STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1285

State of Minnesota,
Respondent,

vs.

Gregory Fred Spickerman,
Appellant.

Filed March 8, 2011
Affirmed
Lansing, Judge

Dakota County District Court
File No. 19-K8-06-2217

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

James C. Backstrom, Dakota County Attorney, Vance B. Grannis III, Assistant County Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Connolly, Judge.

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

LANSING, Judge

The district court denied Gregory Spickerman's motion to suppress evidence of methamphetamine and a pipe obtained in a warrantless search of his residence. Following a stipulated-facts trial in which the district court found him guilty of second-degree controlled substance crime and possession of drug paraphernalia, Spickerman appealed. Because the district court's findings on remand explain and support its determination that the police obtained voluntary consent to enter Spickerman's residence, we affirm.

F A C T S

Acting on an anonymous call that reported drug activity and expressed concern for the caller's seventeen-year-old sister, agents from Dakota County Drug Task Force went to the residence where Gregory Spickerman lived with his girlfriend and her seventeen-year-old daughter, SR. When police arrived they spoke with SR, who was sitting on the steps in front of the house. The contested issue of voluntary consent centers on what happened following this initial conversation.

At the omnibus hearing SR testified that after she told the officers that Spickerman was at home, she entered the residence and went directly upstairs to tell Spickerman that the officers wanted to talk with him. By the time she was upstairs and before she could say Spickerman's name, the officers were "right behind" her "in the bedroom." She testified that she did not give the officers permission to come into the house or upstairs.

Two officers both testified that SR consented to their entering the residence. The first officer testified that he told SR that he was responding to an anonymous complaint about drug activity at the residence and asked whether her mother and Spickerman were at home. SR said that her mother was not at home, but Spickerman was upstairs. The officer testified that when he asked if they could speak with Spickerman, SR said, "Sure"; opened the door to the residence; and said, "Come on in, he's upstairs." SR began walking up the stairs and motioned for the officers to follow her. When SR and the officers reached the top of the staircase, SR motioned toward the master bedroom, indicating that Spickerman was in that room. From outside the bedroom, the officer noticed an open cigarette package on the bed with a glass bubble pipe partially protruding from the package. The officer recognized the protruding item as a methamphetamine pipe.

The second officer testified that the first officer asked SR if the officers could enter the home, but he could not remember the exact words the first officer used. The second officer's testimony also diverged from the first officer's testimony on SR's consent to follow her up the stairs. He testified that she "agreed" when the first officer asked if they could follow her up the stairs.

The district court denied Spickerman's motion to suppress the drug-related evidence. Spickerman and the state agreed to submit the case under the procedure provided in Minn. R. Crim. P. 26.01, subd. 4, preserving his right to challenge the pretrial ruling. The district court found Spickerman guilty of second-degree controlled substance crime and possession of drug paraphernalia.

Spickerman appealed his conviction, challenging the district court's denial of his suppression motion. *State v. Spickerman*, No. A09-401, *3 (Minn. App. Mar. 2, 2010) (order op.). He argued that the district court failed to make findings of fact on whether SR's consent was voluntary, and therefore the record was insufficient to support its pretrial ruling. *Id*. We remanded to the district court "with instructions . . . to make findings that explain its determination that the prosecution satisfied its burden of showing that [SR]'s consent was voluntary." *Id.* at *4-5.

On remand, the district court issued the following findings:

> 1. The two police officers who testified at [d]efendant's trial were credible and both testified that [SR] invited them into the home in question.
>
> 2. [SR] is [d]efendant's girlfriend's daughter and it appears that the initial anonymous caller was [SR]'s sister who voiced concern about her welfare and drug activity.
>
> 3. [SR] was not credible and changed her account of events between the date of the offense and day of trial.
>
> 4. [SR] voluntarily and knowingly gave consent to officers to enter the home.

Spickerman now appeals, arguing that the district court's findings are still inadequate to allow meaningful appellate review and requests that we reverse his conviction in the interests of justice. In his pro se, supplemental brief Spickerman argues that his conviction should be reversed because the district court performed its duties with bias or prejudice.

D E C I S I O N

When a suppression order is challenged on appeal, we independently review the facts and the law to determine whether the district court erred by suppressing or refusing to suppress the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We apply a clear-error standard to our review of the district court's findings of fact, but a de novo standard to determinations of law. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).

The Fourth Amendment to the United States Constitution and Article I of the Minnesota Constitution prohibit the unreasonable search and seizure of "persons, houses, papers, and effects." U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless searches are per se unreasonable, subject to limited exceptions. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992) (citing *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). The state bears the burden of establishing the existence of an exception to the warrant requirement. *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001). The exception at issue in this appeal is consent.

To justify a warrantless search based on consent, the state must prove that the consent was freely and voluntarily given. *State v. George*, 557 N.W.2d 575, 579 (Minn. 1997). "Consent must be received, not extracted." *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). "'Voluntariness' is a question of fact and it varies with the facts of each case. The test is the totality of the circumstances." *Id*. When determining whether consent was voluntary, we consider "the nature of the [police] encounter . . . and what was said and how it was said." *Id.* The supreme court has noted that "[t]he voluntariness of consent is not easily defined." *George*, 557 N.W.2d at 579. The determination

requires "a careful examination of the circumstances surrounding the giving of the consent." *Id.*

On remand the district court made a specific finding that SR voluntarily consented to the officers' entry into the home. It further found that SR's testimony was not credible and that the officers' testimony was credible. Assessing the credibility of a witness and the weight to be given a witness's testimony is exclusively the province of the fact-finder. *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990). "Inconsistencies or conflicts between one . . . witness and another do not necessarily constitute false testimony or [serve as] a basis for reversal." *State v. Daniels*, 361 N.W.2d 819, 826 (Minn. 1985).

Accepting the district court's determination of credibility, we are able to ascertain the basis for its finding that SR voluntarily consented to the officers' entry into the home. Both officers testified that SR permitted the officers to enter the home and follow her up the stairs to Spickerman's bedroom. The district court found this testimony to be credible and it supports the finding that SR consented to the officers' entry into the home. The second officer's testimony that the first officer asked SR if they could enter the residence and again asked if they could follow her up the stairs varies to some degree from the first officer's testimony. But both officers testified that their entry into the home and up the stairs was based on SR's conduct and statements. The officers' inconsistent testimony on the manner in which SR consented does not necessarily indicate that the testimony is false or provide a basis for reversal, but may only reflect ordinary variances of human memory in recalling events after the passage of time. Because the record supports the

district court's finding that SR voluntarily and knowingly consented to the officers' entry into the home, its finding is not clearly erroneous.

In his pro se, supplemental brief, Spickerman claims that the district court violated the Code of Judicial Conduct by basing its determination on bias and prejudice. In support of that allegation, he points to the district court's statement during the omnibus hearing that informed SR and her mother of Spickerman's criminal record and also the statement that the court believed the officers' testimony over SR's testimony.

A judge has a duty to treat each party without bias or prejudice. Minn. Code Jud. Conduct, Rule 2.3(A). "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation . . . ." Minn. Code Jud. Conduct, Rule 2.3(B).

"Whether a judge has violated the Code of Judicial Conduct is a question of law, which we review de novo." *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005). Judicial bias may result in reversal if it arises from an extrajudicial source. *In re Estate of Lange*, 398 N.W.2d 569, 573 (Minn. App. 1986). But opinions formed during the course of the judicial proceedings that are based on evidence introduced or events occurring during the proceedings, "'do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Byers v. Comm'r of Revenue*, 735 N.W.2d 671, 673 (Minn. 2007) (quoting *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157 (1994)). Judicial

remarks "that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases," that reflect a response to the proceedings "ordinarily do not support a bias or partiality challenge." *Id.* (quotation omitted).

Spickerman does not claim that the district court's alleged bias was the product of an external source. The transcript of the hearing reveals that the court's questioning of SR and her mother about Spickerman's criminal record was an attempt to gauge how well they knew Spickerman. Also, in stating that it believed the officers' testimony over SR's testimony, the court was explaining the reason for its credibility determination. This explanation of a credibility determination does not constitute evidence of bias or prejudice. The record does not provide support for a claim of deep-seated antagonism toward Spickerman that impeded the district court's ability to make a fair determination.

Affirmed.