STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1131

State of Minnesota,
Respondent,

vs.

Anthony Peter Fay,
Appellant.

Filed August 11, 2009
Affirmed
Collins, Judge[*]

Anoka County District Court
File No. 02-K7-05-012701

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

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Paul L. Young, Assistant County Attorneys, Anoka County Government Center, 2100 Third Avenue, Suite 720, Anoka, MN 55303 (for respondent)

Samuel A. McCloud, Carson J. Heefner, McCloud & Heefner, Circle K, Box 216, Suite 1000, Shakopee, MN 55379 (for appellant)

Considered and decided by Minge, Presiding Judge; Worke, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

COLLINS, Judge

Appellant challenges his multiple convictions of possession of child pornography, arguing that the district court erred by (1) admitting evidence obtained as a result of an unlawful seizure, (2) finding that appellant consented to the search of his computer, and (3) convicting him of more than one count of possession of child pornography when all pornographic images were contained on one computer. We affirm.

D E C I S I O N

I.

On February 16, 2005, Federal Bureau of Investigation Agent Maureen Lese and Anoka County Sheriff's Office Detective Lawrence Egly drove to appellant Anthony Fay's home in an unmarked police car, dressed in street clothes without "a utility belt [or] a badge [or] gun," knocked on his door, identified themselves, and indicated their desire to speak with him. Fay stated that he was on his way out, but invited them in after Agent Lese asserted that they had an "important matter" to discuss but that it "shouldn't take up too much of his time." On appeal, Fay contends that he was "seized" when officers did not inform him that "he could leave . . . [and] conduct the interview at a different time" after he had told them that he was in a hurry to attend an appointment and did not have time to speak with them.

Both the United States and Minnesota constitutions protect against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. On appeal, the reasonableness of a search and seizure presents a question of law, which we review de

novo. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005). We review a district court's findings of fact for clear error. *Id.*

Here, the officers' actions do not implicate Fay's constitutional interests. Actions by police amount to seizure only if an objectively reasonable person under the circumstances would not have believed he was free to terminate the encounter. *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). There are many ways police might compel such a belief, depending on the extent to which their actions evince a show of authority. *See State v. Pfannenstein*, 525 N.W.2d 587, 588-89 (Minn. App. 1994) (discussing factors such as presence of numerous officers, display of weapon, physical contact with suspect, or using language or tone of voice to compel compliance), *review denied* (Minn. Mar. 14, 1995). Generally, it is a seizure when an officer stops a car, and it is likely a seizure when an officer blocks a car so as to keep a driver from leaving. *See State v. Sanger*, 420 N.W.2d 241, 242-43 (Minn. App. 1988) (seizure occurred because car was boxed in and officer turned on flashing red lights and honked horn). It is typically *not* a seizure when an officer simply approaches a person in public and speaks with that person. *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980). But a seizure can occur when an officer summons a person, in public, to come to the officer and answer questions or identify himself. *State v. Day*, 461 N.W.2d 404, 407 (Minn. App. 1990), *review denied* (Minn. Dec. 20, 1990).

Although not directly addressed by Minnesota appellate courts, other jurisdictions have held that the "knock and talk"[1] procedure employed by the officers here is not a seizure per se. *See United States v. Cruz-Mendez*, 467 F.3d 1260, 1264 (10th Cir. 2006) ("As commonly understood, a 'knock and talk' is a consensual encounter and therefore does not contravene the Fourth Amendment, even absent reasonable suspicion."), *cert. denied*, 549 U.S. 1151 (2007); *United States v. Weston*, 443 F.3d 661, 667 (8th Cir. 2006) (police did not violate Fourth Amendment when they entered defendant's curtilage for legitimate purpose of seeking voluntary conversation and consent to search); *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001) (stating that "[f]ederal courts have recognized the 'knock and talk' strategy as a reasonable investigative tool when officers seek to gain an occupant's consent to search or when officers reasonably suspect criminal activity" (citing *United States v. Hardeman*, 36 F. Supp. 2d 770, 777 (E.D. Mich. 1999))), *cert. denied*, 534 U.S. 861 (2001); *United States v. Tobin*, 923 F.2d 1506, 1511 (11th Cir. 1991) (stating that "[r]easonable suspicion cannot justify the warrantless search of a house, but it can justify the agents' approaching the house to question the occupants" (citation omitted)), *cert. denied*, 502 U.S. 907 (1991); *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964) ("Absent express orders from the person in possession . . . there is no rule of private or public conduct which makes it . . . a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the

[1] Agent Lese testified that a "'knock and talk' basically means we're going to just show up at the residence unannounced, knock on the door, and see if the person in the residence is willing to chat with us, to talk to us[.]" Detective Egly testified that a "knock and talk" is "where we try to make contact with the home owner or the individual we want to talk to and try to talk to them in their home about what's happened."

steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law."). In fact, the Eighth Circuit has expressly approved of the "knock and talk" strategy when reasonably employed by investigating officers. *See Weston*, 443 F.3d at 667. However, a valid "knock and talk" can become coercive if the police assert their authority, refuse to leave, or otherwise make the people inside feel they cannot refuse to respond to questions. *United States v. Poe*, 462 F.3d 997, 1000 (8th Cir. 2006); *United States v. Conner*, 127 F.3d 663, 666 (8th Cir. 1997).

Agent Lese and Detective Egly approached Fay's home in the early afternoon, in plain clothes, and in an unmarked police car. Neither Agent Lese nor Detective Egly brandished handcuffs or weapons or in any way restrained Fay's movement. And although Fay initially indicated that he was on his way out for an appointment and neither Agent Lese nor Detective Egly expressly stated that Fay could reschedule the interview, Fay never overtly declined the officers' request for an interview, and during the one-half-hour to one-hour interview, never requested the officers leave his home or indicated that he was going to be late for his appointment. This is not an example of coercive conduct that transforms a permissive "knock and talk" into a seizure. Therefore, the district court did not err by admitting the evidence.

II.

During the interview, Fay executed a consent-to-search form and consented to a search of his computer. Detective Egly's search of Fay's computer revealed child pornography. Detective Egly informed Fay that he was going to seize the computer. Fay

asserts that although he gave the officers consent to search his computer, the consent was involuntary because he told the officers that he had to leave and he believed he would be late to an appointment, but the questioning continued until he consented to the search.

"When reviewing pretrial orders on motions to suppress evidence, [appellate courts] may independently review the facts and determine, as a matter of law, whether the district court erred [by] suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

> [I]nvoluntariness of a consent to a police request is not to be inferred simply because the circumstances of the encounter are uncomfortable for the person being questioned. Rather, it 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. Consent must be received, not extracted.

State v. Dezso, 512 N.W.2d 877, 880 (Minn. 1994). "'Voluntariness' is a question of fact and it varies with the facts of each case. The test is the totality of the circumstances." *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 249, 93 S. Ct. 2041, 2059 (1973)). When examining the totality of the circumstances, appellate courts consider "the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *Id.* The burden is on the state to demonstrate that the defendant's consent was voluntary. *Id.*

Although Fay relies heavily on *Dezso* to support his contention that the consent was involuntary, Fay's reliance is misplaced. The supreme court in *Dezso* found consent to be involuntary because of the police officer's official and persistent questioning, combined with the police officer's body movement and the defendant's equivocal

responses. 512 N.W.2d at 880-81. Unlike *Dezso*, although Fay originally stated that he was on his way to an appointment, he allowed the officers in and spoke with them between one-half hour and one hour without objecting to the questioning or restating his desire to leave for his appointment. Moreover, throughout the interview, Fay was cooperative, answered questions directly, did not appear nervous, never requested that the interview be terminated, never requested to speak with an attorney, and did not challenge the consent form even after having it read to him. Fay was never restrained nor placed under arrest during the interview. The officers were in plain clothes, displayed no weapons, and never threatened or promised Fay anything in exchange for his consent. Finally, Fay consented to the computer search after one request. Despite the fact that Fay was not expressly informed of his right to terminate the interview, viewing the totality of the circumstances, we cannot determine that the district court erred by finding that Fay voluntarily consented to the search of his computer.

III.

The ensuing search of Fay's computer revealed five images of child pornography. As a result, Fay was charged with five counts of possession of child pornography. Fay contends that he was improperly convicted of more than one count of possession of child pornography, arguing that the statute prohibits "the possession of a 'computer' containing pornography, not the actual images contained on the computer itself."

As an initial matter, the state contends that Fay's claim is procedurally improper because Fay was convicted pursuant to the procedure set forth in *State v. Lothenbach*, 296 N.W.2d 854, 857-58 (Minn. 1980), and he failed to raise this issue before the district

court. The state's procedural arguments are without merit. Courts may correct sentences not authorized by law "at any time." Minn. R. Crim. P. 27.03, subd. 9. Moreover, a party does not waive a claim challenging multiple convictions by failing to raise it before the district court. *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007). A *Lothenbach* procedure merely abbreviates the trial process—it does not have any effect on sentencing or on how many convictions are adjudicated, which is an issue usually resolved at sentencing. Therefore, because Fay challenges his multiple convictions, although he did not raise this issue before the district court, Fay did not forfeit his right to appellate review.

Because we conclude that Fay's claim is properly before us, we must determine whether multiple convictions are authorized under the charging statute, Minn. Stat. § 617.247, subd. 4(a) (2004). It is unlawful for a person to "possess[ ] a pornographic work *or* a computer disk *or* computer *or* other electronic, magnetic, or optical storage system or a storage system of any other type, containing a pornographic work, knowing or with reason to know its content and character[.]" Minn. Stat. § 617.247, subd. 4(a) (2004) (emphasis added). Pornographic work is defined as either

> (1) an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing of a sexual performance involving a minor; or
> (2) any visual depiction, including any photograph, film, video, picture, drawing, negative, slide, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means that: (i) uses a minor to depict actual or simulated sexual conduct; (ii) has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct; or (iii) is advertised,

> promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct.

Minn. Stat. § 617.246, subd. 1(f) (2004).

Fay's sole argument is that the charging statute criminalizes the possession of the computer rather than the possession of the pornographic work itself. However, the statute expressly forbids the possession of a "pornographic work *or* . . . [a] computer . . . containing a pornographic work." Minn. Stat. § 617.247, subd. 4(a) (emphasis added.) And although Fay possessed a single computer, it is undisputed that the computer contained multiple images, each of which meet the statutory definition of "pornographic work." Thus, because the statute criminalizes the possession of each discrete pornographic work contained on a computer, we cannot determine Fay's convictions of and sentence for multiple counts of possession of child pornography to be erroneous.

Affirmed.