STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0175

State of Minnesota,
Respondent,

vs.

Justus Owen Naumann,
Appellant.

Filed December 3, 2012
Affirmed
Bjorkman, Judge

Dakota County District Court
File No. 19HA-CR-11-652

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Heather D. Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

John Arechigo, Arechigo & Stokka, LLP, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Bjorkman, Judge; and Rodenberg, Judge.

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

BJORKMAN, Judge

On appeal from his conviction of being a felon in possession of a firearm, appellant challenges the warrantless entry into his residence and the district court's refusal to depart from the presumptive sentence. Because a resident of appellant's home

consented to the entry and the district court did not abuse its discretion by declining to depart from the presumptive sentence, we affirm.

FACTS

On January 15, 2011, J.K. called 911 and reported that a man with a gun who had been drinking was in her residence. The call was disconnected. The 911 dispatcher informed police officers of the call, stating a "domestic" was in progress. J.K. called 911 back twice, telling the operator that the man was on probation, no longer had the gun, and was going to leave. J.K. also said the police did not need to come to the residence.

The officers arrived at the residence four minutes after being dispatched. Two officers drew their guns and proceeded to knock on the front door. J.K. answered the door and told the officers they did not need to come in. The officers responded that they needed to make sure everything was okay. When the officers asked where the man was, J.K. stepped back into the residence and pointed toward the kitchen. As the officers entered, they saw appellant Justus Naumann placing a black box on top of the refrigerator. The officers questioned Naumann, and confirmed that the box contained a firearm.

Naumann was arrested and charged with possession of a firearm by a felon. The district court denied Naumann's motion to suppress evidence of the gun, concluding that consent and the emergency-aid exception to the warrant requirement permitted the officers' entry. Naumann was found guilty after a stipulated-facts trial. The district court denied Naumann's request to depart from the presumptive sentence of 60 months' imprisonment.

D E C I S I O N

I. J.K. voluntarily consented to the officers' entry into Naumann's residence.

When reviewing a pretrial order on a motion to suppress evidence, we independently review the facts to determine whether, as a matter of law, the district court erred in suppressing or not suppressing the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review the district court's factual findings for clear error and its legal determinations de novo. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless entries and searches inside a person's home are presumptively unreasonable and therefore prohibited unless permitted by an exception. *State v. Lemieux*, 726 N.W.2d 783, 787 (Minn. 2007). The state bears the burden of demonstrating a warrantless entry is justified. *State v. Lussier*, 770 N.W.2d 581, 586 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009).

Police officers may enter a residence without a warrant when an individual with legal authority voluntarily consents to the entry. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011); *State v. Richards*, 552 N.W.2d 197, 203 (Minn. 1996). A mere acquiescence to a claim of police authority does not constitute voluntary consent. *State v. Hummel*, 483 N.W.2d 68, 73 (Minn. 1992). Rather, consent is voluntary if "a reasonable person would have felt free to decline the officer[']s requests or otherwise terminate the encounter." *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994) (quotation omitted) (alteration in original). Consent may be verbal or implied by conduct. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). Pointing and stepping away from a door are

nonverbal gestures that may indicate consent. *See State v. Howard*, 373 N.W.2d 596, 599 (Minn. 1985) (concluding a person consented by opening the door completely and then stepping back to make room for the officers); *State v. Vang*, 636 N.W.2d 329, 333 (Minn. App. 2001) (concluding a person consented by opening the door and turning around to go back into the residence). Whether consent is voluntary is a question of fact that turns on the totality of the circumstances. *Othoudt*, 482 N.W.2d at 222.

Naumann argues that the warrantless entry into the residence was unreasonable because J.K did not provide voluntary consent. We disagree. First, it is undisputed that J.K. had authority to consent to the search; she was living at the residence with appellant on the date in question. *See Hummel*, 483 N.W.2d at 73 (finding that "consent may be given by a third party who possesses common authority over the premises"). Second, the district court expressly found that J.K. consented to the entry by pointing into the residence and stepping away from the door.

The record supports the district court's finding. J.K. testified that when the officers asked her where the man was, she pointed into the home and stepped back out of the doorway. On redirect examination, J.K. stated that she stepped back only after the officers started to enter the residence. But J.K. also testified that she allowed the officers to enter the residence. We defer to the district court's finding that J.K. stepped back before the officers entered. *See State v. Larson*, 520 N.W.2d 456, 464 (Minn. App. 1994) (stating that this court defers to the district court's credibility determinations), *review denied* (Minn. Oct. 14, 1994).

Naumann contends that J.K.'s consent was not voluntary but rather a submission to police authority. We are not persuaded. Although the officers approached the residence with their guns drawn, the guns were always pointed down, never at J.K. And while J.K. advised the officers that they did not need to come in, the circumstances warranted their entry to ensure everyone was safe. The officers never told J.K. that she had to comply and they did not force their way into the residence. Rather, they waited to enter until J.K. consented by stepping away from the door. Importantly, J.K. consented after being asked where Naumann was, not after a demand to enter, demonstrating she did not submit to a claim of police authority. On this record, we conclude that the district court did not clearly err by finding J.K. voluntarily consented to the entry.[1]

II. The district court did not abuse its discretion by imposing the presumptive sentence.

The district court must order the presumptive sentence unless "substantial and compelling circumstances" merit a downward dispositional or durational departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). We review de novo whether there are substantial and compelling circumstances that allow a departure. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). But we review the district court's decision to grant or deny a departure from the guidelines for abuse of discretion. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001). Only in rare

[1] Because we conclude that J.K. consented to the officers' entry, we need not address whether the exigent-circumstances and the emergency-aid exceptions to the warrant requirement apply.

cases will we reverse the imposition of a presumptive sentence. *Kindem*, 313 N.W.2d at 7.

Naumann argues that his amenability to probation warrants a dispositional departure. We are not persuaded. To determine whether a defendant is amenable to probation, we examine the defendant's age, prior record, remorse, cooperation, attitude in court, and support from friends and family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Although Naumann is young, exhibited cooperation and remorsefulness throughout the proceeding, and has support from his family and friends, other evidence leads us to conclude that this is not the rare case in which refusal to depart should be reversed. First, Naumann was on probation when he committed the offense, undercutting his claimed amenability to probation. Second, the officer who conducted the presentence investigation reported that Naumann has not taken probation seriously and recommended the presumptive sentence. Third, while the majority of Naumann's prior criminal offenses have been related to controlled substances, Naumann does not feel he has drug or alcohol problems, and he has refused to complete a chemical-dependency evaluation. Based on our review of the record, we conclude that the district court did not abuse its discretion by imposing the presumptive sentence.

Affirmed.