IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. MICHAEL A. PALMAS, Respondent.	)))))))))	No. 67165-1-I DIVISION ONE UNPUBLISHED OPINION FILED: September 26, 2011

Schindler, J. — After conducting a "knock and talk" procedure with Michael Palmas in order to obtain consent to search his home, the police discovered marijuana and cash. The State charged Palmas with possession of marijuana with intent to deliver. Palmas filed a motion to suppress the evidence seized in the search. The trial court ruled that Palmas did not voluntarily consent to the search of his home during the knock and talk and granted the motion. Because substantial evidence supports the trial court's findings, we affirm.

Late in the evening on October 22, 2008, Detective Sergeant Martin Borcherding, Detective Matt Ledford, and three other detectives from the Mason County Sheriff's Office were searching the room of Ashok Varma at the Little Creek Casino Resort pursuant to a warrant. Detective Borcherding answered Varma's cellular telephone and spoke with a man named Mike. Mike offered to sell Varma some

marijuana. Varma identified the caller as Michael Palmas. After leaving the casino, the five detectives went to Palmas's home. The detectives arrived at Palmas's house just before 3:00 a.m. on October 23. Detectives Borcherding and Ledford knocked on the front door.

After some time, Palmas opened the door wearing shorts, a tank top, and fuzzy slippers. Detective Borcherding said that he smelled marijuana and asked Palmas to step outside on the porch. The detective asked Palmas if he had any marijuana in the house and Palmas said he had about three quarters-of-a-pound. Palmas confirmed that he had offered to sell his friend marijuana during the telephone call earlier that evening. The detectives did not give Palmas Miranda warnings.[1]

Detective Borcherding asked Palmas if he would voluntarily consent to a search of his home. Palmas did not give his consent to search. However, because he was cold, Palmas asked the detectives to enter his home to discuss consent. The detectives refused to enter the house unless Palmas gave them consent to search. Detective Borcherding told Palmas that if he did not consent they would obtain a search warrant and search the house. Palmas asked several times if he could go into the house. Detective Borcherding repeatedly told Palmas that because of the smell of marijuana and the statements Palmas made about marijuana in the house, he could not allow Palmas to go back inside the house until he consented to the search or the detectives received a search warrant. Eventually, Palmas agreed to sign the consent form and initialed the portions of the form indicating that he understood he had the right to refuse consent and he could revoke consent at any time.

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Once inside, Palmas produced a small box containing marijuana and a duffle bag containing marijuana and cash. The detectives seized the marijuana but did not arrest Palmas. The State charged Palmas with possession of a controlled substance with intent to deliver.

Palmas filed a motion to suppress the evidence, arguing that the consent to search the house was not given voluntarily but was a result of coercion. Detective Borcherding, Detective Ledford, and Palmas testified at the suppression hearing. Detective Borcherding testified that Palmas was not under arrest, in custody, or being detained at any time. Detective Borcherding said he told Palmas he could walk away or drive away but Palmas could not go into the house, even if accompanied by a detective, unless he gave consent to search.

Detective Borcherding testified that the knock and talk procedure was done to obtain Palmas's consent and was "a consensual contact, no different than the police knocking on your door to ask you if you were . . . involved in a hit and run collision or something."

The court ruled that considering the totality of the circumstances, Palmas did not voluntarily consent to the search of his home. The court found that although Palmas was not given Miranda warnings, he was of ordinary intelligence and he was told that he could refuse to consent to the search. Nevertheless, the court found that the circumstances surrounding the consent were coercive because the detectives conducted the knock and talk at 2:45 a.m., Palmas was sleeping at the time, the detectives had Palmas stand outside in the cold in shorts and a t-shirt, and would not

allow him into his home until he gave his consent to search.

In its oral ruling, the court states that the fact that detectives knocked on Palmas's door at 3:00 a.m. was concerning because the knock and talk is an informal procedure.

> In a knock and talk procedure, the Court would surmise that the reason we're not seeing many indicators in the case law with regard to the time of day, is that this is a procedure that is intended to be done during a regular daytime activity. The cases that I have looked at have indicated that it is an informal procedure whereby the officers go up to the door and knock and ask if they can talk with the individual inside the residence and many times do gain admission . . . to the residence and are able to locate the contraband that they have come over to at least discuss being present. But it does not appear that it was intended to be something that is done at 2:45 / 3:00 a.m. in the morning where an individual is woken up from sleep, asked to come out on the porch in less than full dress, a tank top and athletic shorts and slippers at 3:00 a.m. in the morning, not to be allowed back in until a choice is made with regard to whether walking away from the house dressed as they are in the very early morning hours or signing the consent to search.
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> . . . And I'm looking at the totality of the circumstances, but as I indicated, the time of day has been very important to the Court.

The court concluded that Palmas did not voluntarily consent to the search. The court granted Palmas's motion to suppress the evidence from the search and dismissed the charge without prejudice. The State appeals.

The State argues that substantial evidence does not support the trial court's conclusion that the consent Palmas gave was not voluntary. The State asserts that Palmas was informed that he could refuse to consent and his consent was not a result of coercion.

We review findings of fact to which error has been assigned to determine whether substantial evidence in the record supports the findings, and in turn, whether

those findings support the conclusions of law. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. State v. Halstien, 122 Wn.2d 109, 129, 857 P.2d 270 (1993). Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). We review conclusions of law de novo. Mendez, 137 Wn.2d at 214.

A trial court's findings of fact and conclusions of law must be read as a whole. State v. Hinds, 85 Wn. App. 474, 486, 936 P.2d 1135 (1997). A reviewing court may resort to the trial court's oral decision to interpret findings and conclusions if there is no inconsistency. Hinds, 85 Wn. App. at 486.

The State assigns error to the trial court's finding that the knock and talk procedure "is usually done during the daylight hours, however on this particular occasion it was done at 3:00AM on October 23, 2008." However, because the State fails to support this assignment of error with argument or citation to the record, we do not address it. RAP 10.3(a)(6).

The Fourth Amendment and article I, section 7 of the Washington State Constitution prohibit unreasonable searches and seizures. State v. Day, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007). As a general rule, a warrantless seizure is per se unreasonable and the State bears the burden of demonstrating the applicability of a recognized exception. Day, 161 Wn.2d at 893–94. A well established exception is

consent to search. State v. Werth, 18 Wn. App. 530, 534, 571 P.2d 941 (1977). Where probable cause to obtain a search warrant is lacking, police may conduct a "knock and talk," where officers go to an address and attempt to obtain consent to search. State v. Graffius, 74 Wn. App. 23, 24, 871 P.2d 1115 (1994). Officers knock on the door, tell the occupant they are investigating, and ask for consent to search. Graffius, 74 Wn. App. at 24. If the occupant refuses, the officers leave. Graffius, 74 Wn. App. at 24.

However, consent to search must be obtained without coercion either by explicit or implicit means. Werth, 18 Wn. App. at 534. In other words, consent must result from a person's own essentially free and unconstrained choice. Werth, 18 Wn. App. at 534. The voluntariness of consent to search is a question of fact to be determined by considering the totality of the circumstances surrounding the alleged consent. State v. Shoemaker, 85 Wn.2d 207, 211-12, 533 P.2d 123 (1975). The State must show by clear and convincing evidence that consent was voluntary and not the result of coercion or duress. State v. Ferrier, 136 Wn.2d 103, 116-17, 960 P.2d 927 (1998). In making this determination, the court should consider several factors, including: (1) whether Miranda warnings had been given prior to obtaining consent, (2) the degree of education and intelligence of the consenting person, and (3) whether the consenting person had been advised of his right not to consent. State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 975 (1990).

The trial court's unchallenged findings of fact support the court's determination that the State did not present clear and convincing evidence that Palmas voluntarily

consented to the search. While Palmas was of ordinary intelligence and the detectives informed him he could refuse to consent, the court found that, considering the totality of the circumstances, the consent was the result of coercion.

The court found that the detectives did not give Palmas Miranda warnings; Palmas was awakened by the detectives knocking on the door at 2:45 a.m.; Palmas answered the door wearing a t-shirt, shorts, and slippers; and the detectives made Palmas stand outside in the cold wearing little clothing and refused to allow him to go back into his house. The record is clear that the detectives told Palmas he could not go inside his home unless he consented.

Because the findings of fact support the trial court's conclusion that the State did not prove by clear and convincing evidence that the consent Palmas gave was voluntary and not the result of coercion, we affirm.

WE CONCUR: