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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESUS MAGADAN VALLE, Appellant.	2 CA-CR 2008-0352 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20072050

Honorable Gus Aragon, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant Jesus Valle was convicted of possession of marijuana for sale and possession of drug paraphernalia. The trial court sentenced him to a substantially mitigated three-year term of imprisonment for possessing marijuana and to time served for possessing drug paraphernalia. On appeal, he argues the trial court erred when it denied his motion to suppress evidence. That motion contended his consent to search the house had not been voluntary, his arrest had not been supported by probable cause, and his statements to a sheriff's deputy had been taken in violation of his constitutional right to remain silent. We conclude the trial court did not err in denying the motion, and we therefore affirm Valle's convictions and sentences.

¶2 When reviewing the denial of a motion to suppress, we consider only the evidence presented at the suppression hearing, and we view that evidence in the light most favorable to upholding the trial court's findings of fact. *State v. Guillen*, 222 Ariz. 81, ¶ 2, 213 P.3d 230, 231 (App. 2009). We review a trial court's ruling "for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo." *State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006).

¶3 The evidence established Pima County sheriff's deputies responded to a report of unusual activity at a residence. Specifically, a neighbor had reported that the house had been taken off the market for sale "some[]time ago, and . . . a U-Haul van was consistently showing up at the residence, backing into the back fenced area, and the same two males were

seen with the vehicle." From this information, the deputies suspected the residence was being used as a "stash house" for storing marijuana or other large quantities of drugs.

¶4 While the deputies were conducting surveillance on the residence, Valle arrived in a minivan and parked in the garage. A few minutes later, he responded to the deputies' knock at the front door. Deputy Jason Rockwell explained to Valle that unusual activity had been reported, that the deputies suspected the house was being used to store illegal drugs, and that they therefore wanted to enter and search the house. At that point, Valle appeared nervous and repeatedly stated he did not understand what was "going on." Asserting that he simply used the house as his residence, Valle stated he did not understand why the officers wanted to enter it. He asked what would happen if he did not consent to a search and asked the officers if they had a search warrant. Rockwell then acknowledged that he and the other officers could not enter without Valle's consent. While the officers waited at the door, Valle telephoned someone he claimed was his landlord to ask what he should do about the deputies' request to search. That person apparently confirmed what Rockwell had told Valle—that the officers needed a warrant to enter without Valle's consent.

¶5 Valle finally agreed to allow one deputy, Rockwell, to walk through the house. According to Rockwell, Valle had a nervous demeanor throughout the encounter. Rockwell noticed the house had no furniture except a mattress in a couple of the bedrooms and a small television and digital video disc player in the living room area. In the garage, Rockwell noticed the back seats had been removed from the van that Valle had been driving. In a room

adjacent to the garage were several large boxes that Valle said contained clothing. Rockwell smelled the aroma of marijuana while walking through the house and noticed that the smell became stronger in one of the bedrooms. Another deputy waiting by the front door also smelled the odor of "fresh" marijuana.

¶6 After a dog trained to detect the odor of illegal drugs subsequently signaled the presence of drugs in the house, the deputies detained Valle by placing him in handcuffs, advised him of his right to remain silent, and placed him in the back of a patrol car. At that time, Valle indicated that he understood his rights and showed no confusion about their meaning or context. While Valle was seated in the patrol car with Rockwell, he initiated a conversation with Rockwell in which he made inconsistent statements about whether he lived at the house.

¶7 Later, when Rockwell began to take a taped statement from Valle, the deputy memorialized that he had previously read Valle the *Miranda* warnings.[1] When Valle then stated he did not understand his rights, Rockwell further explained them. Rockwell never formally asked Valle if he was waiving his rights but believed Valle had so indicated by answering Rockwell's questions.

¶8 The trial court made the following findings in ruling on the several underlying grounds asserted in Valle's motion to suppress evidence. As to the claim Valle's consent to search the home was involuntarily given, the court found: (1) the encounter between Valle

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

and Rockwell that preceded Valle's acquiescence in the home search lasted five to seven minutes; (2) Rockwell had informed Valle that he could refuse consent and that the deputies could not enter without a warrant; and (3) Valle had also made a telephone call to a person who had informed him the deputies could not enter without a warrant.

¶9 As to Valle's claim the deputies lacked probable cause to arrest him, the trial court found Rockwell and another deputy had smelled the odor of marijuana emanating from inside the home and a drug-detection dog had alerted to the presence of drugs in or around the home. As to Valle's claim that the state violated his constitutional rights regarding Rockwell's second post-arrest discussion, the court found Valle had been placed in handcuffs, advised of his rights under *Miranda*, and taken to a patrol vehicle where Rockwell had further explained Valle's rights under *Miranda* in a recorded interview; Valle had ultimately indicated he understood his rights during the recorded interview; Rockwell had never explicitly asked Valle whether he waived his rights under *Miranda*, but Valle had "impliedly waived his *Miranda* rights by answering questions."

¶10 Based on those findings, the trial court denied the motion to suppress in part but granted it in part by precluding the admission of statements Valle made to Rockwell after he had clearly invoked his right to remain silent by stating he wanted to be quiet. This appeal followed.

CONSENT

¶11 Valle argues the consent he provided for Rockwell to enter the home was not voluntarily given because his will was overcome. Thus, he claims, the trial court erred when it denied his motion to suppress on that ground. In the absence of a warrant based on probable cause, a search of a home is per se unreasonable unless it falls within one of the "few specifically established exceptions" to the warrant requirement, one of which is valid consent. *State v. Davolt*, 207 Ariz. 191, ¶ 29, 84 P.3d 456, 468 (2004). "Whether a consent to search has been voluntarily given is a question determined by the totality of the circumstances." *State v. Flores*, 195 Ariz. 199, ¶ 18, 986 P.2d 232, 237 (App. 1999); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973) (consent must "not be coerced, by explicit or implicit means, by implied threat or covert force").

¶12 In evaluating voluntariness by that standard, courts have considered both whether the environment in which consent was sought was coercive—that is, whether the defendant had been placed in custody, whether any officer had drawn a weapon, and whether the officer had administered *Miranda* warnings, *see United States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997)—and whether the dialogue between law enforcement personnel and the defendant suggests the defendant's will had been overborne. *See State v. Ballesteros*, 23 Ariz. App. 211, 214, 531 P.2d 1149, 1152 (1975) (factors tending to show coercion include consent "obtained despite a denial of guilt" or "only after the accused had refused initial requests for consent" or "where the subsequent search resulted in a seizure of

contraband which the accused must have known would be discovered"); *see also State v. Alder*, 146 Ariz. 125, 129, 704 P.2d 255, 259 (App. 1985) (emphasizing lack of police deception in determining voluntariness of consent to search). We will not overturn a trial court's factual findings on the issue of consent unless they are clearly erroneous. *State v. Swanson*, 172 Ariz. 579, 583, 838 P.2d 1340, 1344 (App. 1992).

¶13 Here, no evidence at the suppression hearing suggested the deputies had created a coercive environment when seeking Valle's consent. The trial court found, based on evidence in the record, that Valle was not in custody when his consent was obtained. And Valle presented no evidence the officers had drawn their weapons or threatened any other force during the encounter. *See State v. McMahon*, 116 Ariz. 129, 132, 568 P.2d 1027, 1030 (1977) (consent involuntary when police threatened to break down door and subsequently showed defendant apparently valid search warrant). *But see State v. Watson*, 114 Ariz. 1, 7, 559 P.2d 121, 127 (1976) (consent to search voluntary despite five officers' standing at front door with guns drawn when occupant answered door), *modified on other grounds by State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002). And although the deputies here had not administered *Miranda* warnings, Valle was neither in custody nor under arrest at the time the deputies sought consent.

¶14 No other features of the dialogue between Valle and the deputy suggest Valle's will was overborne. Rockwell notified Valle that he could refuse consent, and he informed Valle that, in the absence of a search warrant, the deputies could not enter the home without

his consent. *See State v. Acinelli*, 191 Ariz. 66, 70, 952 P.2d 304, 308 (App. 1997) (whether defendant knew he had right to refuse request to search a factor to consider in voluntariness determination). Nor did Rockwell tell Valle that the deputies would obtain a search warrant in the event Valle withheld consent. *See McMahon*, 116 Ariz. at 132, 568 P.2d at 1030 (defendant's consent not voluntary when police threatened to take actions for which they lacked authority). And Rockwell testified he had not threatened, coerced, or made any promises to Valle to obtain his consent. Valle did not testify otherwise.

¶15 Valle contends on appeal, without supporting authority, that Rockwell's persistence in seeking his consent was some form of coercion. Rockwell testified he had explained the situation to Valle about five times: that the deputies "wanted to confirm whether or not the tip that [they] had received was valid, and the best and . . . fastest way to do that would be to make contact with the individuals living there and, with their consent, walk through the residence." We acknowledge that an officer's persistence in seeking consent is certainly a factor that, hypothetically, could contribute to a finding that consent was given involuntarily. But here, in light of all of the other circumstances, Rockwell's persistence, standing alone, does not compel the finding that Valle's will was overborne.

¶16 As the state points out, the deputy's persistence must be viewed in context as part of the totality of the circumstances, and Valle never stated that he wanted the deputies to leave or that he did not want them to enter the home. And Valle chose to seek his landlord's advice on whether to consent. Valle made the telephone call to his landlord in the

deputies' presence, and he walked away from the doorway out of their sight several times. Rockwell testified that the entire encounter at the front door before Valle gave his consent lasted only seven or eight minutes and that Valle could have closed the door and refused to speak with them any time.[2] The trial court did not err when it found under the totality of the circumstances Valle's consent had been voluntary.

PROBABLE CAUSE

¶17 Valle argues the trial court erred when it found the deputies had probable cause to arrest him. "A police officer has probable cause when reasonably trustworthy information and circumstance would lead a person of reasonable caution to believe that a suspect has committed an offense." *State v. Hoskins*, 199 Ariz. 127, ¶ 30, 14 P.3d 997, 1007-08 (2000). We review a determination that officers had probable cause to arrest by looking at the totality of the circumstances. *State v. Lawson*, 144 Ariz. 547, 553, 698 P.2d 1266, 1272 (1985).

¶18 Here, a neighbor had reported unusual activity at the house, two deputies smelled the odor of marijuana emanating from inside it, the house was sparsely furnished, the backseats had been removed from the van Valle had been driving, Valle was evasive when confronted by the deputies, and a drug-detection dog alerted to the presence of drugs

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[2]The same evidence also demonstrates Valle was not in custody before he was handcuffed at the front door, contrary to his cursory suggestion the entire encounter was a "de[]facto . . . arrest." *See State v. Smith*, 197 Ariz. 333, ¶ 4, 4 P.3d 388, 390 (App. 1999) (test for custody objective: whether reasonable person would feel, based on totality of circumstances, "'deprived of his freedom of action in a significant way'"), *quoting State v. Carter*, 145 Ariz. 101, 105, 700 P.2d 488, 492 (1985).

in the home Valle identified as his residence—all of which supported the inference that the residence contained marijuana and that Valle was aware of it. The trial court reasonably found from the totality of the circumstances that the officers had probable cause to believe an offense was being committed and to arrest Valle for his role in it. *See State v. Decker*, 119 Ariz. 195, 197-98, 580 P.2d 333, 335-36 (1978) (odor of burnt marijuana alone sufficient to establish probable cause to arrest occupant of hotel room); *State v. Harrison*, 111 Ariz. 508, 509, 533 P.2d 1143, 1144 (1975) (odor of unburnt marijuana emanating from vehicle supplied probable cause to arrest).[3]

MIRANDA VIOLATION

¶19 Valle argues that, because he did not expressly waive his constitutional right to remain silent after receiving a *Miranda* advisory, the trial court erred in failing to suppress his entire taped statement to Rockwell. Specifically, he contends he gave an equivocal answer when asked if he understood his rights and was never asked if he waived his rights.

