STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2188

State of Minnesota,
Respondent,

vs.

Donald Thomas Perrin,
Appellant.

Filed January 11, 2011
Affirmed
Minge, Judge

Carver County District Court
File No. 10-CR-05-400

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

James W. Keeler, Jr., Carver County Attorney, Martha E. Mattheis, Assistant County Attorney, Chaska, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, St. Paul, Minnesota; and

William L. Davidson, Lind, Jensen, Sullivan & Peterson, P.A., Special Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Minge, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

MINGE, Judge

Appellant challenges his conviction for possession of pornographic work involving minors. Appellant argues that the district court erred by denying his motion to suppress evidence removed from his residence by law enforcement, claiming that his consent to take the evidence was coerced. We affirm.

FACTS

On October 27, 2004, two Carver County sheriff detectives and a social worker visited appellant Donald Perrin at his residence to investigate a report that he had a pornographic image of a child on his home computer. The officers digitally recorded the two-hour conversation with appellant.

Appellant's wife let the officers and social worker into the house, and appellant suggested that they talk in the kitchen. When the officers told appellant that they were following up on a report about photographs of children on his computer, appellant immediately replied, "There probably are." Appellant then explained that he ran software on his computer that automatically downloaded images from various "newsgroup services." Appellant said that he used the downloaded images of scenery to make wallpaper for his computer, but that he also received "thousands of files that [he had] to delete because, technically . . . they're illegal."

Throughout the two-hour conversation, the officers asked appellant for consent to search or take the computer numerous times. At first, appellant replied, "Sure, I'll show you what's in there," but then indicated that he didn't want "the kids to lose their

educational computer." Eventually, appellant signed a handwritten form consenting to the officers taking his computer.

After a forensic examination of appellant's computer revealed over 100 pornographic images of children, the state charged appellant with one count of possession of pornographic work under Minn. Stat. § 617.247, subd. 4(a) (2004). Appellant moved the district court to suppress the evidence obtained at his house, arguing that he did not voluntarily consent to the search and seizure of his computer. The district court held an omnibus hearing. The two officers and appellant testified. The district court received, among other exhibits, the audio recording and transcript of the officers' October 27, 2004 meeting with appellant. The district court denied appellant's suppression motion.

Appellant waived his right to a jury trial and agreed to submit the case to the district court on stipulated facts pursuant to Minn. R. Crim. P. 26.01, subd. 3. The district court found appellant guilty of possession of pornographic work involving minors, stayed imposition of sentence, and placed appellant on probation for up to 60 months subject to conditions. This appeal followed.

D E C I S I O N

The issue in this case is whether the district court clearly erred by finding that appellant voluntarily consented to the officers taking his computer.

Whether consent to search is voluntary is a question of fact to be determined from the totality of the circumstances. *State v. Alayon*, 459 N.W.2d 325, 330 (Minn. 1990). The standard on review is whether the district court "clearly erred." *Id.*

Both the United States Constitution and the Minnesota Constitution prohibit "unreasonable searches and seizures." *See* U.S. Const. amend. IV.; Minn. Const. art. I, § 10. In general, subject to certain exceptions, a search or seizure without a warrant supported by probable cause is "per se" unreasonable. *State v. Othoudt*, 482 N.W.2d 218, 221-22 (Minn. 1992). One exception is consent. *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994).

For a search or seizure based on consent to be valid, the state must prove that, based on the totality of the circumstances, the decision to consent was made freely and voluntarily, and was not the product of duress or coercion. *State v. Hanley*, 363 N.W.2d 735, 739 (Minn. 1985). The test for voluntariness is "whether a reasonable person would have felt free to decline the officer's requests or otherwise terminate the encounter." *Dezso*, 512 N.W.2d at 880 (quotation omitted). Courts recognize that the presence of police can be an intimidating experience under the best of circumstances, but do not find coercion simply because the person being questioned is uncomfortable. *Id.* Rather, an encounter becomes coercive when "the right to say no to a search is compromised by a show of official authority." *Id.* In considering whether consent was voluntary, courts consider such factors as the age of the accused, the accused's education or intelligence, and the nature and duration of the questioning. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 2047 (1973); *see Hanley*, 363 N.W.2d at 739 (determining that consent was voluntary when, among other factors, there was nothing in the record to indicate that the accused "lacked the maturity, sophistication, or intelligence to give an effective consent").

Here, the district court found that appellant "appears to be competent, of normal intelligence and maturity." This finding is supported by the record. The district court further found that appellant "was in his house in a comfortable setting at the time of the conversation in question." *Cf. Dezso*, 512 N.W.2d at 880-81 (determining that consent was involuntary when, among other factors, the encounter took place at night, on a highway, in the front seat of a parked squad car). The record indicates that appellant's wife let the officers into the house and that appellant agreed to speak with them. Appellant suggested that they speak in the kitchen, and much of the conversation took place at the kitchen table. There is no claim that the officers used intimidating body language or interfered with appellant's personal space. The record indicates that appellant was able to move freely throughout his house. In addition, the district court, after listening to the recording of the encounter, found that the detectives' questions were "not threatening or overly confrontational in their tone or content." A review of the recording indicates that the detectives were patient and respectful, though persistent, in their attempts to elicit consent.

Furthermore, appellant willingly signed a consent form, read aloud to him before he signed it, stating that he consented to the detectives taking his computer for purposes of searching for illegal images. *See Hanley*, 363 N.W.2d at 739 (determining that consent was voluntary when, among other factors, the accused signed "of her own free will" a consent-to-search form). Moreover, appellant assisted the officers in boxing up and labeling his computer, and by providing information regarding passwords, service providers, and file locations. *See Alayon*, 459 N.W.2d at 331 (holding that the accused

voluntarily consented when, among other factors, he "cooperated in the search of the house, helping the officers find the cocaine"). Appellant insisted that he was "trying to save [the officers] time," was "trying to be nice," and wanted "to make this as quick[] and painless as possible."

And significantly, the officers repeatedly informed appellant that he had the right to refuse consent, explaining his choice regarding consent numerous times. *See Hanley*, 363 N.W.2d at 739 (determining that consent was voluntary when, among other factors, the accused continued to consent after she was advised of her right to refuse).

Appellant argues that he did not have a meaningful choice because one of the officers indicated that if appellant refused consent, he would go get a warrant while the other officer stayed with appellant. If an officer threatens to obtain a search warrant in order to coerce a defendant to consent, the resulting consent may be deemed involuntary. *See id.* (citing *United States v. Boukater*, 409 F.2d 537, 538 (5th Cir. 1969)). But in *Hanley*, the supreme court determined that the officer did not improperly threaten or coerce the accused when he "merely stated that a search warrant would be or could be obtained on the premises." *Id.*; *see also Boukater*, 409 F.2d at 538 (providing that the officer's statement that he would get a search warrant if the accused withheld consent did not render the consent involuntary when "everything else point[ed] toward completely voluntary consent"). The *Hanley* court stated that the officer's statements were not "impermissibly coercive" because the record showed that the officers had probable cause to support an application for a search warrant. 363 N.W.2d at 739.

Here, the record shows that the officers repeatedly stated that if appellant did not provide consent, one of them would go to the courthouse to get a search warrant while the other stayed at appellant's house. As in *Hanley*, the officers presented appellant with two options. The search-warrant alternative required probable cause. Probable cause is defined as "a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985) (quotation omitted). Here, the following evidence supported a finding that there was a fair probability that the officers would find pornographic images of children on appellant's computer: In October 2004, a person under a statutory mandate to report child abuse contacted Carver County Social Services to report that, while at appellant's house, she saw a pornographic image of a child on a computer screen in the living room. Shortly after this report, two officers visited appellant's seven-year-old daughter, M.E.P., at school. M.E.P. reported that appellant took pictures of her and her brother partially or completely undressed. Most significantly, appellant admitted to the officers that he had inadvertently downloaded thousands of illegal images. Because the officers clearly had probable cause to support a search warrant, their statements do not render appellant's consent invalid.

In his pro se brief, appellant asserts that the audio recording of the officers' conversation with him failed to pick up threatening statements made by the officers during the encounter. Because appellant failed to raise this argument in the district court, the parties did not address completeness of the audio recording, and the district court did not consider the issue. Therefore, we conclude it is waived on appeal. *See Roby v. State*,

547 N.W.2d 354, 357 (Minn. 1996) (providing that matters not argued to and considered by the district court are waived on appeal).

In sum, we conclude that the district court's finding that appellant voluntarily consented to the search and seizure of his computer is supported by evidence in the record and is not clearly erroneous. The district court did not err in denying appellant's motion to suppress the evidence removed from his house.

Affirmed.

Dated: