IN THE COURT OF APPEALS OF IOWA

No. 0-667 / 09-1460
Filed April 27, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROSENDO ENRIQUEZ, Jr.,
Defendant-Appellant.

Appeal from the Iowa District Court for Muscatine County, Mary E. Howes (motion to suppress) and James E. Kelley (trial), Judges.

A defendant appeals from his drug and firearm convictions. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, Patricia Reynolds, Assistant Appellate Defender, and Keith Duffy, Student-Intern, for appellant.

Rosendo Enriquez, Jr., Anamosa, appellant pro se.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Gary Allison, County Attorney, and Alan Ostergren, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Vaitheswaran and Doyle, JJ. Tabor, J., takes no part.

VOGEL, P.J.

Rosendo Enriquez appeals from his drug and firearm convictions. He asserts that the district court should have granted his motion to suppress and sufficient evidence does not support his convictions. We affirm.

I. Background Facts and Proceedings.

Stephanie Ryder was on probation in June 2008. As a term of her probation, she had agreed, "I shall submit my person, property, place of residence, vehicle, [and] personal effects to search at any time, with or without a search warrant, warrant of arrest or reasonable cause by any probation/parole officer or law enforcement officer." Near the end of the month, Ryder's probation officer, Mike Aleksiejczyk, was informed by Detective Michael Bailey of possible drug trafficking and firearms in Ryder's home.

On June 30, 2008, Officer Aleksiejczyk went to Ryder's home to do a "home check." He was accompanied by a plain-clothed drug task force officer, Detective Mike Channon. Two other officers, Detectives Ardyth Orr and Courtney Kelley, were also at the scene doing a perimeter check of the home. When Aleksiejczyk and Channon knocked on Ryder's door, she answered and stepped outside for a moment, and then reentered the home followed by the officers.

Aleksiejczyk was aware that Ryder was cohabitating with Enriquez, as he had approved the arrangement sometime earlier. Ryder informed Enriquez, who was in the shower, of the officers' presence. Enriquez stepped out of the bathroom, wrapped in a towel, and asked to get dressed in the bedroom. Detective Channon agreed but stated he would accompany Enriquez, to which

Enriquez refused. Concerned Enriquez may come out with a knife or gun, Channon positioned himself just outside the bedroom's accordion-style door. The accordion-style door was cracked open and Channon opened it a bit further to keep Enriquez in view through the two to two-and-one-half inch space.[1] Channon observed Enriquez go the closet, reach "mid-level" or "up above" with both of his hands and "fumble[ ] with" or "mess[ ] with" something. Enriquez did not get anything out of the closet, but retrieved clothing from the bed. After Enriquez emerged from the bedroom, Channon went to the closet, in the same general area where Enriquez had been "fumbling about," and discovered a large plastic bag tucked in clothing. Within the bag were several smaller bags that contained methamphetamine and cocaine. As Channon turned around, he saw a silencer on the dresser. Upon this discovery, no further search was done until a search warrant had been secured. In addition to the drugs found in the closet, a .22 caliber handgun was found in the closet, and additional ammunition was found in a cabinet near the kitchen or in the hall closet.

On July 7, 2008, Enriquez was charged with possession of a controlled substance (more than five grams of methamphetamine) with intent to deliver while in possession of a firearm in violation of Iowa Code section 124.401(1)(b)(7) and (1)(e) (2007); drug tax stamp violation in violation of Iowa Code section 453B.12; possession of a controlled substance (cocaine) in

[1] At the suppression hearing, Channon testified the door was open "approximately two, two and a half inches. At trial, he testified that Enriquez "tried to close" the door and Channon "opened it so [he] could see for officer safety issues as he goes and gets dressed."

violation of Iowa Code section 124.401(5); and possession of a firearm (.22 caliber pistol) by a felon in violation of Iowa Code section 724.26.[2]

On September 24, 2008, Enriquez filed a motion to suppress, asserting that the search was done without a warrant and he did not voluntarily consent to the search of the home, which he claimed was a violation of the Fourth Amendment of the United States Constitution. A hearing was held. Officer Aleksiejczyk testified that Ryder was on probation and had executed a probation agreement, which he reviewed with Ryder at least twice. As a result of the information he had received of possible drug trafficking and firearms in Ryder's home, he did a "home check" on her residence. Enriquez testified that he did not consent to the search. On October 21, 2008, the district court found that Enriquez did not consent to the search and thus, granted his motion to suppress.

On October 22, 2008, the State filed a motion to reconsider asserting that it agreed Enriquez did not consent to the search, but the search was justified by Ryder's probation agreement and the drugs were seized under the plain view doctrine, and cited *United States v. Hughes*, 940 F.2d 1125, 1126–27 (8th Cir. 1991) (holding that where an officer had a right to search under a bed and in a coat pocket and the incriminating nature of the cocaine and gun were readily apparent, the evidence was properly admitted under the plain view doctrine). On November 7, 2008, the district court found that the officers were conducting a lawful search of the home, no private area of Enriquez's was searched, and Enriquez did not object to the search. Thus, the district court denied Enriquez's

[2] The trial information also charged Ryder with the first three counts.

motion to suppress. Enriquez filed a motion to reconsider, which the district court denied on December 3, 2008.

Enriquez sought discretionary review by the supreme court, which the supreme court denied on February 19, 2009. Following trial, a jury found Enriquez guilty as charged on July 22, 2009. On September 4, 2009, the district court entered judgment and sentence. Enriquez appeals.

II. Motion to Suppress.

Enriquez, through counsel and pro se, asserts that the search of his home was in violation of the United States Constitution. We review constitutional claims de novo. *State v. McGrane*, 733 N.W.2d 671, 675 (Iowa 2007). "This court independently evaluates the defendant's claim under the totality of the circumstances." *Id.*

"The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects." *Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S. Ct. 2793, 2797, 111 L. Ed. 2d 148, 156 (1990). One exception to the warrant requirement is the voluntary consent from a person possessing authority. *Georgia v. Randolph*, 547 U.S. 103, 109, 126 S. Ct. 1515, 1520, 164 L. Ed. 2d 208, 219 (2006). Where there are co-occupants to a home, one who shares common authority may consent, even if the other co-occupant is not present and later objects. *Id*. (citing *United States v. Matlock*, 415 U.S. 164, 170, 94 S. Ct. 988, 993, 39 L. Ed. 2d 242, 249 (2006)). The Supreme Court examined co-occupant cases in *United States v. Matlock*, 415 U.S. 164, 170, 94 S. Ct. 988, 993, 39 L. Ed. 2d 242, 249 (1974) (holding that "the consent of one who possesses common authority over

premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared"), and *Illinois v. Rodriguez*, 497 U.S. 177, 186, 110 S. Ct. 2793, 2800, 111 L. Ed. 2d 148, 160 (1990) (holding that consent of a person reasonably believed to possess common authority valid).

In *Georgia v. Randolph*, 547 U.S. 103, 106, 126 S. Ct. 1515, 1518–19, 164 L. Ed. 2d 208, 217 (2006), the Supreme Court examined a case where both co-occupants were present, and one co-occupant consented to a search but the other objected. That case held "that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Id*. at 120, 126 S. Ct. at 1526, 164 L. Ed. 2d at 226. However, it also distinguished the two prior cases, finding that where the defendants were nearby—in a squad car not far away and sleeping in the apartment—but not at the door and "not invited to take part in the threshold colloquy," those defendants "lose[ ] out." *Id.* at 121, 106 S. Ct. at 1527, 164 L. Ed. 2d at 226 (explaining that in *Rodriguez* the defendant was asleep in the apartment, and in *Matlock* the defendant was in a squad car nearby).

In the present case, Enriquez does not challenge the validity of the initial search—either that Ryder consented or Ryder's probation officer received information of contraband and conducted a valid "home check." *See State v. Ochoa*, 792 N.W.2d 260, 281 (Iowa 2010) (explaining that in *Griffin v. Wisconsin*, 483 U.S. 868, 875–76 107 S. Ct. 3164, 3169–70, 97 L. Ed. 2d 709, 718–19 (1987), the Supreme Court upheld the validity of a warrantless search of a probationer's home where there was reasonable grounds to believe that

contraband was present before the search was conducted). Rather, Enriquez argues that as a "physically present inhabitant" he had the right to refuse a search of his home, and he did not consent. He cites to *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006). What Enriquez overlooks it that when consent to search was obtained, he was nearby but not invited to take part in the threshold colloquy. At the time the search began, Enriquez was not there to object.

We recognize that Enriquez did object to Officer Channon's entry into the bedroom as he was getting dressed. Specifically, according to Channon, Enriquez stated "[y]ou're not going in there with me" and then tried to close the sliding bedroom door. In our view, this statement did not vitiate Ryder's initial consent to entry into the home. *See Randolph*, 547 U.S. at 114, 126 S. Ct. at 1523, 164 L. Ed. 2d at 222 (noting no authority for co-tenant consenting to entry into home to prevail over a "present and objecting co-tenant"). Consent had already been secured when Ryder opened the door and admitted the officers into the home. At that point, Officer Channon was justified in taking action (expanding the opening in the bedroom door so that he could see Enriquez) to ensure his safety and the safety of the other officers. *Id.* at 116 n.6, 126 S. Ct. at 1524 n.6, 164 L. Ed. 2d at 223 n.6 (noting exigencies created by presence of objecting co-tenant, including need to protect safety of police officers); *see also State v. Holland*, 389 N.W.2d 375, 381 (Iowa 1986) (allowing for cursory check of arrestee's lodging for other persons who may pose security risk to officers).

Enriquez additionally asserts that the search was not valid pursuant to the plain view exception, namely because the drugs and gun were not out in the

open but were in a closet under clothing.[3] The State responds that Enriquez misinterprets its argument—it did not argue the evidence was out in the open to independently justify the search under the plain view exception, but rather that the officers were conducting a valid search in a valid location when they found the contraband. *See United States v. Hughes*, 940 F.2d 1125, 1126–27 (8th Cir. 1991) (holding that where an officer had a right to search under a bed and in a coat pocket and the incriminating nature of the cocaine and gun were readily apparent, the evidence was properly admitted under the plain view doctrine). We agree with the State that Enriquez misconstrued the argument and having found the search was valid, we find this argument without merit.

Finally, Enriquez raises an ineffective-assistance-of-counsel claim. He asserts that if we find the search of the house invalid under his consent and plain view arguments, then his trial counsel was ineffective for failing to argue that there is not good faith exception to the exclusionary rule under the Iowa Constitution. *See State v. Cline*, 617 N.W.2d 277, 283 (Iowa 2000), *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601 (Iowa 2001) ("[W]e decline

[3] Enriquez pro se asserts that (1) the prosecutor committed misconduct by submitting false facts to the court that the contraband was found in plain view when it was actually found under clothes in the closet; and (2) his trial counsel was ineffective for failing to object to the prosecutor's misrepresentation that the contraband was found in plain view. We find these arguments without merit.

Enriquez through counsel asserts his trial counsel was ineffective for failing to for failing to obtain a ruling on the plain view issue, arguing "[p]rejudice resulted because the defendant *could be* precluded from presenting the meritorious plain view argument on appeal." Because we did not find he was precluded from making his plain view argument on appeal, this claim must fail.

to adopt a good faith exception to Iowa's exclusionary rule under the Iowa Constitution.") As we found the search valid, this argument is inapplicable.[4]

III. Sufficiency of the Evidence.

We review challenges to the sufficiency of the evidence for correction of errors at law. *State v. Webb*, 648 N.W.2d 72, 75 (Iowa 2002). "If a verdict is supported by substantial evidence, we will uphold a finding of guilt. Substantial evidence is that upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005). "The State must prove every fact necessary to constitute the crime with which the defendant is charged. The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *Webb*, 648 N.W.2d at 76. In conducting our review, we consider all the evidence in the record, that which is favorable as well as unfavorable to the verdict, and view the evidence in the light most favorable to the State. *Henderson*, 696 N.W.2d at 7.

Enriquez, through counsel and pro se, next asserts sufficient evidence did not support his convictions, namely that he constructively possessed the drugs and firearm. "Constructive possession occurs when the defendant has knowledge of the presence of the controlled substance and has the authority or right to maintain control of it. The existence of constructive possession turns on the peculiar facts of each case." *Id.* at 9. "Constructive possession is recognized

[4] He makes no argument that his counsel was ineffective for failing to argue the state constitution should be distinguished from the federal one on the issue of whether the search is valid. *See Ochoa*, 792 N.W.2d at 265 (discussing the relationship between the federal and state constitution).

In *Ochoa*, the supreme court distinguished the state from the federal constitution in the context of searches of a parolee by a general law enforcement officer, specifically stating that it did not address a search by a parole officer. *Id.* at 289.

by inferences. However, constructive possession cannot rest simply on proximity to the controlled substance." *State v. Maxwell*, 743 N.W.2d 185, 193–94 (Iowa 2008).

As the State points out, there is evidence that Enriquez had actual possession of the drugs. An officer testified that he watched Enriquez reach into the closet and fumble with something and then found the drugs in that location, which leads to the inference that Enriquez had the drugs in his hands and was attempting to hide them. The gun was found in the same closet near the drugs and an officer testified that it is common for drug traffickers to keep firearms. We find sufficient evidence supports his conviction. Therefore, we affirm.

AFFIRMED.