STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0662

State of Minnesota,
Respondent,

vs.

Keith V. Harklerode,
Appellant.

Filed May 19, 2009
Affirmed
Peterson, Judge
Dissenting, Klaphake, Judge

Dakota County District Court
File No. K8-06-2038

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

William L. Bernard, Grannis & Hauge, P.A., 1260 Yankee Doodle Road, Suite 200, Eagan, MN 55121 (for respondent)

Daniel J. Koewler, Charles A. Ramsay, Charles A. Ramsay & Associates, 450 Rosedale Towers, 1700 West Highway 36, Roseville, MN 55113 (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

PETERSON, Judge

In this appeal from convictions of refusal to submit to a chemical test, obstructing legal process or arrest, and disorderly conduct, appellant argues that (1) the warrantless police intrusion into his garage was not justified by either consent or exigent circumstances, and (2) his right to counsel was not vindicated when police failed to provide him with a telephone to use to speak to an attorney before submitting to a chemical test. We affirm.

FACTS

Appellant Keith V. Harklerode entered a restaurant and began speaking with a restaurant employee. Based on appellant's behavior and an odor of alcohol, the employee determined that appellant was intoxicated, and when appellant left the restaurant and drove away, two restaurant employees followed him. While following appellant, the employees called the police and reported that appellant appeared intoxicated when he was in the restaurant and that he was honking his horn while stopped at a red light. They also reported appellant's license-plate number and that he was driving erratically.

The police dispatcher ran the license-plate number to obtain the registered address for the vehicle and then gave the address to the two officers who responded to the call. The responding officers went to the address without turning on their squad-car lights and sirens. When they arrived at the address, the officers identified the car in the driveway as

the car described by the employees, based on the description and the license-plate number.

The home had an attached, two-car garage, and the overhead garage door was fully open. The officers saw a man who was later identified as appellant standing inside the garage, toward the back, near the doorway between the garage and the house. Before entering the garage, one of the officers asked appellant if the officers could talk to him, and he said yes. The officers entered the garage and began speaking with appellant to determine whether appellant was the driver of the vehicle reported by the restaurant employees.[1] Appellant did not ask the officers to leave. The officers could smell the

[1] The dissent contends that a fair characterization of the omnibus-hearing testimony shows that the officers' conduct after they entered the garage "consisted of merely informing appellant of the allegations regarding his driving conduct, apprehending appellant, throwing him to the ground, and arresting him." In the memorandum that accompanied the order denying appellant's suppression motion, the district court described the entry into the garage as follows: "One of the officers asked the [appellant] if they could talk to him, and the [appellant] answered 'yes'. The officers then entered the garage, walked up to the [appellant], and began talking to him." The record supports the district court's description. During direct examination at the omnibus-hearing, the officer who asked appellant if the officers could talk to him described the conversation with appellant in the garage as follows:

> I began speaking with him. Let him know we did receive witness information about his conduct at the Subway store and on the road. While speaking with him, I could smell the odor of alcohol coming from his breath. He had red, watery eyes at that time, and he was slurring his speech. Upon continuing to talk with him, he began making conversation, but he was having a hard time making any sense of really what he was saying.

When the officers told appellant that he was being arrested, he resisted, and a scuffle occurred. During the scuffle, appellant was taken to the ground.

odor of alcohol on appellant's breath and saw that he had red, watery eyes and was slurring his speech.

When the officers told appellant that he was being arrested for driving while impaired, appellant began fighting with them. Appellant was handcuffed and taken to a police station, where he stated that he would not sign any forms and would not perform any tests or do anything that he was told to do. While appellant was still in handcuffs, an officer read the implied-consent advisory to him. When advised that he had a right to counsel, appellant first stated that he would like to consult with an attorney. When asked if he had an attorney that he wanted to call, appellant said no. When asked if he wanted to use a telephone book to find an attorney, appellant said no. The officer did not further attempt to determine whether appellant wanted to use a telephone and did not provide a telephone to appellant. Appellant refused to take a chemical test.

Appellant was charged with second-degree refusal to submit to a chemical test, Minn. Stat. §§169A.20, subd. 2, 25 (2004), third-degree driving while impaired (DWI), Minn. Stat. §§ 169A.20, subd. 1(1), .26 (2004), obstructing legal process or arrest, Minn. Stat. § 609.50, subd. 2(2) (2004), and disorderly conduct, Minn. Stat. § 609.71, subd. 1(2). Appellant filed a motion seeking to suppress evidence and dismiss the charges for lack of probable cause, arguing that the state violated his right to be free from unreasonable searches and seizures by entering his garage without a warrant and violated his right to counsel by not allowing him to consult with counsel before deciding whether to submit to a chemical test. The district court denied the motion. The DWI charge was

dismissed, and, after a trial on stipulated facts, appellant was convicted on the remaining counts. This appeal followed.

D E C I S I O N

I.

Appellant argues that by entering his garage without a warrant, the police violated his rights under the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution. Therefore, he contends, the district court erred when it denied his motion to suppress the evidence that the police obtained when they spoke with him in his garage.

When reviewing a pretrial order denying a motion to suppress evidence, we independently review the facts and determine whether, as a matter of law, the district court erred by not suppressing the evidence. *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004). "In reviewing factual determinations by the trial court bearing on a motion to suppress on Fourth Amendment grounds, we follow the 'clearly erroneous' standard." *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

The Fourth Amendment to the United States Constitution and Article I of the Minnesota Constitution protect against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10; *Kyllo v. United States*, 533 U.S. 27, 31, 121 S. Ct. 2038, 2041 (2001); *In re Welfare of B.R.K.*, 658 N.W.2d 565, 578 (Minn. 2003). The exclusionary rule prohibits the admission of evidence discovered during an illegal search. *Welfare of B.R.K.*, 658 N.W.2d at 578.

"It is well settled under the Fourth and Fourteenth Amendments to the United States Constitution that a search conducted without a warrant issued upon probable cause is per se unreasonable subject only to a few specifically established and well delineated exceptions." *State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985) (quotations and alteration omitted (1967)). "It is equally well-settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Id*. The state bears the burden of proving that the defendant voluntarily consented to a search or seizure. *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). Determining whether consent was voluntarily given is a question of fact based on the totality of the circumstances, "including the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *Id.*

Consent does not have to be verbal; it may be implied from conduct. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). Whether appellant gave permission to enter his garage is judged by an "objective reasonableness" standard: "'what would the typical reasonable person have understood by the exchange between the officer and the suspect?'" *United States v. Waupekenay*, 973 F.2d 1533, 1535 (10th Cir. 1992) (quoting *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 1803-04 (1991)).

The issue, therefore, is whether a reasonable person would have understood that appellant was voluntarily consenting to the officers entering the garage when an officer standing just outside the garage asked appellant if the officers could talk to him and, while standing in the garage with the overhead door fully open, appellant said yes. It is

important to emphasize that, in analyzing this issue, we are not attempting to determine whether the officers' interpretation of appellant's answer was correct; we are only determining whether the interpretation was reasonable. The Supreme Court has explained:

> It is apparent that in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement—is not that they always be correct, but that they always be reasonable. As we put it in *Brinegar v. United States*, 338 U.S. 160, 176, 69 S. Ct. 1302, 1311 (1949):
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> > "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability."

Illinois v. Rodriguez, 497 U.S. 177, 185-86, 110 S. Ct. 2793, 2800 (1990).

Nothing in the record indicates that the officers exerted any kind of authority over appellant before entering the garage, other than that inherent in their appearance as police officers. Their conduct was not overbearing. They did not use the sirens or lights on their squad cars when approaching appellant's house. They asked appellant if they could talk with him before entering his garage. Absent evidence of any exertion of authority, a reasonable person would have understood that appellant was acting voluntarily when he told the officers that they could speak with him.

The district court determined that appellant's consent to talk to the officers "implicitly included his consent to be approached by the officers in his garage." Although appellant might not have subjectively intended to consent to the officers entering his garage when he told them that they could talk with him, based on the totality of the circumstances, a typical reasonable person would have understood that appellant was consenting to the entry.

The officers approached the garage during daylight hours while the overhead garage door was fully open. Nothing obstructed the officer's view into the garage, and nothing stood between the officers and appellant when they asked if they could talk to him. When appellant said yes, he was near the back of the garage, about a car length away from the officers. Because it is common for people who are talking to one another to stand significantly less than a car length apart, it was reasonable for the officers to interpret appellant's response to mean that the officers could approach him to talk with him and that he was consenting to their entering the garage.[2]

II.

Appellant argues that the officer who administered the implied-consent advisory violated his Sixth Amendment right to have counsel present before deciding whether to submit to chemical testing. "[A]n individual has a right, upon request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing."

[2] Because we conclude that the officers reasonably determined that appellant consented to their entering the garage, we need not address appellant's claim that there were not exigent circumstances that permitted the entry.

Friedman v. Comm'r of Pub. Safety, 473 N.W.2d 828, 835 (Minn. 1991). This right is limited, however, and is vindicated if the person is provided with a telephone and a reasonable time to contact and talk with counsel. *Id.* If the request is ambiguous, the officers are required to either provide the person with a telephone or clarify the request. *State v. Slette*, 585 N.W.2d 407, 410 (Minn. App. 1998). But, "as a threshold matter the driver must make a good faith and sincere effort to reach an attorney." *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992).

Appellant argues that he did not waive his limited right to counsel after initially invoking it, and, therefore, the officers were required to provide him with a telephone. This court has addressed similar factual circumstances. In *Busch v. Comm'r of Pub. Safety*, the driver told the arresting officer immediately after he was arrested that he wanted to talk to an attorney. 614 N.W.2d 256, 257 (Minn. App. 2000). While in the officer's patrol car, the officer read the driver the implied-consent advisory and asked him if he wished to consult an attorney. *Id.* The driver refused to respond. *Id.* En route to the jail, the driver told the officer that he was going to "make things difficult" for him and that he would "pay for this." *Id.* This court held that "the district court properly found that [the driver's] behavior frustrated the implied consent process and amounted to a retraction of his request for an attorney and a refusal to submit to testing." *Id.* at 260.

In *State v. Collins*, the driver made two requests for an attorney before arriving at the jail and a third request just before the officer prepared to read the implied-consent advisory. 655 N.W.2d 652, 656-58 (Minn. App. 2003). The driver then began

"screaming, swearing, making accusations of rape, and insisting she would not listen." *Id.* at 658. This court determined that the driver even more clearly frustrated the process than the driver in *Busch* and explained that "[w]e have recognized that the implied-consent law imposes on a driver a requirement to act in a manner so as to not frustrate the testing process. If the conduct of any driver does frustrate the process, it will amount to a refusal to test." *Id.* at 658 (citations omitted). This court concluded that the driver's actions "frustrated the implied-consent procedure and amounted to a retraction of her request to contact an attorney," and, therefore, her limited right to counsel was not violated. *Id.*

Appellant initially said that he wanted to consult an attorney. But just before he was advised of his right to counsel, appellant stated, "I'm not signing any [expletive] forms," and he told the officer that he was not going to perform any tests or do anything that the officer told him to do. Appellant responded no when asked if he had an attorney in mind and if he wanted a phone book. According to the officer, appellant then, "just stared straight ahead." Like the drivers in *Busch* and *Collins*, appellant's uncooperative behavior frustrated the testing process and his two "no" responses following his request to speak with an attorney amounted to a retraction of his request for counsel. Therefore, we conclude that appellant's limited right to counsel was not violated.

Affirmed.

KLAPHAKE, Judge (dissenting)

I dissent because I believe the entry into appellant's garage exceeded the scope of the limited consent appellant gave for police to "talk to him." Police could not have reasonably believed that this limited permission authorized three officers, one of whom was a "use of force instructor," to enter appellant's garage, and to engage in a "conversation" that, according to a fair characterization of the omnibus hearing testimony, consisted of merely informing appellant of the allegations regarding his driving conduct, apprehending appellant, throwing him to the ground, and arresting him.

Police may not enter a person's home to search for evidence or arrest a person without a warrant. *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380 (1980); *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994) ("Subject to certain exceptions, a warrantless search and seizure without probable cause is a *per se* violation of the Fourth Amendment."). This constitutional protection is based on the interest in preserving a person's right to privacy while in his or her own home:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." . . . In terms that apply equally to seizures of property and to the seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton, 445 U.S. at 589-90, 100 S. Ct. at 1381-82; *see State v. Carter*, 697 N.W.2d 199, 208 (Minn. 2005) (noting that expectation of privacy in the home is "most heightened"); *State v. Othoudt*, 482 N.W.2d 218, 224 (Minn. 1992) (noting that Minnesota does "not look kindly upon warrantless entries of family residences"). Here, appellant was in his home once he entered his garage.

The only exception to the "jealously and carefully drawn" warrant requirement that could apply in this case is the exception that police had consent from appellant to enter his residence. *Jones v. United States*, 357 U.S. 493, 499, 78 S. Ct. 1253, 1257 (1958). Consent is voluntary if it is "the product of an essentially free and unconstrained choice by its maker[.]" *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-25, 93 S. Ct. 2041, 2046-47 (1973). The scope of a search is limited by the terms of its authorization, *Walter v. United States*, 447 U.S. 649, 656, 100 S. Ct. 2395, 2401 (1980), as judged objectively, and is determined by what a reasonable officer would have understood the scope of that consent to be. *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 1803-04 (1991). A search that exceeds the scope of authorized consent is unreasonable and violates the Fourth Amendment. *State v. Powell*, 357 N.W.2d 146, 150 (Minn. App. 1984), *review denied* (Minn. Jan. 15, 1985). We examine the nature of the consent granted under the totality of the circumstances. *Schneckloth*, 412 U.S. at 224-25, 93 S. Ct. 2046; *Dezso*, 512 N.W.2d at 880 (ruling that the state bears the burden to prove that a suspect voluntarily granted extent to search).

Examination of the totality of the circumstances in this case demonstrates that police exceeded the scope of the consent they received from appellant. Any

misunderstanding about the scope of consent granted to police by appellant originated in the deceptive form of the question asked by them: could they "talk" to appellant. Given that police have a legitimate interest in obtaining evidence but are presumed to know the law, this question was insufficient to gain permission to cross the threshold into appellant's home. Further, appellant's affirmative response to this question did not give police a reasonable belief that they had obtained the permission they actually sought: to obtain a right of entry into appellant's home. Finally, the police conduct of immediately taking physical control over appellant and placing him on the ground belies the stated purpose and reasonableness of their request to "talk" to appellant. Taking into consideration appellant's heightened privacy interest in his home, the misleading question by police, and appellant's reasonable misapprehension about the meaning of the question, the actions taken by police exceeded the scope of appellant's consent, and evidence obtained as the result of the search should have been suppressed.