RENDERED: DECEMBER 1, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001424-MR

JESSE LYNCH FRENCH — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 15-CR-00004

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: JOHNSON, JONES AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Jesse Lynch French entered a conditional guilty plea to numerous charges including tampering with physical evidence; various drug and firearm offenses; and second-degree persistent felony offender. His conditional guilty plea preserved his right to appeal the trial court's denial of his motion to suppress evidence found in a home he shared with his girlfriend, Shannon Kays, and owned by Kays's mother. On appeal, French argues that his right to be free

from unreasonable searches and seizures was violated because Kays did not consent to a walkthrough of the upstairs bedroom shared by French and Kays and that Kays's subsequent consent to search the bedroom was coerced. We conclude the trial court clearly erred when it found Kays consented to a walkthrough of the bedroom and that she subsequently voluntarily consented to a search of the bedroom.

On December 22, 2014, French, who was on probation, attempted to cheat on a drug screening administered at the Nelson County Probation and Parole office by using a Whizzinator device.[1] Detective Mattingly of the Greater Hardin County Narcotics Task Force was called to the probation and parole office. French was later transported to jail.

Kays, who was waiting outside the office in French's car, was approached by Detective Hardin of the Nelson County Sheriff's Department. At that time, Detective Hardin was investigating whether French was in possession of stolen property. Based on a condition of French's probation permitting a search of the car, Detective Hardin approached the car with a drug dog. Although the dog alerted, no drugs were found. However, Kays was arrested after Detective Hardin recognized that the address where she stated she lived was not the same as that on

[1] A Whizzinator is a prosthetic penis worn under the clothes that the user fills with clean urine which is substituted for his own.

her driver's license in violation of Kentucky Revised Statutes (KRS)186.540.[2] Kays was then questioned about any stolen property French might possess. Kays denied any knowledge, but indicated there might be some at the home she shared with French. Deputy Hardin, Detective Mattingly, other officers and Kays, who was in custody and handcuffed, went to the home.

Upon arrival at the home, the officers first searched the basement where they found marijuana and rail-mounted lasers and flashlights for pistols. The officers then went upstairs where they did a walkthrough of the bedroom shared by French and Kays. In the bedroom, they saw a gun case and straws they believed were used to ingest illegal drugs. The officers then conducted a search of the bedroom where guns, multiple types of illegal drugs and evidence of trafficking were found.

---

[2] Effective until January 1, 2019, KRS 186.540(1) provides:

> (1) Except as provided in subsection (2) of this section, when any person, after applying for or receiving an operator's license, moves from the address named in the application or license issued to him or when the name of a licensee is changed, by marriage or otherwise, the person shall within ten (10) days after the change apply to the circuit clerk in his county of residence for the issuance of a corrected license.

Under KRS 186.990(3), violation of the statute is a Class B misdemeanor. However, subsection (5) of the statute provides:

> If it appears to the satisfaction of the trial court that any offender under KRS 186.400 to 186.640 has a driver's license but in good faith failed to have it on his or her person or misplaced or lost it, the court may, in its discretion, dismiss the charges against the defendant without fine, imprisonment, or cost.

French filed a motion to suppress the evidence found in the bedroom. At the suppression hearing, the trial court heard testimony from the various officers involved in the search. An audio recording that captured much of the conversations between Kays and the officers preceding and during the search of the bedroom was introduced into evidence.

Deputy Hardin testified that Kays consented to the search of the basement. He testified that he did not hear Kays ask for an attorney or for the officers to get a warrant. Deputy Hardin did not affirmatively testify that Kays gave consent to search any area of the home other than the basement.

Officer Gillock of the Bardstown Police Department participated in the search of the home. Officer Gillock testified that he, Deputy Hardin, Detective Mattingly and Officer Simpson, also of the Bardstown Police Department, searched the basement and, after getting a key to search the upstairs which was separated by a door, searched the upstairs bedroom. He testified he did not hear Kays consent to the officers going upstairs, but denied that she ever told them to stop the search. Officer Gillock testified he did not hear officers tell Kays that they would "tear" the house apart or that her consent to search the bedroom would result in more favorable treatment for her.

Officer Simpson testified that he believed Kays consented to the search the basement and one bedroom. He testified Kays did not ask for an

attorney, never requested they obtain a warrant and did not hear any officer threaten to tear the home apart if Kays did not consent to the search.

Detective Mattingly testified that prior to their arrival at the home, Kays consented to the officers' search of the home. He testified that following the search of the basement the following occurred:

> It became apparent to me that, um, that they didn't actually stay there in the basement. Um, there was not any place to sleep. Uh, there didn't appear to be any clothing, dressing, dressers with clothing in them or, uh. So, I asked, you know, "where do you all sleep" and she said "we sleep upstairs" and I said "we'd like to have a look up there." She said that she thought we only wanted to search the basement. I said, "well, we did, however we're looking for stolen property and you know, it's reasonable that if you all sleep upstairs, you know, that there might be stolen property in there." And she asked that. I said "we'll just walk through the room." And so we went upstairs and I walked through the room and as I walked through the room I, I noticed a, uh, what I believed to a Colt hand gun case there on the floor. Uh, this room has a master bath and when I went there, there were, uh, straw portions that are, uh, used to snort illegal drugs. Uh, they were on, in plain view on the counter and upon seeing those then I came back to Ms. Kays. She was upstairs, kinda right there at the threshold, and I, uh, made her aware of what I saw, uh, and told her how we'd like to proceed.

At the hearing and after the above quoted testimony, the prosecutor asked Detective Mattingly: "So, when you went into the room there you were doing so initially with her permission, correct?" Detective Mattingly responded "yes."

The audio recording contains five portions. Only parts of the conversations and search were recorded. Before the search of the basement, Kays can be heard on the audio recording saying: "I'll let you do whatever you want, just don't call my mom." Although it contains conversations about the search of the basement, there is a gap which Detective Mattingly testified occurred when he turned off the recorder to conserve its battery. Because the audio recording was turned off, conversations regarding the walkthrough of the upstairs bedroom cannot be heard. When the audio recording resumes after the walkthrough, Kays can be heard initially refusing consent to a search of the bedroom and pleading with the officers not to tear apart her mother's house.

After Kays refused consent to search the bedroom, instead of attempting to secure a warrant, the officers proceeded to engage in what the trial court characterized as "bullying" to obtain Kays consent. The audio recording reveals what occurred and was summarized by the trial court as follows:

> Mattingly indicated that if he got a warrant it would be for the whole house rather than just the bedroom. On the audio recording, a third officer can be heard saying, "You know this house is going to get ripped apart don't you?" Mattingly then said that when they got done searching the house it would look like someone had picked it up "and shook it." Kays was still reluctant to give consent at that time so the third officer added, "Basically, your options are give him permission to search this bedroom or he goes and gets a warrant and turns this house upside down." Kays then asked to speak with her lawyer and was told by one of the officers "You can talk to your

> lawyer, but that's the two choices you have. Its not going to change that." Mattingly then told Kays that he would be more lenient when they get to court if she was "honest and cooperative." Kays repeated that she thought she needed to speak with an attorney, to which Hardin replied they would then "take you down to jail, go get a search warrant, and we'll destroy your momma's house." Kays begrudgingly gave consent to search the room after Mattingly said she could limit what they search for in the room. She told them there was "dope" and a gun in the bedroom.

Following the hearing, the trial court issued its opinion and order. The trial court found Kays initially refused consent to search the bedroom "but, after a discussion, she consented to Mattingly doing a walk-through inspection of the bedroom." It further found that after the walkthrough, Kays refused consent to a more thorough search of the bedroom and found the officers "bullied" Kays into consenting. However, the trial court found the coercion exerted was not sufficient to render the search unconstitutional. The trial court also upheld the search under the inevitable discovery doctrine.

When reviewing a trial court's denial of a motion to suppress, we apply different standards of review to the trial court's factual findings and to its legal conclusions. "A more deferential standard of review applies to the trial court's factual findings than to its legal conclusions[.]" *Payton v. Commonwealth,* 327 S.W.3d 468, 471 (Ky. 2010). As explained in *Commonwealth v. Neal,* 84 S.W.3d 920, 923 (Ky.App. 2002) (footnotes omitted):

> An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.

The Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment and Section Ten of the Kentucky Constitution, protects citizens from unreasonable searches and seizures by the government. A basic tenet of Fourth Amendment law is that warrantless searches and seizures inside a home are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980). "Under the fruit of the poisonous tree doctrine, evidence derived from the exploitation of an illegal seizure must be suppressed, unless the government shows that there was a break in the chain of events sufficient to refute the inference that the evidence was a product of the Fourth Amendment violation." *Baltimore v. Commonwealth*, 119 S.W.3d 532, 539-40 (Ky.App. 2003). However, there are several exceptions to the warrant requirement, including voluntary consent to search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

"The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who

shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained." *Georgia v. Randolph*, 547 U.S. 103, 106, 126 S.Ct. 1515, 1518, 164 L.Ed.2d 208 (2006). If the consent is not given or given involuntarily, the consent exception is not applicable and evidence seized in violation of the Fourth Amendment is not admissible against the nonconsenting co-occupant. As stated in *Stevens v. Commonwealth*, 354 S.W.3d 586, 590 (Ky.App. 2011) (quoting 8 Leslie W. Abramson, *Kentucky Practice, Criminal Practice and Procedure* § 17:5 (5th ed. 2010)), a co-occupant may invoke the exclusionary rule based on involuntary consent to search if: "(1) he or she has standing to challenge the original violation, i.e., the tree; (2) the original police activity violated his or her rights; and (3) the evidence sought to be admitted against him or her, i.e., the fruit, was obtained as a result of the original violation[.]"

There is no dispute that French, as an occupant of the bedroom searched, has standing or that he was protected by the Fourth Amendment's warrant requirement. The question is whether the evidence seized from the bedroom was the "fruit" of a tainted search. French does not dispute that Kays had authority to consent to a search of the home or that she voluntarily consented to the search of the basement. He argues that Kays did not consent to the walkthrough in

the upstairs bedroom and her consent to the subsequent search of that bedroom was not voluntary.

"The Commonwealth has the burden of showing by a preponderance of the evidence, *through clear and positive testimony*, that valid consent to search was obtained." *Farmer v. Commonwealth*, 169 S.W.3d 50, 52 (Ky.App. 2005) (emphasis added). Here, the sole evidence relied upon by the Commonwealth was Detective Mattingly's testimony.

Detective Mattingly provided a detailed account of the conversation between him and Kays regarding the walkthrough. Noticeably missing from that account is any mention that officers sought Kays's consent for the walkthrough or that she gave them consent for the walkthrough.

Detective Mattingly testified that when he told Kays the officers wanted to go upstairs in the home, Kays responded that she "thought [the officers] only wanted to the search the basement." According to his testimony, Detective Mattingly *told* Kays they were going upstairs to "just walkthrough the room." Throughout his detailed testimony and repeated description of the conversation concerning the extension of the search to the upstairs of the home, Detective Mattingly never testified that Kays consented to the walkthrough. His detailed recount of the events supports only a finding that Kays, who was handcuffed, acquiesced to being told by the officers that they were going upstairs.

Acquiescence is not consent. *Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968).

The Commonwealth points out that Detective Mattingly responded "yes" to the leading question "when you went into the room there, you were doing so initially with her permission, correct?" However, Detective Mattingly's one-word response is not the type of clear and positive testimony required to meet the Commonwealth's burden to prove Kays consented to the walkthrough inspection. There are three reasons why this is true.

First, it is unclear whether Detective Mattingly was referring to consent to the walkthrough or the later search of the bedroom. Second, if he was referring to consent to the walkthrough his one-word response contradicts his detailed account of his communication with Kays regarding the circumstances of the walkthrough inspection. Third, his one-word response offers no insight into what was said by Kays to permit a court to find that she consented. This is crucial to the determination of whether Kays consented to the walkthrough. As stated in *Harris v. Hendricks*, 423 F.2d 1096, 1099 (3d Cir. 1970) (internal quotations and footnotes omitted) (emphasis added):

> [T]he existence and voluntariness of a consent is a question of fact, to be decided in the light of the attendant circumstances by the trier of facts. Critical factors of attendant circumstances include the setting in which the consent was obtained, what was said and done by the

> parties present with particular emphasis on what was *said by the individual consenting*[.]

Absent such details, there are simply no attendant circumstances from which the trial court could find Kays consented to the walkthrough. The trial court's finding based on Detective Mattingly's one-word response is clearly erroneous.

Kays ultimately consented to the search of the bedroom after the walkthrough inspection. The trial court "regrettably [found] that the [officers'] coercive conduct is not enough to invalidate the voluntariness of Kay's consent to search the bedroom and adjoining bathroom." As to this finding, we also conclude that the trial court clearly erred.

Mere consent will not validate a warrantless search. The consent must be voluntary. In *Schneckloth*, the Court explained the purpose of the voluntariness requirement as follows:

> "[V]oluntariness" has reflected an accommodation of the complex values implicated in police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.

Schneckloth, 412 U.S. at 224-25, 93 S.Ct. at 2046 (internal citations omitted). Consent that is "coerced by threats or force, or granted only in submission to a claim of lawful authority" is invalid and the search unreasonable. *Id*. at 233, 93 S.Ct. at 2051.

In determining whether consent was voluntary, the trial court applies an objective standard "ask[ing] what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 1803-04, 114 L.Ed.2d 297 (1991). "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227, 93 S.Ct. at 2047-48.

To determine whether Kays's consent was voluntary, the trial court relied on the factors set forth in *United States v. Elkins*, 300 F.3d 638, 647 (6th Cir. 2002), including: Kays's age, intelligence, and education; whether she understood the right to refuse to consent; whether Kays understood her constitutional rights; the length and nature of detention; and the use of coercive or punishing conduct by the police. While each individual factor is relevant, "[t]he psychological atmosphere in which the consent is obtained is a critical factor in the determination of voluntariness." *United States v. Rothman*, 492 F.2d 1260, 1265 (9th Cir. 1973).

Although the fact consent to search was given while in police custody is not alone sufficient to demonstrate the consent was coerced, *United States v. Watson*, 423 U.S. 411, 424, 96 S.Ct. 820, 828, 46 L.Ed.2d 598 (1976), "courts have been particularly sensitive to the heightened possibilities for coercion when the 'consent' to a search was given by a person in custody." *Schneckloth*, 412 U.S. at 240, 93 S.Ct. at 2055 n. 29. Moreover, mere statements that a warrant could be obtained does not, as a matter of law, render consent to search involuntary. *United States v. Ivy*, 165 F.3d 397, 403 (6th Cir. 1998). However, those same statements when combined with other circumstances may add to the coercive atmosphere created by the officers seeking consent. *Id*.

Here, the relevant circumstances began when Kays was approached by officers while outside the office of probation and parole. After their search of the car did not reveal illegal drugs, the officers decided to arrest Kays for failing to change her address on her drivers' license as required by KRS 186.540. We refrain from addressing the validity of Kays's arrest for a Class B misdemeanor because that issue is not directly before us. However, Kays's arrest for this minor offense raises the suspicion that the officers' purpose in arresting Kays was a pretext to obtain her consent to search the home she shared with French. What occurred after her arrest confirms that suspicion.

Kays was arrested, *Mirandized*, handcuffed, placed in a police vehicle and transported to the home where she remained handcuffed throughout the search. She can be heard on the audio recording repeating her fear her mother would learn of her arrest and search of the home and that the officers would tear apart the home. Although Kays originally consented to a search of the home, as found by the trial court, she unambiguously revoked that consent.

Consent to search may be revoked at any moment, *United States v. Buckingham*, 433 F.3d 508, 513 (6th Cir. 2006), and when a search is made pursuant to consent, it is "limited by the terms of its authorization." *Guzman v. Commonwealth*, 375 S.W.3d 805, 808 (Ky. 2012). With the knowledge that Kays feared her mother's home would be torn apart by a search, Kays's revocation of consent and refusal to permit a search of the bedroom she shared with French did not deter the officers.

Instead of attempting to obtain a warrant, as stated by the trial court, the officers resorted to "bullying" tactics. Kays was threatened with harsher criminal consequences if she did not consent and told speaking to an attorney was futile. Most disturbing, despite that Kays repeatedly pleaded with the officers not to damage her mother's house, three officers threatened that the house would be "ripped apart," "look like someone had picked it up and shook it" and that the they

would "destroy" her mother's house if she did not consent to a search of the bedroom.

Despite the trial court's expressed disdain for the officers' conduct and its finding that the officers' conduct was coercive, it found this was not sufficient to render Kays's consent involuntary. The law is clear that under the Fourth Amendment, consent cannot be obtained by coercion. *Schneckloth*, 412 U.S. at 228, 93 S.Ct. at 2048. Coercion is not a matter of degree. Either consent was obtained by coercion, in which case it was involuntary, or it was the product of the consenter's free will, in which case it was voluntary. As the United States Supreme Court has indicated, coercion and voluntariness of consent are incompatible. "Where there is coercion there cannot be consent." *Bumper*, 391 U.S. at 550, 88 S.Ct. at 1792.

