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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/27/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0963
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
WENDI THERESE BIEHL,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-118895-001 DT

The Honorable James T. Blomo, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

W. Michael Walz, Attorney At Law Phoenix
By W. Michael Walz
Attorney for Appellant

B R O W N, Judge

¶1 Wendi Biehl appeals from her convictions and sentences
for one count of possession of marijuana and one count of

possession of drug paraphernalia, both class one misdemeanors. She argues the trial court abused its discretion in denying her motion to suppress. For the following reasons, we affirm.

BACKGROUND

¶12 The following evidence was presented at a combined evidentiary hearing and bench trial. On January 8, 2010, around 10:00 p.m., a police officer noticed Biehl was driving with a broken license plate lamp. Officer La Clere conducted a traffic stop and Biehl pulled into the parking lot of the apartment complex where she lived. He immediately detected the odor of burnt marijuana and also observed there was a child in the car with Biehl.

¶13 La Clere asked Biehl whether there was marijuana in the car. She said there was none, but in subsequent questioning she admitted she had smoked marijuana several hours earlier. La Clere also asked her whether she had any family in the area and she replied that she did not.

¶14 At some point during the conversation, La Clere asked Biehl to exit her vehicle so they could speak outside the presence of the child. La Clere asked Biehl whether there was marijuana in her apartment, but she did not immediately answer. La Clere brought it up again and Biehl admitted she had about a gram of marijuana and a pipe inside her apartment. La Clere then asked Biehl to get the marijuana and pipe.

¶15 During the traffic stop, a police helicopter appeared overhead. La Clere had not requested the helicopter assistance nor did he have direct radio contact with the helicopter. La Clere testified the helicopter was part of routine police nighttime surveillance operations, was overhead for less than a minute, and was unrelated to this particular stop.

¶16 La Clere and Biehl then separately drove across the apartment complex parking lot to her apartment. La Clere also called for a back-up officer because he preferred not to enter a woman's apartment by himself. Biehl was the first to enter her apartment, followed by the child and La Clere. La Clere entered only a few feet past the threshold, and the other officer was at or just inside the threshold. Both officers remained near the front door while Biehl went to her bedroom and retrieved the marijuana and the pipe and gave them to La Clere. La Clere then read Biehl her *Miranda*¹ rights, and Biehl consented to further questioning. La Clere did not take Biehl into custody because she cooperated and she had no one else to care for the child.

¶17 According to Biehl, when La Clere approached the vehicle, he indicated he "smelled marijuana," and upon her disagreement said, "You know, it's a Class 6 felony in the State of Arizona to DUI with a minor child." Biehl also testified that when she denied having marijuana, La Clere told her, "well,

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

we could call CPS [(Child Protective Services)] right now and then we will deal with you" and that "he was going to call CPS to take [her] son and then he was going to further check [her] DUI status." Biehl stated that it was only after this statement, in an attempt to protect her child, that she admitted the existence and location of the marijuana. Biehl also said that La Clere did not tell her what would happen if she retrieved the marijuana or advise her it was a good idea to be cooperative.

¶18 La Clere testified that Biehl was cooperative throughout their encounter and that he did not make any promises, threats of arresting Biel, or statements about placing her child into CPS custody. He also stated that he did not promise Biehl if she was cooperative, she would not be arrested.

¶19 Prior to trial, Biehl moved to suppress the marijuana and pipe, asserting they were obtained "as a result of her detention and threats to place her child in control of [CPS]." Thus, Biehl argued that her actions in retrieving the marijuana and pipe were involuntary. Following the hearing/trial, the court denied the motion to suppress and found Biehl guilty on both counts. Biehl was then sentenced to six months unsupervised probation. This timely appeal followed.

DISCUSSION

¶10 We review a trial court's decision to deny a motion to suppress for an abuse of discretion. *State v. Dean*, 206 Ariz. 158, 161, ¶ 9, 76 P.3d 429, 432 (2003). An abuse of discretion occurs when "no reasonable judge would have reached the same result under the circumstances." *State v. Armstrong*, 208 Ariz. 345, 354, ¶ 40, 93 P.3d 1061, 1070 (2004). We defer to the court's factual findings, including those regarding credibility of witnesses and reasonable inferences, but review de novo the ultimate legal determination. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996). Additionally, "we can uphold a trial court's ruling on a motion to suppress if the court reached the correct result even though based on an incorrect reason." *State v. Gant*, 202 Ariz. 240, 246, ¶ 16, 43 P.3d 188, 194 (App. 2002), *vacated on other grounds by Arizona v. Gant*, 540 U.S. 963 (2003).

¶11 Both the United States Constitution and the Arizona Constitution protect against unreasonable searches and seizures. U.S. Const. amend. IV; Ariz. Const. art. 2, § 8. A warrantless search is per se unreasonable unless one of a few specifically established exceptions apply. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). One exception to the warrant requirement occurs when the suspect consents to the search or seizure. *State v. Davolt*, 207 Ariz. 191, 203, ¶ 29, 84 P.3d 456, 468

(2004). Consent must be voluntary to be valid. *State v. Guillen*, 223 Ariz. 314, 317, ¶ 11, 223 P.3d 658, 661 (2010). Whether consent is voluntary is "a question of fact to be determined from all the circumstances." *Schneckloth*, 412 U.S. at 248-49.

¶12 Here, the trial court determined there was "no basis" for the motion to suppress, noting in part as follows:

[Biehl] was allowed to drive; she drove her own vehicle; she was not placed in custody and then went back to her apartment or condo; she could have changed her mind at any point in time and gone into her apartment or not allow the officers to go into the apartment and not to get the marijuana and then go back up and get the pipe.

Thus, the court impliedly determined that Biehl's consent was voluntary. Although we do not necessarily agree with all of the trial court's reasoning, the record supports the denial of Biehl's motion to suppress.

¶13 Biehl argues that her consent to retrieve the marijuana and pipe was obtained involuntarily because "[t]he combination of an implied threat to arrest her and place her child in [CPS custody]" unless she cooperated and the police helicopter flying overhead "created an atmosphere that would probably cause most people to acquiesce to get their marijuana and smoking pipe." La Clere's testimony, however, was in direct conflict as he denied making any statements to Biehl about

calling CPS. In denying the motion to suppress, the trial court necessarily concluded that La Clere's testimony was more credible than Biehl's. See *Gonzalez-Gutierrez*, 187 Ariz. at 118, 927 P.2d at 778 (deferring to trial court's credibility determinations). In addition, the helicopter was not on site at the request of La Clere and was present for less than a minute. Biehl never attempted to revoke her consent and even continued to answer questions in her apartment after the seizure had occurred.

¶14 The trial court's denial of the motion to suppress in this case is consistent with *State v. Jensen*, 111 Ariz. 408, 531 P.2d 531 (1975). In *Jensen*, the trial court denied a motion to suppress relating to the defendant's decision to give police a rifle for ballistics testing that was later connected to a murder. *Id.* at 409, 531 P.2d at 532. Although there was conflicting testimony by the defendant and officer as to whether the defendant was coerced in handing over the weapon, the trial court believed the officer. *Id.* at 411, 531 P.2d at 534. Our supreme court recognized that "clear and positive evidence may come from an officer's testimony showing unequivocal conduct despite a direct conflict between his testimony and that of the appellant." *Id.* Thus, the court found that the defendant's cooperative behavior from the beginning was consistent with his

behavior to retrieve the gun, supporting a valid waiver of rights and denial of the motion to suppress.

¶15 Similarly, the testimonies of La Clere and Biehl were in direct conflict on the question of whether any threats were made. It is the role of the trial court to resolve such conflicts. Additionally, La Clere's actions do not support a finding of coercion. He asked to talk to Biehl outside the presence of her son, asked for backup "to cover [him]self," only entered her home a few steps, and reassured her son that his mother was not going to be arrested. These actions, together with Biehl's cooperative behavior throughout the process, support the trial court's implicit conclusion that Biehl's consent was voluntary and not the result of a coercive or threatening environment.

CONCLUSION

¶16 For the foregoing reasons, we affirm Biehl's convictions and sentences.

/s/

MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Judge

/s/

PHILIP HALL, Judge