STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1105

State of Minnesota,
Respondent,

vs.

Ryan Scott Weber,
Appellant.

Filed September 8, 2020
Affirmed
Bratvold, Judge

Chisago County District Court
File No. 13-CR-17-1011

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Janet Reiter, Chisago County Attorney, Brian J. Duginske, Assistant County Attorney, Center City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Christopher L. Mishek, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Bratvold, Judge; and Frisch, Judge.

U N P U B L I S H E D O P I N I O N

BRATVOLD, Judge

In this appeal from a final judgment of conviction for first-degree drug possession, appellant seeks review of a district court order denying his motion to suppress evidence

seized after law enforcement conducted a warrantless search of an air-conditioning unit in appellant's backyard and found drugs inside a camera case located inside the unit. Appellant argues that the third party who consented to the search did not have actual or apparent authority to do so. Appellant also argues that, even if the third party had the necessary authority to consent, law enforcement exceeded the scope of that consent by opening the closed camera case. We conclude that the third party had actual authority or, alternatively, apparent authority, to consent to a search of the premises. Because appellant failed to argue to the district court that the third party did not have actual authority to consent to a search of the camera case, or that law enforcement exceeded the scope of the third party's consent, we decline to consider these issues. Thus, we affirm.

FACTS

The following summarizes evidence received at the contested omnibus hearing and the district court's findings of fact in its suppression order.

In the early evening on November 2, 2017, three sheriff's deputies responded to a house in Chisago County. Appellant Ryan Scott Weber's 17-year-old son called police and requested assistance while A.R., his father's "estranged" girlfriend, removed her personal items from the house.

Deputy Swenson arrived first. While on his way, Swenson learned that A.R.'s driver's license listed the house as her address, and that police had arrested Weber at the house earlier that day for a domestic dispute between A.R. and Weber. The landlord and A.R. were standing outside the house when Swenson arrived. A.R. told Swenson that she "had been involved in an incident earlier and was there to get property." Swenson testified

that A.R. "was indicating she lived there." The landlord told Swenson that A.R. was "on the lease" and lived at the house. Swenson testified that he "believe[d]" that A.R. lived at the house, although he did not know if A.R. had a key.

At the time, Swenson did not know that A.R. had not been living at the house for the past month, but had recently returned and stayed a few nights before the search. But Swenson testified that Weber's son told him something similar—that A.R. "had been gone for a period of time" and he wanted police to "remove[]" her. Weber's son testified that he wanted A.R. to "have an escort so she [didn't] steal any of our stuff."

Swenson testified that he told Weber's son he would not remove A.R. from the property. He determined "there's no legal basis to remove her" because she "resides there." Swenson testified that "everybody was in agreement" that "there wouldn't be further problems if [A.R.] stayed" at the house that evening, and that it "[s]ounded like [A.R.] was going to stay there that night and possibly leave in the morning."

Before "clearing the incident," Swenson spoke with the landlord to get his information for the incident report. The landlord told Swenson that he had concerns about Weber, including that there was an air-conditioning unit "that he believed was stolen on the property." The landlord explained that there had been a working air-conditioning unit installed at the house when Weber and A.R. moved in, but that they "removed it and brought this new one in." The new unit "wasn't even hooked up to the house at this time." The landlord asked Swenson to look at the unit.

Swenson was aware of a "crime stopper" tip from July or August 2017 that named Weber as a suspect in an air-conditioning-unit theft from a rest area off Interstate 35.

Swenson testified that he asked A.R. "whether or not she was aware of" an air-conditioning unit on the property "being stolen"; A.R. responded that she "believed that it was also stolen." Swenson testified that he "asked about getting permission from [A.R.] to look around the property, which she granted." The district court found that A.R. consented for Swenson to "check the air conditioning unit."

Swenson went "to the back of the house" and saw "two different AC units there." He saw one unit "was sitting still where it had been disconnected from the house; the other one was sitting off to the side." He approached the unit that "didn't appear to be hooked to the house or anything" and was within two feet of the house. Swenson "opened that one up to try to find a serial number for it" by removing an access panel on the side of the unit. He saw a black camera case inside the unit, thought it "seemed pretty suspicious," but did nothing with the camera case. Swenson located two serial numbers, one on a "compressor inside the AC unit" and one "on the outer edge" of the access panel. He asked dispatch to search for both serial numbers, but received no match to reported stolen property.

Meanwhile, deputies Hamm and Edmonds arrived and spoke with A.R. Hamm testified that A.R. told him she lived "technically here, but I have been residing at two other places for maybe the last—maybe about a month or so." Swenson told Edmonds and Hamm that A.R. had consented to them looking around the backyard and "investigating the air conditioning unit." Swenson asked Edmonds for help in finding the serial number. Edmonds looked at the unit, saw the access panel placed on top of the unit, and noticed the camera case inside the unit. Edmonds testified that the "camera case itself was clean, was

not weathered," and "appeared as though it had been recently placed inside of the air conditioning unit."

Edmonds removed the camera case and opened it. Inside, he found a digital scale and "several small plastic baggies containing a white-colored crystalized substance." The substance field-tested positive for methamphetamine, and later testing confirmed it was roughly 120 grams of methamphetamine. Edmonds also found another serial number inside the air-conditioning unit later determined to match the one reported stolen.

The state charged Weber with first-degree controlled-substance possession under Minn. Stat. § 152.021, subd. 2(a)(1) (2016), along with other charges.[1] Weber moved the district court to suppress the drug evidence obtained as a result of the deputies' warrantless search of the air-conditioning unit, arguing the search was illegal because the deputies relied on A.R.'s unauthorized consent.[2]

At a contested omnibus hearing, the state called deputies Swenson and Edmonds, and Weber called his son and deputy Hamm. The landlord and A.R. did not testify. The deputies testified to the facts summarized above. The district court received exhibits: a recorded statement that A.R. gave to the deputies after the search, a transcript of A.R.'s

[1] The landlord also told the deputies he believed that an all-terrain vehicle (ATV) parked near the unit was stolen. Deputies located a vehicle identification number on the ATV, asked dispatch to conduct a search, and learned the ATV had been reported stolen. The state charged Weber with receiving stolen property (the ATV and the air-conditioning unit) in violation of Minn. Stat. § 609.53, subd. 1 (2016), but the jury acquitted him.

[2] Weber also moved the district court to dismiss all charges for lack of probable cause, but retracted the challenge at the contested omnibus hearing.

statement, the crime-stopper email about the stolen air-conditioning unit, and four photos of the air-conditioning unit.

Weber's son testified that he lived at the house until December 2017, and that A.R. had moved out of the house in late September or early October. He testified that she visited after she moved out, and agreed that A.R. may have spent "a couple nights" at the house before Weber's arrest on the morning of November 2, 2017. He also testified that he did not know if A.R. had a key. Weber's son testified that while Weber was being arrested earlier in the day, Weber told him not to let A.R. into the house because she would "steal all of [their] stuff."

The district court issued a written order denying Weber's suppression motion. The district court found that A.R. had "actual authority to consent to a search of the air conditioning unit on the property" because she was on the lease, was residing at the address "for two and a half days immediately preceding" the incident, and "had common authority over the premises." The district court also found that, even if A.R. lacked actual authority, "it was objectively reasonable under the circumstances" for the deputies to conclude that she had apparent authority to consent to a search because the address on her driver's license "matched" Weber's house, the landlord confirmed she was on the lease, the deputies knew that law enforcement had interacted with her at the house earlier in the day, and she had personal property at the house.

After a two-day jury trial, the jury found Weber guilty of first-degree drug possession. The district court convicted Weber and imposed an executed sentence of 75 months with credit for time served. Weber appeals.

D E C I S I O N

When reviewing the denial of a pretrial motion to suppress evidence, we review the district court's legal conclusions de novo and factual findings for clear error. *State v. Molnau*, 904 N.W.2d 449, 451 (Minn. 2017). The district court's findings of fact are clearly erroneous if an appellate court, after reviewing the record evidence, is "left with the definite and firm conviction that a mistake occurred." *State v. Diede*, 795 N.W.2d 836, 846-47 (Minn. 2011). "Whether actual or apparent authority to consent exists is a legal question subject to de novo review." *State v. Dotson*, 900 N.W.2d 445, 450 (Minn. App. 2017).

I. The district court did not err when it denied Weber's suppression motion because A.R. had authority to consent to a search of the air-conditioning unit.

Weber argues that the district court erred because A.R. did not have either actual or apparent authority to consent to a search of the premises. We discuss each argument in turn.

A. Actual authority over the premises

Weber argues that the state failed to prove that A.R. had "mutual use" and "joint access or control for most purposes" of the property and that she was "a visiting guest" at the time of the search. The Fourth Amendment to the United States Constitution and the Minnesota Constitution prohibit "unreasonable" searches of an individual and their property by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. An individual's home, and the "'land immediately surrounding and associated with the home,' the curtilage, is 'part of the home itself for Fourth Amendment purposes.'" *State v. Chute*, 908 N.W.2d 578, 583 (Minn. 2018) (quoting *Oliver v. United States*, 466 U.S. 170, 180,

104 S. Ct. 1735, 1742 (1984)); *see* U.S. Const. amend. IV. The parties agree that the air-conditioning unit was located within the curtilage of Weber's house.

A warrantless search is unreasonable unless it falls into an exception to the warrant requirement. *Riley v. California*, 573 U.S. 373, 381-82, 134 S. Ct. 2473, 2482 (2014). "The state bears the burden of establishing the applicability of an exception" to the warrant requirement. *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003). Any evidence obtained as a result of a warrantless search that is not justified by an exception to the warrant requirement must be suppressed. *State v. Horst*, 880 N.W.2d 24, 36 (Minn. 2016) ("[T]he remedy for an illegal search or seizure is generally limited to the suppression of illegally obtained evidence.").

The warrant exception at issue in this appeal is consent. Law enforcement may search without a warrant if a person consents to a search of their property. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 2045 (1973) ("[W]e recognized that a search authorized by consent is wholly valid.") (citing *Katz v. United States*, 389 U.S. 347, 358, 88 S. Ct. 507, 515 (1967)); *State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985) (stating that a search "conducted pursuant to consent" is a "well-settled" exception to the warrant requirement).

A third party, who has "common authority over premises or effects," may consent to a search of the premises or effects of an "absent, nonconsenting person with whom that authority is shared." *United States v. Matlock*, 415 U.S. 164, 170, 94 S. Ct. 988, 993 (1974); *see also Hanley*, 363 N.W.2d at 738 ("[U]nder certain circumstances a third party can validly consent to a search of a defendant's premises or effects."). Common authority

is "mutual use of the property by persons generally having joint access or control for most purposes," so "it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Matlock*, 415 U.S. at 171 n.7, 94 S. Ct. at 994 n.7.

In sum, for the state to prove the consent exception applied to law enforcement's search of Weber's air-conditioning unit, the state had to demonstrate that A.R. had authority to consent. Her authority could be actual or apparent. *Licari*, 659 N.W.2d at 250. Actual authority requires that A.R. had "mutual use" and "joint access or control" of the house. *Matlock*, 415 U.S. at 171 n.7, 94 S. Ct. at 994 n.7.

Weber argues that the evidence offered at the contested omnibus hearing does not support the district court's determination that A.R. had actual authority. Weber points to evidence that A.R. had moved out roughly one month before the search, Weber paid the rent, there was "no evidence that [A.R.] could access the home without Weber present," and no witness "recall[ed] seeing her with a key." Weber also argues that A.R. "did not have a way into the home without Weber because she knocked at the door to gain entry when she returned for her personal items." Weber also notes that A.R. had personal items in bags in the garage, and "it appeared [A.R.] had no intent to stay past a brief visit to obtain her belongings."

It is true that, generally, a guest or a landlord cannot consent to a search of a house by law enforcement. *See State v. Hatton*, 389 N.W.2d 229, 233 (Minn. App. 1986) ("Ordinarily, a mere guest of a premises may not give consent to search those premises

when his or her interest is inferior to that of the host."), *review denied* (Minn. Aug. 13, 1986); *Chapman v. United States*, 365 U.S. 610, 616-17, 81 S. Ct. 776, 780 (1961) (holding a search unlawful when landlord consented to search of the premises).

We conclude that the district court did not err when it determined that A.R. had actual authority to consent to a search of the premises. The record shows that A.R. was not a mere guest but had "mutual use" and "joint access or control" of the house. *See Matlock*, 415 U.S. 171 n.7, 94 S. Ct. 994 n.7. First, A.R.'s driver's license listed the house as her address. Second, Swenson knew that police had responded to a domestic dispute between Weber and A.R. earlier the same day at the house, and A.R. told Swenson that she "had been involved in an incident earlier and was there to get property." Third, Swenson testified that A.R. "was indicating she lived there," the landlord stated that A.R. was "on the lease" and lived at the house, and A.R. told Swenson she planned to stay over that night and she had personal items at the house. Finally, A.R. told deputies, after the search, that she had stayed at the house for the past two days.

Weber argues that the district court's factual finding is clearly erroneous that A.R. was residing at the house on the date of the search. We disagree. To be clear, the district court found that "[a]lthough [A.R.] moved out of the home for about a month in late September/early October 2017, she returned to the residence and had been residing there for two and a half days immediately preceding the November 2, 2017 incident." The record supports this finding. Swenson testified that A.R.'s driver's license listed the house as her address. Swenson testified that the landlord informed him that A.R. was "on the lease" and lived at the house. Swenson testified that A.R. indicated she lived there and he "believe[d]"

that A.R. lived at the house. Weber's son agreed that A.R. may have spent "a couple nights" at the house before Weber's arrest. And police did not learn that A.R. had moved out until after she gave her consent to search. The district court's finding is not clearly erroneous. *See Diede*, 795 N.W.2d at 846-47.

Weber argues that *Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793 (1990) is instructive because the facts are "remarkably similar." In *Rodriguez*, police arrested defendant after officers found drugs in his apartment. The police gained entry, without a warrant, after obtaining consent from a woman who had lived at the apartment with defendant for several months. *Id.* at 179-80, 110 S. Ct. at 2797. The woman had reported to law enforcement that defendant had assaulted her, and that he was at "our" apartment. *Id.* at 179, 110 S. Ct. at 2797. The woman led police to the apartment, where she had clothes and furniture. *Id.* at 180, 110 S. Ct. at 2797. She had a key and unlocked the door. *Id.* But the Supreme Court stated it was "unclear" whether she currently lived there or only "used to live there." *Id.* at 179, 110 S. Ct. at 2797. The woman had moved out one month before the search and, since then, had spent occasional nights, but "never went there herself when he was not home." *Id.* at 181, 110 S. Ct. at 2798. The woman was not on the lease and did not pay rent. *Id.*

The Supreme Court determined that the woman did not have actual authority because she did not have "mutual use" or "joint access or control" to establish common authority as required by *Matlock*. *Id.* at 181-82, 110 S. Ct. at 2798. Thus, the Supreme Court reversed the Illinois appellate court's decision affirming a trial court's order suppressing evidence, based on its determination that the woman did not have common

authority because "she had moved out of the apartment." 497 U.S. at 177, 110 S. Ct. at 2795. The Supreme Court remanded for the appellate court to determine whether the woman had apparent authority. *Id.*

We agree that the facts in *Rodriguez* and in Weber's case are similar, but there are significant differences. A.R.'s driver's license listed the house as her address. A.R. and the landlord told Swenson that she lived there. A.R. told deputies she had been staying there the past two days, which Weber's son agreed was probably true. A.R. and the landlord also told Swenson that A.R. was on the lease. While both the woman in *Rodriguez* and A.R. had recently moved out, A.R. visited the house and, in fact, was staying there at the time of the search. And Swenson knew police had responded to the house earlier in the day because of a domestic dispute between A.R. and Weber. Weber's son even told Swenson that A.R. could continue to stay there. Swenson did not learn that A.R. had moved out until after she gave her consent.

Weber argues that the fact that A.R. was on the lease—and therefore had a property interest—cannot elevate her status from a guest to one with common authority. Weber is correct that a "mere property interest" cannot establish common authority. *Matlock*, 415 U.S. at 171 n.7, 94 S. Ct. at 993 n.7. But this is not the only fact that shows A.R.'s common authority. She had mutual use of Weber's house because she was on the lease, had been residing there, was staying there for at least two days, and had personal property there. Weber instructed his son to call the police if A.R. returned because he was concerned she would steal items—which supports the district court's determination that A.R. had joint

access to the house. These facts establish that A.R. had mutual use of and joint access to the house, and therefore she had actual authority to consent to a search.

B. Apparent authority over the premises

Weber argues that the district court erred when it concluded, in the alternative, that it was objectively reasonable for the deputies to conclude that A.R. could consent to search the premises because she had apparent authority. We have already concluded that A.R. had actual authority over the premises, therefore, we consider whether A.R.'s apparent authority is an alternative reason to affirm.

The United States Supreme Court articulated an objective standard for apparent authority in *Rodriguez*: "would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" 497 U.S. at 188, 110 S. Ct. at 2801 (quotation omitted). The Minnesota Supreme Court has adopted and applied this standard, stating, "Where common authority does not actually exist, consent to entry is still valid where, under an objective standard, an officer reasonably believes the third party has authority over the premises and could give consent to enter." *State v. Thompson*, 578 N.W.2d 734, 740 (Minn. 1998). This standard applies only when law-enforcement officers make a mistake of fact, not law. *Licari*, 659 N.W.2d at 254.

Weber argues that the deputies made a mistake of law because it was not objectively reasonable to conclude that A.R. "could legally give consent" because the deputies knew: (1) A.R. was Weber's "estranged" girlfriend and had moved out of the house; (2) Weber wanted to exclude A.R. from the property and told his son not to let A.R. into the house;

(3) Weber's son did not want A.R. to enter without a police escort; (4) A.R. came with the landlord, which "indicates she did not have her own key"; and (5) the deputies did not know whether A.R. had a key for the house.

The state argues that it was "objectively reasonable" for the deputies to conclude that A.R. could consent to a search of the premises because her driver's license listed the house as her address, the deputies knew that she had been involved in a domestic incident at that address earlier in the day, A.R. had personal property at the house, and the landlord confirmed she was on the lease. We agree. Based on the same facts that show A.R.'s actual authority and were known to the deputies when A.R. consented to the search, we conclude, in the alternative, that the district court did not err when it determined that it was objectively reasonable for the deputies to conclude that A.R. could consent to the search.

II. The search of the camera case is not before us on appeal.

On appeal, Weber argues that even if A.R. did have actual authority over the premises, she lacked authority to consent to a search of the closed camera case inside the air-conditioning unit, and therefore deputies "exceeded the scope of [A.R.'s] consent when they opened up a closed camera bag" found inside the air-conditioning unit. But Weber did not make these arguments in his motion to suppress, during the omnibus hearing, or in his brief in support of his motion to suppress submitted after the contested omnibus hearing. The district court did not determine whether A.R. had authority to consent to a search of the camera case, or whether the deputies exceeded the scope of A.R.'s consent.

A defendant seeking to challenge the validity of a search on Fourth Amendment grounds must raise the challenge at the omnibus hearing. *State ex rel. Rasmussen v. Tahash*,

141 N.W.2d 3, 13-14 (Minn. 1965). If a defendant fails to raise a Fourth Amendment challenge to the admissibility of evidence obtained by police at the omnibus hearing, the defendant may not raise the challenge on appeal and forfeits the challenge. *See State v. Brunes*, 373 N.W.2d 381, 386 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985). Also, appellate courts seldom consider issues that were not raised in the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). "This is especially true when the record is not fully developed." *State v. Hill*, 871 N.W.2d 900, 903 n.1 (Minn. 2015). This court may, however, review an issue not raised in the district court in the interests of justice. *Roby*, 547 N.W.2d at 357. Review may be warranted in the interests of justice if consideration would not unfairly surprise either party. *Id.*

Here, both parties briefed the legal issues relating to the search of the camera case. But we are concerned that the record was not fully developed in the district court on either issue. *See Hill*, 871 N.W.2d at 903 n.1 (declining to consider an issue when it was not raised in the district court and the record was not "fully developed"). The omnibus hearing transcript includes no questions to any witness about the search of the camera case. Because we cannot analyze the camera-case issues without further development of the record, we decline to consider both issues. *See State v. Marsh*, 931 N.W.2d 825, 829 (Minn. App. 2019) (declining to review a challenge to a search warrant because it was not preserved in the district court); *Hill*, 871 N.W.2d at 903 n.1.

Affirmed.