STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0587

State of Minnesota,
Respondent,

vs.

Louis T. Kyte,
Appellant.

Filed May 27, 2008
Affirmed
Minge, Judge

Dakota County District Court
File No. K8-04-3010

Lori Swanson, Attorney General, 445 Minnesota Street, 1800 Bremer Tower, St. Paul, MN 55101-2134; and

James C. Backstrom, Dakota County Attorney, Debra E. Schmidt, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Charles F. Clippert, Bethel & Associates, Special Assistant Public Defender, 2677 County Road 10, Mounds View, MN 55112 (for appellant)

Considered and decided by Connolly, Presiding Judge; Kalitowski, Judge; and Minge, Judge.

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

MINGE, Judge

Appellant challenges his conviction of one count of possession of child pornography, claiming that the district court erred by denying his motion to suppress evidence seized from his home computer because he did not voluntarily consent to the search and seizure, and even if he did consent, police exceeded the scope of any consent given. Appellant also contends that his conviction should be reversed because the district court relied on the burden-shifting provision of Minn. Stat. § 617.247, subd. 8 (2004), which has been held unconstitutional. Because we conclude that (1) appellant voluntarily consented to the search and seizure of hard drives from his home computer; (2) police did not exceed the scope of the consent given; and (3) the district court did not improperly rely on section 617.247, subdivision 8; we affirm.

FACTS

The Eagan Police Department received information that appellant Louis T. Kyte used a credit card to access a website involving child pornography. Eagan police detective Douglas Mattson drove to Kyte's home, saw him outside, and while both were in the driveway engaged Kyte in conversation. Because both are longtime residents of Eagan and knew each other, they spent a few minutes getting reacquainted. Mattson eventually told Kyte that he was there on police business to investigate Kyte's Internet surfing habits related to child pornography. Kyte asked Mattson to define child pornography, Mattson obliged, and Kyte admitted that he currently possessed child pornography.

At that point, Mattson told Kyte that one of two things could happen—Kyte could either consent to a search of his computer or an officer would stand by while Mattson obtained a search warrant. Kyte replied that a search warrant would be unnecessary and consented to the search. Kyte signed a "consent to search" form allowing Mattson to search two computer hard drives located on Kyte's computer. Mattson testified that he read Kyte the consent form, including the part informing Kyte that he had a right to refuse consent. Mattson testified that after Kyte signed the document, both men walked into the back bedroom of Kyte's home. Mattson took Kyte's hard drives and returned to the police department. Kyte raised no objection to the search, seizure, or removal of the hard drives from his home. At the police station, Mattson used forensic software to preview images on Kyte's hard drives. After Mattson found images clearly depicting child pornography, he stopped the search of the computer drives and obtained a search warrant to do a detailed analysis of both hard drives.

Kyte was subsequently charged with possession of child pornography in violation of Minn. Stat. § 617.247, subd. 4(a) (2004). Kyte moved to suppress the evidence obtained from his hard drives, claiming that he did not consent to the search, that the information relied on as a basis for the police search was stale, and that there was not probable cause to support the complaint. Following a hearing, the district court denied Kyte's suppression motion. Kyte agreed to submit the matter to the district court on a stipulated record pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980), and the district court found Kyte guilty of the offense. The district court stayed imposition of

Kyte's sentence, placed him on probation for five years, ordered Kyte to serve 60 days confinement, and directed him to complete sex offender treatment. This appeal follows.

D E C I S I O N

I.

The first issue is whether the district court clearly erred in its pretrial determination that Kyte consented to Mattson's search and seizure of his hard drives. Both our state and federal constitutions prohibit unreasonable searches by the government of "persons, houses, papers and effects." U.S. Const. amend. IV; Minn. Const. art. I, § 10; *State v. Paul*, 548 N.W.2d 260, 264 (Minn. 1996). Warrantless searches are presumed to be unreasonable under the Fourth Amendment, *State v. Search*, 472 N.W.2d 850, 852 (Minn. 1991), but consent is an exception to the warrant requirement, *State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985).

A "totality of the circumstances" test is applied in determining whether consent is voluntary. *Id*. at 739. The voluntariness of consent is a question of fact, and the state has the burden of showing that consent was voluntarily given. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). Consent does not have to be verbal, but may be implied from conduct or gesture. *See State v. Howard*, 373 N.W.2d 596, 599 (Minn. 1985). However, "[m]ere acquiescence on a claim of police authority or submission in the face of a show of force is . . . not enough." *Id.* "[I]t is at the point when an encounter becomes coercive, when the right to say no to a search is compromised by a show of official authority, that the Fourth Amendment intervenes." *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). Furthermore, an officer's statement that a search warrant will be obtained if consent is

not given is merely one factor to consider in the totality of circumstances and does not mandate a finding of involuntariness. *State v. Lotton*, 527 N.W.2d 840, 844 (Minn. App. 1995) (*citing United States v. Culp*, 472 F.2d 459, 461-62 (8th Cir. 1973), *cert. denied*, 411 U.S. 970 (1973), *and United States v. Bye*, 919 F.2d 6, 9 (2d Cir. 1990)), *review denied* (Minn. Apr. 18, 1995).

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). But we accept the district court's findings of fact regarding a motion to suppress unless they are clearly erroneous. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

Kyte claims his consent was not voluntary. Kyte notes that Mattson never gave him a *Miranda* warning, informed him that he had a right to speak to an attorney, or told him that he could refuse to answer Mattson's questions. Kyte states that he has only an 8th grade education and, before Mattson contacted him, had never been the subject of a criminal investigation. Furthermore, contrary to Mattson's testimony, Kyte argues that he signed the consent-to-search form only after Mattson removed his hard drives from the home. In addition, Kyte contends that his consent was involuntary because he acquiesced in the face of Mattson's ultimatum: consent to the search or an officer would stand by while a warrant was obtained. We address Kyte's arguments in turn.

It was unnecessary for Mattson to provide a *Miranda* warning because he never placed Kyte under arrest and because there is no evidence in the record suggesting that a

reasonable person in Kyte's position would have believed that he or she was in police custody. *See Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 1612 (1966) (holding that states may not use statements gleaned from a person in custody without a prior specific explanation and waiver of rights); *State v. Champion*, 533 N.W.2d 40, 43 (Minn. 1995) (considering the definition of "custody" to be "whether a reasonable person under the circumstances would believe that he or she was in police custody of the degree associated with formal arrest").

Although Kyte may have limited education and experience with the criminal justice system, he does not claim that he has a disability or that he did not understand that the inquiry was a serious matter. Mattson informed Kyte that he was conducting a police investigation into his Internet surfing habits. At Kyte's request, Mattson defined child pornography, and Kyte admitted to possessing such images. Mattson also testified that he read Kyte the consent-to-search form before Kyte signed the document. Kyte makes no claim that he lacked the mental competence to understand Mattson's disclosures or the information read to him from the consent-to-search form, which included a statement that Kyte could withhold consent.

The district court considered the conflicting testimony over whether Kyte signed the consent-to-search form before or after the search. The district court found Mattson's testimony that Kyte's consent preceded the search to be more credible. The district court further found that Mattson verbally disclosed, and that Kyte understood, that he had a right to withhold his consent before agreeing to the search. Because we defer to the district court's ability to weigh such testimony, we accept these findings.

Next we consider Kyte's contention that his consent was involuntary. We recognize that Mattson told Kyte that he was a police detective, that Mattson would post an officer at the house until Mattson could obtain a search warrant if Kyte withheld consent, and that the situation may have been intimidating. However, Mattson was dressed in plain clothes and not visibly armed. Mattson engaged Kyte in small talk and attempted to minimize the intimidating quality of the visit. The record indicates Mattson did not touch, handcuff, arrest, or threaten to arrest Kyte and further suggests that the conversation between the two men remained cordial throughout the investigation. After Kyte admitted that he possessed child pornography, Mattson explained that Kyte could either consent to the search or an officer would stand by while Mattson obtained a search warrant.

Ultimately, the record does not contain persuasive evidence of coercion before Kyte admitted to possessing child pornography or consented to the search. The representation that an officer would stand by if a search warrant had to be obtained was simply a realistic statement of how Mattson would proceed. Although it suggested it would be futile to withhold consent, it was not a threat and did not prevent Kyte from refusing to allow a search. Furthermore, there is direct testimony that Kyte provided both written and verbal consent. That consent is consistent with the fact that Kyte raised no objection as Mattson entered his home, seized the hard drives, and removed the evidence from the premises. Although we engage in an independent review when the facts are uncontested, here, there are factual questions of what was said, when it was said, and who was more credible. The district court's decision was based on the totality of the

circumstances. Based on this record, we conclude that it was not clearly erroneous for the district court to find that Kyte voluntarily consented to the search and to deny his motion to suppress the evidence obtained from his computer.

II.

The second issue is whether Mattson exceeded the scope of Kyte's consent to search by removing the hard drives from the home. Kyte claims that he did not know Mattson would remove the hard drives for further investigation at the police station. The record reveals that Kyte did not raise this issue before the district court at any point during the proceeding. The resolution of this claim may involve credibility determinations. Because the district court did not have an opportunity to consider or rule on this question, we decline to reach the issue. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that issues not raised to the district court are generally not decided on appeal).

III.

The third issue is whether the district court prejudicially relied on Minn. Stat. § 617.247, subd. 8 (2004). The crime of which Kyte was convicted requires possession of *child* pornography. *See* Minn. Stat. § 617.247, subd. 1 (2004) (stating the intent of the legislature to penalize the possession of pornographic work involving minors). Although a core element of the crime is that the pornography involve minors, the statute provides that "[i]t shall be an affirmative defense . . . that the pornographic work was produced using only persons who were 18 years or older." *Id.*, subd. 8. In a case decided after Kyte's conviction, the Minnesota Supreme Court ruled that by shifting the burden of

establishing the age of the person in the pornographic material to the accused as an affirmative defense, this subdivision violates due process and is unconstitutional. *State v. Cannady*, 727 N.W.2d 403, 408 (Minn. 2006). However, the supreme court did not strike the entire child pornography law, only the offending subdivision. *Id.* The court recognized that

> [a] deprivation of rights in a criminal trial may be harmless error, even though it is a constitutional violation. Constitutional error is not reversible error when the error is harmless beyond a reasonable doubt. When determining whether the error is harmless, we consider all of the facts and circumstances of the case.

Id. at 408-09 (citations omitted).

Kyte argues that his conviction relied on the unconstitutional subdivision and was prejudicial, not harmless error, because the state failed to introduce the pornographic images from Kyte's computer, relying instead on the reports and testimony of Officer Mattson that the images depicted minor children. We agree that if in determining whether there was proof beyond a reasonable doubt, the district court had relied on Kyte's failure to show that the images depicted individuals over the age of 18, the district court's reliance would be prejudicial, not harmless error.

Here, Mattson testified that his subsequent investigation uncovered 5,894 images and a "fair number" of video clips depicting sexual acts with children approximately 18 months to 13 years of age. He also testified regarding the training and methodology he employed in identifying the subjects of the pornography as being within that age range. That part of the record is clear. Kyte never challenged that testimony, never argued that

the persons depicted were over 18, and never attempted to raise any defense under the now invalidated subdivision of the statute. Mattson testified that Kyte admitted that he had *child* pornography on his computer. This testimony was part of the stipulated *Lothenbach* record. Furthermore, the district court did not state it was relying on the burden-shifting statutory subdivision that has been declared unconstitutional. Rather, the district court expressly rejected the constitutional challenge by interpreting the statute as not absolving the state of its burden of proving age. Based on the record before it, the district court determined that the state met its burden of proof.

Because neither Kyte, the state, nor the district court relied on the unconstitutional provision of Minn. Stat. § 617.247, subd. 8, and because age was not at issue, we conclude that the conviction is not attributable to any reliance on the unconstitutional subdivision of the statute and that the district court's rejection of the constitutional challenge to the subdivision was not prejudicial but was harmless error.

Affirmed.

Dated.