

DA 16-0577

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 117N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHEAL JAMES LENOIR,

Defendant and Appellant.

APPEAL FROM: District Court of the Seventh Judicial District,
In and For the County of Dawson, Cause No. DC 15-93
Honorable Richard A. Simonton, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Penelope S. Strong, Penelope Strong Law Firm, Billings, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Jonathan M. Krauss,
Assistant Attorney General, Helena, Montana

Olivia Rieger, Dawson County Attorney, Glendive, Montana

Submitted on Briefs: April 4, 2018

Decided: May 8, 2018

Filed:



Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Michael James Lenoir appeals from an order of the Seventh Judicial District Court, Dawson County, denying his motion to suppress evidence found during a search of his vehicle and a judgment of conviction for felony criminal possession of dangerous drugs. We affirm.

¶3 On September 7, 2015, while patrolling Interstate 94, west of Glendive, Montana, State Trooper Barry Kilpela observed a vehicle traveling eighty-one miles-per-hour in a zone with a speed limit of seventy-five miles-per-hour. Trooper Kilpela initiated a traffic stop and made contact with the vehicle's driver, Lenoir; front-seat passenger, Lenoir's friend; and backseat passenger, Lenoir's four-year-old daughter. Trooper Kilpela saw barcode stickers on the vehicle's windows and smelled air fresheners and marijuana emanating from its interior. Trooper Kilpela asked Lenoir to come to his patrol car so that he could process and issue him a warning for speeding. During their encounter, Lenoir explained that he was his daughter's sole custodian; he suffered from a serious medical condition; the vehicle was rented; and that there was a small amount of marijuana in the vehicle's glove box. Trooper Kilpela asked if he could search Lenoir's vehicle. Lenoir was initially equivocal, saying he did not care whether Trooper Kilpela searched the

vehicle. Thereafter, Lenoir refused to consent to Trooper Kilpela's request to search the vehicle. Trooper Kilpela notified Lenoir that if Lenoir did not consent to the vehicle's search, he would impound it and apply for a search warrant. After further discussion, Lenoir allowed Trooper Kilpela to search the vehicle and signed a consent-to-search form. Prior to signing the consent form, Trooper Kilpela verbally confirmed with Lenoir that he did not feel threatened.

¶4 Trooper Kilpela found thirteen ounces of marijuana during his search of the vehicle's trunk. The State charged Lenoir with possession of dangerous drugs, a felony in violation of § 45-9-102, MCA. Lenoir moved to suppress the evidence found during Trooper Kilpela's search, arguing that his consent was coerced and involuntary. The District Court held that particularized suspicion supported the traffic stop and that Lenoir consented to the search, as evidenced by the valid, signed consent form. The consent form indicated Lenoir consented to a search of the vehicle "freely and voluntarily, without any threats or promises." The District Court further concluded that Trooper Kilpela obtained sufficient information to obtain and execute a search warrant in the event Lenoir ultimately refused to consent. The District Court denied Lenoir's motion to suppress and subsequently convicted him of felony possession of dangerous drugs. Lenoir appeals.

¶5 First, Lenoir argues Trooper Kilpela unlawfully enlarged the scope of a routine traffic stop for speeding into a felony drug investigation. Lenoir relies on § 46-5-403, MCA, to support this contention. A stop "may not last longer than is necessary to effectuate the purpose of the stop." Section 46-5-403, MCA. Lenoir raises this argument for the first time on appeal. "It is perhaps our most fundamental rule of appellate review that, with rare

exception, we will not consider an issue or claim that was not properly preserved for appeal.” *State v. Norman*, 2010 MT 253, ¶ 16, 358 Mont. 252, 244 P.3d 737. Supporting this rule is the notion that “it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.” *State v. West*, 2008 MT 338, ¶ 16, 346 Mont. 244, 194 P.3d 683 (internal quotations and citations omitted). Lenoir failed to raise this argument in his motion to suppress and the District Court did not have the opportunity to consider it. Lenoir failed to properly preserve this argument for our review.

¶6 Second, Lenoir argues the District Court erred by denying his motion to suppress evidence. Lenoir contends his consent was involuntary. Warrantless searches are per se unreasonable unless an exception applies. *State v. Dupree*, 2015 MT 103, ¶ 19, 378 Mont. 499, 346 P.3d 1114. One exception includes when a citizen consented to the search. *Dupree*, ¶ 19. Consent must be freely given and, when challenged, this Court looks to the totality of the circumstances, considering several factors including whether the consenting party was in custody or under arrest; informed of the right not to consent; subjected to prolonged questioning; or informed that a search warrant could be obtained. *Dupree*, ¶ 19.

¶7 Here, Lenoir was not under arrest; he was informed of his right not to consent; and he was informed that a search warrant could be obtained. Trooper Kilpela lawfully conducted the traffic stop based on particularized suspicion. At one point Lenoir refused to consent, indicating he understood he had the right to refuse. During the course of the traffic stop, Trooper Kilpela observed indications of drug trafficking. He saw barcode stickers on the vehicle’s windows signifying it was a rented vehicle and knew that people

transporting contraband often do so in rented vehicles. Additionally, he smelled air fresheners and marijuana. Later, Lenoir admitted there was marijuana in the vehicle's glove box.

¶8 The additional information Trooper Kilpela gathered during the traffic stop ripened into the probable cause necessary to support a search warrant. Trooper Kilpela asked Lenoir repeatedly if he would consent to a search; however, the repeated questioning is attributable to Lenoir's vacillating responses, which ranged between equivocal, negative, and affirmative. Trooper Kilpela sought a direct answer.

¶9 During the traffic stop, Trooper Kilpela also learned Lenoir is his young daughter's sole custodian and that he suffers from a medical condition. On appeal, Lenoir argues his daughter's presence and his medical condition made him feel coerced into consenting. However, prior to Lenoir signing the consent form, Trooper Kilpela confirmed with Lenoir that he was voluntarily consenting. Further, the consent form stated he was consenting "freely and voluntarily, without any threats or promises."

¶10 "When officers misrepresent the law to obtain consent, it may be found that the misrepresentation was coercive in nature and render the consent involuntary." *Dupree*, ¶ 19. Here, however, Trooper Kilpela made no misrepresentation of law when he informed Lenoir he intended to impound the vehicle and apply for a search warrant in the event Lenoir refused to consent. Based on the totality of the circumstances, the District Court correctly concluded the search of Lenoir's vehicle was reasonably conducted pursuant to his voluntary consent.

¶11 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶12 Affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON