IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Mark L. Pebley, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20030966-CA F I L E D (July 8, 2005) 2005 UT App 312

Second District, Ogden Department, 021905150
The Honorable Michael D. Lyon

Attorneys: Dee W. Smith and Randall W. Richards, Ogden, for Appellant
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake City, for Appellee

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Before Judges Billings, Bench, and Orme.

ORME, Judge:

We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record[,] and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3). Moreover, the issues presented are readily resolved under applicable law.

Even assuming, arguendo, that the officers in this case had violated Pebley's Fourth Amendment rights when they entered his property, peered into a garage window, and detained him in a level two encounter without reasonable suspicion, we nevertheless conclude that Pebley's consent to the searches of his garage and home was valid and was not obtained by exploiting any prior illegal search or seizure. See generally State v. Hansen, 2002 UT 125,¶47, 63 P.3d 650 (stating that even when police illegally detain an individual in the course of a level two encounter without reasonable suspicion to do so, "evidence obtained during a subsequent search may nevertheless be admitted if the person g[ives] valid consent to the search"); State v. Thurman, 846 P.2d 1256, 1265 (Utah 1993)(explaining legal requirements for proving "that a defendant's consent following police illegality is valid under the Fourth Amendment").

The parties agree that the applicable legal standard to determine whether Pebley gave valid consent is whether "'(1) [t]he consent was given voluntarily, and (2) the consent was not obtained by police exploitation of the prior illegality.'" Hansen, 2002 UT 125 at ¶47 (alteration in original) (quoting Thurman, 846 P.2d at 1262). Likewise, the parties agree on the legal standards and various factors used in the voluntariness analysis, see id. at ¶¶51-52, 56-57, as well as on the mechanics of the exploitation analysis. See id. at ¶¶62-67. The parties only part ways in their arguments concerning the application of the law to the facts of this case.

Pebley argues that several facts undermine the trial court's conclusion that "[f]ollowing a cordial conversation with the defendant . . . [w]ithout a show of any force or deception, defendant voluntarily gave permission" to search his garage and home. He specifically argues that his consent was coerced or given under duress because of the "reception" he received when he pulled into his driveway. Nevertheless, after hearing all the testimony, the trial court concluded that the totality of the circumstances[1] revealed that "[t]he officers made no claim of improper authority to search, they exhibited no force at the time of securing consent, and employed no deception or trick. They merely made a request to search and the defendant cooperated and consented." We agree with the trial court.

Our review of the record reveals that Pebley gave voluntary consent, without duress or coercion. We see no evidence in the record that supports Pebley's contention that the officers tricked Pebley into consenting to the search by telling him they would not take him to jail if he let them search the garage. In fact, it appears instead that Pebley went above and beyond the norm in helping the officers to successfully search his garage by volunteering where the keys were that opened the locked garage and by informing the officers exactly which desk drawer held his stash of illegal drugs. While some aspects of this case are

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[1]While it is true that the State may bear a heavier burden of proving voluntary consent after police action that violates the protections of the Fourth Amendment, see State v. Hansen, 2002 UT 125,¶51, 63 P.3d 650, the Utah Supreme Court has made it clear that "[t]he appropriate standard to determine voluntariness is the totality of the circumstances test, and the burden of proof is by preponderance of the evidence." Id. at ¶56. Thus, "[t]he totality of the circumstances must show consent was given without duress or coercion. In other words, a person's will cannot be overborne, nor may 'his capacity for self-determination [be] critically impaired.'" Id. at ¶57 (last alteration in original) (citations omitted).

consistent with duress or coercion, the fact that Pebley concedes that "the officers assumed a less intimidating posture" after they had frisked him and found no weapons on him, and the fact that there was an intervening and "cordial conversation" between Pebley and the officers before consent was given, undermine any conclusion that Pebley was coerced into consenting or did so as a product of duress. The record also adequately supports the findings that none of the officers claimed the authority to search the garage or Pebley's home, that they exhibited no force at the time of securing consent, and that Pebley was actually an obliging facilitator of the officers' searches.

Our review of the record likewise leads us to conclude that the officers did not gain Pebley's consent by exploiting any of their prior illegal actions.[2] The officer's illegal glance into the garage window in no way aided the officers to subsequently gain Pebley's consent, nor was "the purpose of the illegal conduct to obtain consent." Hansen, 2002 UT 123 at 64. Moreover, that act was sufficiently attenuated from Pebley's consent so that the intervening time and circumstances dispel the possibility of exploitation. Likewise, the officers' actions that can be construed as an illegal level two detention are fairly viewed as acts to ensure officer safety--to ascertain whether Pebley was carrying any weapons--and not as a means to coerce him into consenting to a search of his garage or home. See Thurman, 846 P.2d at 1273 (recognizing officers' concern for their safety as the influence behind their behavior rather than an intent to facilitate a search for evidence). In fact, one officer testified that he even asked Pebley for permission to frisk him. As a result, that aspect of the officers' conduct was not "flagrantly abusive" so as to increase the "likelihood that the police engaged in the conduct as a pretext for collateral objectives." Id. at 1264.

Because we conclude that the purpose of the officers' conduct was not aimed at gaining Pebley's consent, "the lapse of time between the misconduct and the consent and the presence of intervening events become less critical to the dissipation of the taint." Id. That said, Pebley concedes "the officers assumed a less intimidating posture" after they had frisked him and found

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[2]"An exploitation analysis requires looking at the facts of each case." State v. Hansen, 2002 UT 125,¶64, 63 P.2d 650. To aid in the analysis, the Utah Supreme Court has identified "three factors that have particular relevance in reviewing the facts: (1) the 'purpose and flagrancy' of the illegal conduct, (2) 'the presence of intervening circumstances,' and (3) the 'temporal proximity' between the illegal [conduct] and consent." Id. (quoting Brown v. Illinois, 422 U.S. 590, 603-04 (1975)).

no weapons on him. Moreover, the intervening "cordial conversation" between Pebley and the officers for approximately five to ten minutes before he was asked for consent to search his garage also lessens the possibility that the officers exploited the brief illegal detention in a way that helped them gain Pebley's consent.[3]

Affirmed.

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Gregory K. Orme, Judge

WE CONCUR:

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Judith M. Billings,
Presiding Judge

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Russell W. Bench,
Associate Presiding Judge

[3]In denying Pebley's motion to suppress, the trial court was nonetheless critical of the officers' decision to proceed without a warrant, and it strongly disagreed with the police tactics used in this case. The trial court's point is well taken. Upon receiving the citizen-informant's report, the officers should have applied for a warrant to search the garage. Had they done so, the State's evidentiary and procedural hurdles in this case would have been avoided entirely.