IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Kendra Mabey and Timothy Mabey, Defendants and Appellants.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080378-CA F I L E D (December 17, 2009) 2009 UT App 383

Fourth District, Provo Department, 071401686, 071401687
The Honorable Lynn W. Davis

Attorneys: Margaret P. Lindsay, Spanish Fork, for Appellants
Mark L. Shurtleff and Jeffrey S. Gray, Salt Lake City, for Appellee

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Before Judges Orme, Davis, and Thorne.

DAVIS, Judge:

Defendants Kendra and Timothy Mabey pleaded guilty to charges of possession with intent to manufacture or produce a controlled substance, see Utah Code Ann. § 58-37-8(1)(a)(i) (Supp. 2009). They entered Sery pleas, reserving the right to challenge the district court's denial of their motion to suppress evidence obtained from a warrantless search of their home. See generally State v. Sery, 758 P.2d 935, 938-40 (Utah Ct. App. 1988) (discussing conditional guilty pleas).

"Warrantless searches are per se unconstitutional under the Fourth Amendment unless conducted pursuant to a recognized exception to the warrant requirement. One such exception includes searches conducted pursuant to consent." State v. Bisner, 2001 UT 99, ¶ 43, 37 P.3d 1073 (citations omitted). Although Defendants gave consent to the third search of their home, they argue that the consent was not valid. "[F]or a consent search to be valid, consent must have been given voluntarily and not have been 'obtained by police exploitation of . . . prior illegality.'" Id. (quoting State v. Thurman, 846 P.2d 1256, 1262 (Utah 1993)).[1]

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1. We disagree with Defendants' argument that after any illegal search on the part of police, there is no way to subsequently

(continued...)

First, we determine whether consent was given voluntarily. "Consent is not voluntary if it is obtained as 'the product of duress or coercion, express or implied.'" Id. ¶ 47 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973)). When viewing the "totality of all the surrounding circumstances," see id., we see here each of the following factors indicating a lack of duress or coercion:

> "1) the absence of a claim of authority to search by the officers; 2) the absence of an exhibition of force by the officers; 3) a mere request to search; 4) cooperation by the owner of the [property]; and 5) the absence of deception or trick on the part of the officer."

Id. (alteration in original) (quoting State v. Whittenback, 621 P.2d 103, 106 (Utah 1980)).[2] Thus, consent here was given voluntarily.

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1. (...continued)
obtain valid consent. If this were so, the rule would simply focus on whether there was a prior illegality, not whether there was police exploitation of such an illegality.

Moreover, the requirement of police exploitation is based on the fruit of the poisonous tree doctrine. See State v. Arroyo, 796 P.2d 684, 690 (1990). This doctrine requires the determination of "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Id. (quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963)). Thus, consent is not tainted by the mere existence of some prior illegality but is only tainted if it is somehow the fruit of such illegality.

2. Defendants argue that their consent was not voluntary because they "were faced with a situation in which they believed their only option was to allow their home to be searched." Their assessment of the situation was essentially correct--they did, indeed, have no option regarding an eventual search. But such a predicament was simply due to their own bad luck that the drugs and paraphernalia had been discovered by the EMTs and that, as a result, the officers had ample information to secure a search warrant; the predicament was not the result of any coercive tactics on the part of the officers. To the contrary, the officers candidly explained the existing options to Defendants and recognized that it was Defendants' right to refuse the search and require the officers to get a search warrant.

Second, we determine whether the consent here was obtained by police exploitation of prior illegality. Even assuming, as Defendants argue, that the first two police entries into the house were illegal searches, there was nothing procured from those searches that the officers used to obtain the later consent to search.[3] Instead, the information the officers gave to Defendants that led to their consent was simply that the officers knew that there was contraband in the house--information obtained without the officers setting foot inside the house. Rather, the officers first became aware of this information through an officer's first-hand observation of the marijuana attached to a stretcher exiting the house as well as the EMTs' report that they saw "marijuana, paraphernalia, and two . . . marijuana plants growing in the bathroom." And even though the officers told Defendants that the EMTs showed them the contraband, we do not see that the officers' ability to obtain either a search warrant or Defendants' consent would have been any less if the officers simply reported that the EMTs told them of the contraband. Even relying only on the information they had prior to first entering the home, the officers were correct that "[t]he only difference between a consent form and a search warrant was time." Thus, no

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3. The district court determined that the second entry was an illegal search but that the first entry was not because there existed probable cause and exigent circumstances. Defendants argue that both searches were illegal.

Although we need not determine whether the first two warrantless searches were legal, we flatly reject the State's argument that there was no search here for purposes of the Fourth Amendment due to the lack of a reasonable expectation of privacy in the home because of an inhabitant's chronic illness, i.e., diabetes. We think it untenable to assume that persons lose their Fourth Amendment rights to be free from unreasonable searches of their home simply because they have a medical condition that gives them a somewhat elevated likelihood of needing to call emergency medical care at some point in their lives.

prior illegality was exploited in order to obtain Defendants' consent to search the house.[4]

Affirmed.

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James Z. Davis, Judge

WE CONCUR:

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Gregory K. Orme, Judge

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William A. Thorne Jr., Judge

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4. Both parties state that an exploitation analysis should include assessment of the following factors: "(1) the 'purpose and flagrancy' of the illegal conduct, (2) 'the presence of intervening circumstances,' and (3) the 'temporal proximity' between the illegal detention and consent." State v. Hansen, 2002 UT 125, ¶ 64, 63 P.3d 650 (quoting Brown v. Illinois, 422 U.S. 590, 603-04 (1975)). However, these factors are not entirely helpful in our analysis because, as is obvious from the language of the third factor, these factors were established for cases of illegal detention that led to consent. But insofar as these factors do apply, they cut in favor of the State. The purpose of the first two searches was not to obtain information that would guarantee consent; indeed, as explained above, the officers did not gain any new information or see anything more than what the EMTs had previously seen and reported. As to intervening circumstances, Defendants were advised of their Miranda rights as well as specifically told that they could refuse consent and require the officers to obtain a search warrant. And although the record is unclear as to the amount of time that passed between the first two searches and the consent, the searches were certainly separate and distinct events from that of the officers approaching Defendants and obtaining consent.