¶20 After Valle was detained in the patrol car, Deputy Rockwell reminded him that he had been read the *Miranda* warnings and asked if he understood them. Valle responded that he did not. Rockwell explained each right in further detail, and the following exchange took place:

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[3]We recently decided in *State v. Guillen*, 222 Ariz. 81, ¶ 30, 213 P.3d 230, 239 (App. 2009), that officers need reasonable suspicion under the Arizona Constitution to use a drug-detection canine to conduct a sniff search of a residence. We need not decide whether the deputies had that level of suspicion here because we conclude, even without the dog's alert, the deputies would have had probable cause to arrest Valle.

> [ROCKWELL]: We read those to you earlier so you have kind of an idea of what we're talking about now?
>
> [VALLE]: Yeah, somewhat.
>
> [ROCKWELL]: O[K,] so those still apply. So whenever I come back and talk to you, I just want you to know why you're in custody. That those rights still apply to you at anytime, [OK]. So if you decide you want to talk to us and [at] some point want to change your mind and don't want to talk to us, that's your legal right.
>
> [VALLE]: O[K].
>
> [ROCKWELL]: O[K]. So before I start to ask you questions and stuff, I just want to make sure you're clear about those. O[K]?
>
> [VALLE]: O[K].

After Rockwell posed his first question, Valle asked, "[B]efore . . . I . . . decide to say anything, why am I under arrest?" Later, Valle stated, "I mean . . . I'd rather just be qui[et]." The trial court suppressed Valle's statements after the latter statement but admitted those made after the first statement.

¶21 Valle relies almost exclusively on *State v. Flower*, 161 Ariz. 283, 778 P.2d 1179 (1989), to support his argument that his initial failure to waive expressly his Fifth Amendment rights requires suppression of all statements he made thereafter. But *Flower* is readily distinguishable. In *Flower*, the defendant had remained silent after officers advised him of his rights and asked if he would answer questions. 161 Ariz. at 286, 778 P.2d at 1182. And, he had stayed silent for twenty minutes before the officers reinitiated the interrogation

without readvising him of his rights. *Id.* On those facts, our supreme court held that Flower's right to remain silent had been violated and that the interrogating detective should have "either . . . cease[d] all interrogation or . . . clarif[ied] whether Flower was exercising his right to silence." *Id.*

¶22 Here, Valle did not remain silent after Rockwell advised him of his rights. Rather, he indicated he understood them by saying "O[K]" in response to the deputy's statement, "So before I start to ask you questions and stuff, I just want to make sure you're clear about those [rights]. O[K]?" Rockwell was not required to obtain an explicit waiver from Valle before continuing to question him. *See North Carolina v. Butler*, 441 U.S. 369, 374 (1979); *State v. Montes*, 136 Ariz. 491, 495, 667 P.2d 191, 195 (1983). Valle's next statement—that he wanted to know why he had been arrested before he decided to say anything—also suggests he understood he could choose to remain silent. *See Montes*, 136 Ariz. at 495, 667 P.2d at 195 (evidence demonstrating familiarity with criminal process factor in whether waiver knowing and intelligent). Thus, we see a substantial difference between Flower's sustained silence, which reasonably could be interpreted as an implicit assertion of his Fifth Amendment rights, and Valle's strategically motivated banter with Rockwell.

¶23 Under such circumstances, when Valle subsequently began answering Rockwell's questions, the trial court reasonably found his conduct demonstrated his decision to waive his right to remain silent. *See State v. Trostle*, 191 Ariz. 4, 14, 951 P.2d 869, 879 (1997) (defendant's response to officer's questions can be implicit "'waiver by conduct'" of

right to remain silent), *quoting State v. Tapia*, 159 Ariz. 284, 287, 767 P.2d 5, 8 (1988). We find no error in the court's determination Valle waived his constitutional right to remain silent before making the first portion of his statement to Rockwell.

¶24 Valle's convictions and sentences are affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge