STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0422

State of Minnesota,
Respondent,

vs.

Richard Dean Elam,
Appellant.

Filed February 3, 2009
Reversed
Stauber, Judge

Meeker County District Court
File No. 47CR07995

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

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Robert D. Schaps, 236 North Sibley Avenue, Litchfield, MN 55355 (for appellant)

Considered and decided by Peterson, Presiding Judge; Larkin, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from his conviction of third-degree driving while impaired, appellant argues that the district court erred in determining that the search performed by law

enforcement was reasonable and that his father had impliedly consented to the search. Because the search was not supported by exigent circumstances, and because no consent to search was given, we reverse.

FACTS

On July 21, 2007, at 11:30 p.m., Litchfield police officers, Chief Patrick Fank and Sergeant Bryant Blackwell, were dispatched to a minor three-vehicle accident in the drive-thru lane of a fast-food restaurant. The officers arrived minutes after the accident to find that the driver of the vehicle allegedly responsible for the accident had left the scene without providing any contact information. After obtaining the license plate number of the suspect vehicle from a witness, the officers discovered that the vehicle was registered to appellant Richard Dean Elam. Sergeant Blackwell proceeded to appellant's registered address while Chief Fank remained at the scene.

At approximately midnight, Sergeant Blackwell arrived at the residence and discovered the vehicle involved in the accident parked outside. The residence was a single-family home with an attached garage situated on a standard city lot. Sergeant Blackwell approached the front door and spoke with appellant's father, Richard Elam, Sr., (father) the owner of the house. Sergeant Blackwell informed father that he was investigating an accident that involved the vehicle parked in front of the residence. Father indicated that appellant was the primary driver of the vehicle and lived at the residence, but he was unsure if appellant was home. Concerned that his son may have been involved in an accident, father searched appellant's room and the lower level of the

home but did not find him. Sergeant Blackwell, who had remained outside of the home, returned to his squad car to wait for Chief Fank to arrive.

Shortly after Chief Fank's arrival, both officers approached the home and were met by father. Chief Fank explained that they were trying to locate appellant and believed he may have returned home because his vehicle was parked outside the residence. Father, who Chief Fank described as "[v]ery cooperative, very friendly," provided appellant's cell phone number. According to Chief Fank, father also told the officers that he had not seen appellant enter the home and was not sure where appellant would be "unless he is in the back or someplace, but why don't you come in [the house] and . . . I'll check." Sergeant Blackwell, who was "standing by" some distance behind Chief Fank during the conversation, "immediately" walked to the backyard to search for appellant. Chief Fank followed father into the home and waited on the mat in the entryway while father spoke with other family members about appellant's whereabouts.

There is no sidewalk or pathway from the front of the house to the backyard. Sergeant Blackwell walked around the west side of the house to the backyard using a flashlight to illuminate his way. Sergeant Blackwell searched around several trees along the side of the house and backyard and also walked by a backyard patio area. As he proceeded across the backyard, Sergeant Blackwell shined his flashlight into a small service window at the rear of the garage and observed appellant in the garage. He then approached the window and asked to speak with appellant. Despite some initial hesitation, appellant opened the service door and Sergeant Blackwell stepped into the doorway of the garage before proceeding back to the front of the house. While

questioning appellant, the officers observed indicia of intoxication that led them to believe that appellant had been driving while impaired (DWI) at the time of the accident. Appellant was subsequently charged with two counts of third-degree DWI in violation of Minn. Stat. §§ 169A.20, subd. 1(1), (5), 169A.26 (2006), and one count of leaving the scene of an accident in violation of Minn. Stat. § 169.09 (2006).

At an omnibus hearing, appellant moved to suppress evidence that was obtained as a result of the search of the backyard and garage claiming it violated his constitutional right to be free from unreasonable searches and seizures. In support of the motion, appellant offered testimony from father that conflicted in many respects with the officers' accounts. According to father, upon arriving at the residence, Chief Fank ordered Sergeant Blackwell to "[g]o find [appellant]" without father's permission. Chief Fank then entered the home and threatened to obtain a search warrant to "take [the] house apart" if they could not find appellant. Father also claimed that he never suggested that appellant might be in the backyard or garage and that he never gave permission to search any of these areas.

The district court denied appellant's motion, concluding that the search was reasonable. Relying on *State v. Crea*, 305 Minn. 342, 233 N.W.2d 736 (1975), the court noted that (1) "Sergeant Blackwell had probable cause to believe that if he shined his flashlight into the window on the back of the garage, evidence of criminal activity would be found," (2) the intrusiveness of the search was "minimal," and (3) due to the late hour it might have been difficult to obtain a search warrant for the home. The court also concluded that a warrant was unnecessary because father "through his words, conduct,

and cooperativeness with the police, manifested an intent that the search be conducted and thus gave his tacit consent to the search, even though at no time did the officers ever expressly request consent or did [father] affirmatively give it." After a *Lothenbach* trial on stipulated facts, appellant was found guilty of both DWI counts and not guilty of leaving the scene of an accident. This appeal followed.

D E C I S I O N

I.

Appellant argues that the district court erred in denying his motion to suppress evidence from the search of the curtilage of the home. "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). "The district court's findings of fact should be reviewed for clear error." *State v. Lemieux*, 726 N.W.2d 783, 787 (Minn. 2007).

The United States and Minnesota Constitutions protect the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. "This constitutional protection extends to all places where an individual has a reasonable expectation of privacy, including the home and its curtilage." *Haase v. Comm'r of Pub. Safety*, 679 N.W.2d 743, 746 (Minn. App. 2004). "A dwelling's curtilage is generally the area so immediately and intimately connected to the home that within it, a resident's reasonable expectation of privacy should be respected." *Garza v. State*, 632 N.W.2d 633, 639

(Minn. 2001). The Minnesota Supreme Court has held that the curtilage of a home includes the garage. *State v. Crea*, 305 Minn. 342, 345, 233 N.W.2d 736, 739 (1975).

Searches conducted without a warrant are per se unreasonable, subject to a few exceptions. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). Police may enter and search a home or its curtilage without a warrant if they have either "(1) consent or (2) probable cause and exigent circumstances." *State v. Taylor*, 590 N.W.2d 155, 157 (Minn. App. 1999), *review denied* (Minn. May 18, 1999). In addition, areas of curtilage that are impliedly open to public use, such as driveways and porches, may be searched without a warrant because they do not offer a person a reasonable expectation of privacy. *See Crea*, 305 Minn. at 346, 233 N.W.2d at 739.

The state acknowledges that the officers did not have a warrant and that the backyard and garage window did not involve areas of curtilage that are impliedly open to public use. But, relying upon the district court's analysis under *Crea*, the state argues that it was reasonable for Sergeant Blackwell to step off the sidewalk, walk around the front of the home, enter the treed backyard, proceed around a deck, and shine a light in the garage window, all in search of appellant.

We disagree because the supreme court has indicated that the three-factor reasonableness test from *Crea* has no remaining vitality. Though not expressly overruled, the supreme court has disavowed any interpretation of *Crea* that might support a warrantless search of a home or its curtilage based on a reasonable suspicion of criminal activity and a limited degree of intrusion. *See State v. Carter*, 569 N.W.2d 169, 178 n. 15 (Minn. 1997) (indicating that "the fact that an officer reasonably expected to

find evidence and used the least intrusive means possible to achieve that end is insufficient to sustain a warrantless search"), *rev'd on other grounds by Minn. v. Carter*, 525 U.S. 83, 119 S. Ct. 469 (1998). A warrantless search must, instead, be supported by probable cause and exigent circumstances. *See id.* ("It was not our intent in *Crea* to step back from the requirement of probable cause and exigent circumstances or to, in any other way, modify our analysis of warrantless searches under the Fourth Amendment.").

The evidence in this case does not support a finding of both probable cause and exigent circumstances. Probable cause to search exists if there is a fair probability, based on the totality of the circumstances, that the object of the search will be found in a particular place. *State v. Carter*, 697 N.W.2d 199, 205 (Minn. 2005). Here, the police were investigating an accident that had occurred less than a half hour before and the vehicle involved in the accident was parked outside the residence. Under the totality of the circumstances, there was at least a fair possibility that appellant would be found on the premises.

But despite the presence of probable cause, there were no exigent circumstances to justify the intrusion into the curtilage without a warrant. Exigent circumstances can be established either by a single factor or by the "totality of the circumstances." *State v. Gray*, 456 N.W.2d 251, 256 (Minn. 1990). This court evaluates the facts found by the district court to determine, as a matter of law, whether exigent circumstances existed. *Id.* The following single factors, standing alone, are considered to support exigent circumstances: (1) hot pursuit; (2) imminent destruction or removal of evidence; (3) protection of human life; (4) likely escape of the suspect; and (5) fire. *Id.*

Based on the totality of the circumstances, we conclude that there were no exigent circumstances justifying the search. The officers were investigating a minor automobile accident that included no reported injuries and only minor damage to the vehicles involved. The officers were not in hot pursuit or concerned about destruction of evidence. On this record, there was no reason to believe that immediate entry without a warrant was necessary. Accordingly, the search of the curtilage violated appellant's constitutional rights.

We also note that the outcome would not change under *Crea*. In *Crea*, police investigated the theft of a snowmobile trailer and two snowmobiles at the defendant's residence after identifying him as the likely perpetrator of the crime. 305 Minn. at 343, 233 N.W.2d at 738. As they walked down the driveway of the residence, police observed two snowmobile trailers in plain view, including one that matched the description of the stolen trailer behind the house. *Id.* at 343-44, 233 N.W.2d at 738. The police examined the trailer and observed snowmobile tracks in the snow that led from the trailer to a walk-in basement door. *Id.* at 345, 233 N.W.2d at 739. Shining their flashlights through a window in the door, police observed a snowmobile that matched the description of one of the two stolen. *Id.* The defendant alleged that his Fourth Amendment rights were violated because the police searched his yard and peered into his window without a warrant. *See id.* at 344, 233 N.W.2d at 740. In considering the propriety of the searches, the supreme court noted that "[t]he test is not whether it would have been reasonable for the police to obtain a warrant but whether the police acted reasonably in proceeding without one." *Id.* at 346, 233 N.W.2d at 739-40. The court concluded that the

warrantless search of the yard was reasonable because police observed the trailer in plain view from the driveway—an area that is impliedly open to the public—and were, therefore, entitled to examine it under this exception. *Id.*, 233 N.W.2d at 740. The court also upheld the search through the basement window because (1) the police had "very strong probable cause" to believe that if they shined the flashlight into the window, they would see the stolen snowmobiles; (2) their intrusion was minimal because it was visual and only involved a basement window; and (3) due to the late hour, it may have been difficult to obtain a search warrant. *Id.* at 346-47, 233 N.W.2d at 740.

The state contends that, as in *Crea*, the search of the curtilage was lawful in this case because the police had probable cause to believe that appellant was in the garage, made only a minimal intrusion, and would have had difficulty obtaining a warrant. We disagree. Although obtaining a warrant might have been troublesome at that hour, the police did not have "very strong" probable cause to suspect that appellant was in the garage, and the search that ultimately led to his discovery far exceeded the scope of the search in *Crea*.

As noted above, the officers had probable cause to believe that appellant would be found on the premises. But *Crea* requires "very strong" probable cause to justify such a search. *Id.* at 346, 233 N.W.2d at 740. The circumstances here do not rise to such a level because much of the evidence suggested that appellant was not home. Before Sergeant Blackwell proceeded to the backyard, father had already searched unsuccessfully for appellant throughout much of the home, and those present at the residence had not seen appellant since earlier that day.

The state also emphasizes that the intrusion into the garage was minimal because Sergeant Blackwell only shined his flashlight into the window. We agree that the intrusion *into the garage* was minimal; however, to focus exclusively on the window search would be inconsistent with the holding in *Crea*. In *Crea*, the supreme court distinguished between the initial search of the yard and the search through the window. *Id.* at 346-47, 233 N.W.2d at 739-40. The search of the yard was justified by the plain view exception, while the search through the window was found permissible under the three factors mentioned above. *Id.* Conversely, in this case, Sergeant Blackwell was not operating under any exception to the warrant requirement in searching the curtilage. Therefore, the entire search, including the search of the front, side, and backyard of the residence, would have to be justified by the *Crea* test. Weighing this factor in the context of the full scope of the search, we conclude that the intrusion into the curtilage here was not minimal. Sergeant Blackwell searched a substantial portion of the side of the home and backyard, including the trees and patio area, before reaching the garage window. Because the officers did not have very strong probable cause, and because the intrusion into the curtilage was not minimal, the search was not reasonable under *Crea*.

II.

Notwithstanding our conclusion that the officers' intrusion into the curtilage did not comport with *Crea*, the state contends that the search was constitutional because father implicitly consented to the search. Police must have probable cause to support a search and obtain a warrant authorizing the search before it is considered reasonable. *In re Welfare of G.M.*, 560 N.W.2d 687, 692 (Minn. 1997). But if the search is conducted

pursuant to voluntary consent from a person in control of the premises, it is not unreasonable and "neither probable cause nor a warrant is required." *State v. Pilot*, 595 N.W.2d 511, 519 (Minn. 1999). Whether a person voluntarily consented to a search is a question of fact determined by examining the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-27, 93 S. Ct. 2041, 2046-48 (1973). Examination of the totality of the circumstances requires evaluating "the nature of the encounter, the kind of person [the consenter] is, and what was said and how it was said." *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). Consent does not have to be oral; it may be implied from conduct. *Othoudt*, 482 N.W.2d at 222. In a case involving nonverbal consent, the issue is typically whether the person engaged in actions, gestures, or movements demonstrating that police were free to enter. *See, e.g., State v. Vang*, 636 N.W.2d 329, 333 (Minn. App. 2001) (finding consent based on nonverbal gesture); *Carlin v. Comm't of Pub. Safety*, 413 N.W.2d 249, 251 (Minn. App. 1987) (finding consent where person opened door for officer and turned around without interacting with officer). Failure to object does not constitute consent, and consent cannot be inferred solely from a person's acquiescence to police authority. *Deszo*, 512 N.W.2d at 880 (failure to object does not constitute consent); *State v. George*, 557 N.W.2d 575, 580 (Minn. 1997) (acquiescence to police authority not the same as consent).

This court reviews the district court's voluntary consent finding to determine whether it is clearly erroneous. *See Overline v. Comm't of Pub. Safety*, 406 N.W.2d 23, 28 (Minn. App. 1987) (stating that district court's finding of consent was not "clearly erroneous"). "Clearly erroneous means manifestly contrary to the weight of the evidence

or not reasonably supported by the evidence as a whole." *Novack v. Nw. Airlines, Inc.*, 525 N.W.2d 592, 597 (Minn. App. 1995) (quotation omitted).

In challenging the district court's finding of consent, appellant acknowledges that father was cooperative with police and did not ask them to leave, but argues that implied consent cannot be inferred from his behavior. We agree. Father's behavior toward the officers, though cooperative, did not reasonably convey to the officers that they were free to search the home, much less the curtilage and garage. When Sergeant Blackwell originally arrived at the residence, he waited outside the home while father searched for appellant and was not invited to search on his own. Later, after Chief Fank arrived, the officers again approached the residence to discuss appellant's whereabouts. The substance of the conversation that ensued is in dispute. Father claimed that, after he opened the front door, Chief Fank immediately told Sergeant Blackwell to "go find" appellant. Chief Fank acknowledged that it was "possible" that he may have given such an order, and Sergeant Blackwell admitted that Chief Fank "might have" ordered him to search. Chief Fank also admitted that he may have threatened to obtain a warrant if they could not find appellant. Finally, Chief Fank was not invited to search the home and remained on the mat near the front door while father talked to other family members about appellant's whereabouts. The totality of this evidence indicates that father did not impliedly agree to the search.

Moreover, even assuming the district court discredited father's version of events regarding what transpired after Chief Fank arrived, Chief Fank's account also supports appellant's argument. Chief Fank testified that father told him: "I have not seen

[appellant] come back to the house yet . . . . [I do not know where he is] unless he's in the back or someplace, but why don't you come in and . . . I'll check." As mentioned above, Chief Fank proceeded to follow father into the home, but waited on the mat by the front door as father attempted to locate appellant. As a whole, this evidence suggests that father was inviting the officers into the home while *father* checked for appellant.

Because there were no exigent circumstances justifying the warrantless intrusion into the curtilage, and because the record does not reasonably support the finding of implied consent, we reverse.

Reversed.