seizure of the challenged evidence. *State v. Olm*, 223 Ariz. 429, 431, ¶ 5 (App. 2010). The Fourth Amendment to the United States Constitution protects individuals against "unreasonable searches and seizures," and any evidence collected in violation of this provision is generally inadmissible in a subsequent criminal trial. *Mapp v. Ohio*, 367 U.S. 643, 654 (1961) (internal quotations and citation omitted). Article 2, Section 8, of the Arizona Constitution is "specific in preserving the sanctity of homes and in creating a right of privacy." *State v. Bolt*, 142 Ariz. 260, 264-65 (1984). A warrantless search is *per se* unreasonable under the Fourth Amendment unless a well-established exception applies. *Arizona v. Gant*, 556 U.S. 332, 338 (2009).

¶10 One well-established exception to the warrant requirement is a consensual search. *See State v. Ault*, 150 Ariz. 459, 463 (1986). To be valid, consent must be voluntarily given, and whether the consent was voluntary "is a question of fact to be determined from the totality of the circumstances." *State v. Davolt*, 207 Ariz. 191, 203, ¶ 29 (2004) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973)). Consent must "not be coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth*, 412 U.S. at 228. It is the State's burden to "prove voluntary consent by a preponderance of the evidence." *State v. Valenzuela*, No. CR-15-0022-PR, 2016 WL 1637656, slip op. at *3, ¶ 11 (Ariz. April 26, 2016) (citing Ariz. R. Crim. P. 16.2(b)).

¶11 Platt acknowledges that once Hopper was in the apartment, he consented to (1) Hopper's request to look for other people in the apartment and (2) examine the contents of the bottle. However, according to Platt, he did not give Morris or Hopper consent to enter his apartment in the first place, and therefore the subsequent consent to search, resulting search warrant, and Platt's admissions were invalid because they were tainted by the officers' unlawful entry.

¶12 When Hopper arrived at Platt's apartment, the door was open and Platt was inside speaking with Morris. Hopper testified that because the door was open and Morris was already inside, he did not ask Platt for permission to enter. Significantly, Morris did not testify at the evidentiary hearing, and none of the four testifying officers discussed when Morris entered or whether he obtained permission to enter Platt's residence. Without any evidence that Morris lawfully entered Platt's apartment, the State did not meet its burden of showing the officers' initial entry was lawful under the Fourth Amendment.

¶13 When an illegal entry precedes a defendant's grant of consent to search, the State must show that defendant's consent was voluntary and "establish a break in the causal connection between the illegality and the evidence thereby obtained." *State v. Blakley*, 226 Ariz. 25, 30, ¶ 18 (App. 2010) (citation omitted). Platt concedes his consent to search was voluntary; thus, the issue we must decide is whether the consent was sufficiently attenuated so as to purge the taint of the constitutional violation. In doing so, we consider (1) the temporal proximity of the consent to the violation, (2) any intervening circumstances, and (3) the purpose and flagrancy of the violation. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975). To determine whether the consent is purged of the taint,

> [w]e need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection [has been] made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Blakley, 226 Ariz. at 31, ¶ 20 (citing *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

¶14 Evaluating the *Brown* factors, the trial court did not err in denying Platt's motion to suppress. The first factor, temporal proximity, favors Platt and suppression of the evidence. Unlawful entry by the police into Platt's home and his subsequent consent to search were virtually simultaneous, although the record is silent as to how many minutes Morris was inside the apartment before Hopper arrived and obtained Platt's consent. While no specific time frame is determinative, the closer the illegal entry is to consent, the more likely the illegal entry induced the consent. *United States v. Whisenton*, 765 F.3d 938, 941 (8th Cir. 2014). Although this factor favors Platt, Arizona courts have found this to be the "least important *Brown* factor." *State v. Hummons*, 227 Ariz. 78, 81, ¶ 10 (2011) (citing *State v. Reffitt*, 145 Ariz. 452, 459 (1985)).

¶15 The second factor, intervening circumstances, favors Platt because the officers' illegal entry and Platt's consent were closely connected. *See Davolt*, 207 Ariz. at 203, ¶ 32 (noting there were no intervening circumstances to break the causal chain because after defendant invoked his right to counsel, he was interrogated for forty-five minutes, placed in a cell, and provided with a consent form to sign); *cf. State v. Guillen*, 223 Ariz. 314, 318, ¶ 17 (2010) (noting that lack of knowledge of illegal dog sniff two hours earlier constituted "a major break in the causal chain").

¶16 The United States Supreme Court has placed particular emphasis on the third factor, the "purpose and flagrancy of illegal conduct." *Hummons*, 227 Ariz. at 81, ¶ 14 (citing *Brown*, 422 U.S. at 603-04). This factor "goes to the very heart and purpose of the exclusionary rule"—deterrence of police misconduct. *Id.* at ¶ 14. As explained by the Supreme Court, "[s]uppression of evidence . . . has always been our last resort, not our first impulse." *Utah v. Strieff*, No. 14-1373, 2016 WL 3369419, slip op. at 4 (U.S. June 20, 2016). This factor "reflects that rationale by favoring

exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant." *Id.* at 7.

¶17 In assessing the third factor, courts consider "whether the violation was investigatory in design and purpose and executed in the hope that something might turn up," as well as "the manner of entry, the amount of force used, and the presence of threats or intimidation." *Whisenton*, 765 F.3d at 942 (internal quotations and citations omitted). We look to the totality of the circumstances in determining whether the flagrancy of the illegal conduct warrants suppression of the evidence. *Hummons*, 227 Ariz. at 82, ¶ 14. This factor favors the State.

¶18 Platt suggests that the officers entered his apartment with an unlawful purpose in mind, asserting the "officers testified that they entered after arresting the driver, and did not believe that the passenger was anything more than an investigative lead" as to why Michael fled. However, the only officer who testified to an "investigative lead" was Clancy, who left the apartment complex after taking Michael into custody and never returned. Hopper testified that he entered the apartment to try to search for anyone that may have been in the car during the high-speed chase. Assuming entry into the apartment by Morris or Hopper was not justified by exigent circumstances, an issue we need not decide, the purpose for entering, as testified to by Hopper, was to look for people—not to seize evidence from Platt. *See United States v. Washington*, 387 F.3d 1060, 1075-77 (9th Cir. 2004) (finding purpose of entry without warrant was to "obtain evidence of criminal activity" from defendant's room in hope that something might turn up when six officers approached without probable cause, refused to allow the door to be closed, and repeatedly threatened to arrest defendant in an effort to coerce consent to search). Nothing from the suppression hearing supports the conclusion that the officers who entered the apartment did so in the "hope that something might turn up." *Id.*; *see also United States v. Greer*, 607 F.3d 559, 564 (8th Cir. 2010) (holding that officers' unlawful entry was purged, in part, because their purpose was not to investigate, but to apprehend a fugitive they saw in the residence through an open doorway); *cf. Blakley*, 226 Ariz. at 31, ¶ 22 (noting there was no evidence officer was on property for legitimate purpose because he testified he was there to investigate the car and not to make contact with the residents).

¶19 Nor do we discern any evidence in the record indicating the officers' illegal entry was flagrant. Instead, the only testimony presented at the suppression hearing indicates that the door remained open throughout the incident. Clancy testified the door was open when he arrived and it

remained open after Michael stepped out of the apartment. Hopper similarly testified that he walked through an open door to speak with Platt, and asked if he could look around the apartment for other people. Platt spoke with officers and freely gave consent to search his apartment and the bottle where the drugs were found.

¶20 No evidence suggests, nor does Platt argue, that officers used force, threats, or intimidation, or displayed their weapons. Nor does the evidence show Platt was handcuffed or restrained in any way before consenting to the search. *See Whisenton*, 765 F.3d at 942-43 (holding that taint of Fourth Amendment violation was purged because, among other factors, there was no forced or violent entry, no threats or promises, and defendant was not handcuffed); *see State v. Phillips*, 577 N.W.2d 794, 807-08 (Wis. 1998) (finding that agents' conduct in entering basement without permission did not rise to the level of flagrant misconduct where they did not use trickery, deception, violence, threats, or physical abuse to gain entry). This evidence indicates the officers' entry was not flagrant. *Cf. Davolt*, 207 Ariz. at 203, ¶ 33 (noting that police misconduct was extreme; police violated defendant's *Miranda* rights twice after invoking right to remain silent and to counsel, and was expressly promised nothing he said could be used against him); *United States v. Robeles-Ortega*, 348 F.3d 679, 684 (7th Cir. 2003) (illegal entry of five agents in breaking down the door and ordering occupants of the apartment to lie down on the floor while the agents entered all of the rooms gave "appearance of having been calculated to cause surprise, fright, and confusion.").

¶21 Weighing the *Brown* factors, although the unlawful entry occurred shortly before Platt voluntarily consented to a search of his apartment to look for other people, the most compelling factor here is the lack of any evidence demonstrating any purposeful or flagrant illegal conduct by the police in entering through an open door to speak with Platt. Accordingly, Platt's consent to search and the resulting search warrant were sufficiently attenuated from the officers' unlawful entry so as to purge the taint of the constitutional violation.[4]

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[4] The dissent, *see infra* ¶ 25, asks several questions regarding Morris' entry into the apartment, which are not addressed in the briefs and which appear unanswerable on this record. We do know, however, that when Hopper arrived, the apartment door was open and Morris was inside speaking with Platt. Hopper entered and asked Platt if he could search for other people that may have fled from the car. The dissent necessarily

CONCLUSION

¶22 Because the trial court properly denied Platt's motion to suppress, we affirm his convictions and sentences.

P O R T L E Y, Judge, dissenting

¶23 I concur with the analysis of my colleagues that State had the burden of proof under Rule 16.2(b), and the State did not meet its burden of showing that Officer Morris' entry into the apartment was lawful under the Fourth Amendment. I, however, disagree that Platt's consent to Detective Hopper's request was sufficiently attenuated so as to purge the taint of the constitutional violation.

¶24 Despite its burden, the State failed to present any evidence to demonstrate how Officer Morris got into the apartment, or why he was there. There was no testimony at the suppression hearing by Sergeant Kunert or then-Officer Clancy that Morris was in the parking lot or just outside of the apartment at the time the Michael was arrested and taken to the squad car. There was no testimony by Officer Marcus Hood, Clancy's training officer, about his role at the scene, or whether he directed Morris to stand outside or go into the apartment. And Detective Hopper testified that when he arrived the apartment door was open, Morris was inside and talking with Platt.

¶25 How did Morris get into the apartment? Was the door still open after Officer Clancy escorted Michael downstairs? Was the door closed and Morris entered, whether invited or uninvited? Why did he go

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presumes Morris' purpose for entering was improper and his actions a flagrant disregard for the law. But no evidence in this record suggests, nor does Platt contend, that conclusion. Absent such evidence or argument, we decline to presume Morris engaged in anything more than negligent conduct in entering the apartment unlawfully. *Cf. Strieff*, 2016 WL 3369419, at 7 (finding that police officer was "at most negligent" and his "errors in judgment" hardly rose to a purposeful or flagrant violation of the defendant's Fourth Amendment rights). Equally important, lack of evidence indicating exactly how and when Morris entered the apartment is but one aspect of the attenuation analysis under *Brown*. Considering the totality of the circumstances, including Platt's concession on appeal that his consent to search was voluntary, Platt's consent purged the taint of the constitutional violation.

in? And what, if anything, happened between the time Morris entered the apartment and Detective Hopper's arrival, and the subsequent consent to search? Was there discussion between Morris and Platt that Michael, and/or others, may have been involved in some storage facility burglaries, as testified to by Officer Clancy?

¶26 Unlike *Phillips*, where, based on the record, the Wisconsin Supreme Court found that the agents did not exploit their unlawful entry into the home to secure the subsequent consent, 577 N.W.2d at 798, ¶ 11, I cannot say the same about Morris before Hopper's arrival. And given the State's burden, the absence of any evidence about Morris' entry into or purpose for being in the apartment, I cannot join the conclusion that Platt's consent was sufficiently attenuated so as to purge the taint of constitutional violation. Accordingly, I dissent, and would vacate the convictions and sentence and remand the case for a new trial.