Under the trial court's findings of fact and considering the circumstances, we can only conclude that the officers crossed the constitutional line between reasonable and unreasonable searches. The trial court committed clear error when it found Kays voluntarily consented to the search of the bedroom.

Absent an exception to the fruit of the poisonous tree doctrine, evidence seized as a result of the officers' walkthrough and search of the bedroom in violation of the Fourth Amendment is not admissible against French. However, in *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), the Court

adopted the inevitable discovery rule "to permit admission of evidence unlawfully obtained upon proof by a preponderance of the evidence that the same evidence would have been inevitably discovered by lawful means." *Hughes v. Commonwealth*, 87 S.W.3d 850, 853 (Ky. 2002). The inevitable discovery rule avoids putting "the police in a worse position that they would have been in absent any error or violation." *Nix*, 467 U.S. at 443, 104 S.Ct. 2509. However, it is an exception to the exclusionary rule that should not put the police in a better position because of their unreasonable search.

The theory advanced by the Commonwealth and adopted by the trial court was that if Kays had not consented, a search warrant would have been obtained and the illegal items in the bedroom would have been inevitably discovered. The federal courts have found the same theory problematic.

In *United States v. Haddix*, 239 F.3d 766, 768 (6th Cir. 2001) (internal quotations and citations omitted), the Court rejected the theory that under the inevitable discovery rule, evidence is admissible "when the police could have obtained a warrant but did not do so—that is, whenever probable cause would have existed had a magistrate considered the question in advance of the search, regardless of whether a magistrate in fact did." The Court was unequivocal: "Let it be absolutely clear: this [theory] is untenable . . . . [T]his position of the United States would 'completely obviate the warrant requirement' and would constitute, to

say the least, 'a radical departure from the Fourth Amendment warrant requirement. precedent.'" *Id*. (quoting *United States v. Johnson*, 22 F.3d 674, 683-84 (6th Cir. 1994)).

Other federal courts that have discussed the inevitable discovery rule as it applies to the failure to obtain a warrant have required not only that there must have been probable cause to obtain a warrant, but that the officers must have been in the process of obtaining a warrant. In *United States v. Virden,* 488 F.3d 1317, 1322-23 (11th Cir. 2007) (emphasis added) (internal quotations and citations omitted), the Court stated:

> Under the inevitable discovery exception, if the prosecution can establish by a preponderance of the evidence that the information would have ultimately been recovered by lawful means, the evidence will be admissible . . . . This circuit also requires the prosecution to show that the lawful means which made discovery inevitable were being actively pursued prior to the occurrence of the illegal conduct. *This second requirement is especially important.* Any other rule would effectively eviscerate the exclusionary rule, because in most illegal search situations the government could have obtained a valid search warrant had they waited or obtained the evidence through some lawful means had they taken another course of action.

The Court in *U.S. v. Reilly*, 224 F.3d 986 (9th Cir. 2000), expressed the same view holding that the inevitable discovery doctrine does not apply merely because the police could have obtained a warrant. To do so would "completely obviate the

warrant requirement of the [F]ourth [A]mendment." *Id*. at 995. (quoting *United States v. Echegoyen*, 799 F.2d 1271, 1280 n. 7 (9th Cir. 1986).

In *Commonwealth v. Elliot*, 714 S.W.2d 494, 497 (Ky.App. 1986), this Court held the inevitable discovery rule should not be applied to "open the door" to admitting evidence seized through an illegal search. If probable cause to search alone was sufficient to excuse the warrant requirement, we would open the door so wide that the warrant requirement of the Fourth Amendment would become meaningless. As pointed out in the federal cases cited, if evidence seized in violation of the Fourth Amendment is admissible because probable cause existed for a warrant, there would be no need to get a warrant. To further add to the absurdity, officers would need a warrant only if there was no probable cause which, of course, they could not get. The Commonwealth's theory is "untenable." *Haddix*, 239 F.3d at 768.

In this case, even if the officers had probable cause to obtain a warrant, they did not do so. Instead, they decided to coerce Kays's consent. Under the circumstances, the inevitable discovery rule does not apply.

Based on the foregoing, the judgment of conviction is vacated and the case remanded for further proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Brandon Neil Jewell
Assistant Public Advocate
Dept. of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Bryan D. Morrow
Assistant Attorney General
Frankfort, Kentucky