STATE OF MINNESOTA
IN COURT OF APPEALS
A09-263

State of Minnesota,
Respondent,

vs.

Darryl Alan Kise,
Appellant.

Filed January 26, 2010
Reversed and remanded
Shumaker, Judge

Kandiyohi County District Court
File No. 34-CR-08-269

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Boyd Beccue, Kandiyohi County Attorney, Constance J. Crowell, Assistant County Attorney, Willmar, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Shumaker, Judge.

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

SHUMAKER, Judge

Appellant challenges his conviction of first-degree controlled-substance crime, arguing that the search of his residence was unlawful. Based on the record, we conclude that the district court erred in determining that appellant's father had the authority to consent to a search; therefore, we reverse and remand.

FACTS

Granite Falls police officers stopped Troy Bunce's car for a traffic violation. Appellant Darryl Alan Kise was a passenger. During the stop, one of the officers noticed items inside the car that appeared to be precursor ingredients for the manufacture of methamphetamine. An assisting Drug Task Force officer searched the car, confirmed the nature of those items, and found drug paraphernalia in the car. The police then arrested Bunce and Kise. Bunce admitted that he and Kise were collecting materials for the manufacture of methamphetamine and that they had intended to bring them to Kise's home. Kise admitted that he uses methamphetamine.

Suspecting that there might be hazardous materials in Kise's home, the police went there. Kise, an adult, lived with his father, John Kise, in the elder Kise's home. Kise lived in the basement, and his father resided on the main floor. His father never came into the basement because he could not walk up and down the stairs.

Before the police entered the home, the chief of police telephoned John Kise and told him that officers were outside his door. When John Kise opened the door, the police told him of his son's arrest and of their suspicion that there were illegal drugs in the

home. The police had no search warrant, but they asked John Kise if he would consent to a search. He agreed to do so, and he signed a written consent form.

The basement was accessible by a common stairway from the main floor. One area in the basement contained a washer and dryer and another area that Kise used as his living quarters. No walls or doors separated the areas, but rather they were partitioned by hanging bedsheets.

The search of Kise's living quarters yielded drug paraphernalia, numerous precursor items for the manufacture of methamphetamine, and powder that tested positive for methamphetamine. The state then charged Kise with controlled-substance crimes.

At an omnibus hearing, Kise moved to suppress the evidence found at his residence on the ground that it was obtained through an illegal search. The district court denied the motion, ruling that Kise's "father gave lawful consent to the warrantless search of his residence, including the basement level where [appellant] resided."

After the district court denied his motion, Kise agreed to submit the case as a *Lothenbach* proceeding. The district court received and considered stipulated evidence, and found Kise guilty of first-degree controlled-substance crime. Contending that the district court erred in finding the search of his residence lawful, Kise brought this appeal.

D E C I S I O N

"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). When reviewing the legality of a search, we will not

reverse the district court's findings unless they are "clearly erroneous or contrary to law." *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003) (quotation omitted).

The search of Kise's residence was conducted without a search warrant but was based on the consent of John Kise, the owner of the property. Warrantless searches and seizures are presumptively unreasonable, and therefore unconstitutional, unless an established exception to the warrant requirement exists. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967); *see also* U.S. Const. amend. IV; Minn. Const. art. I, § 10. Consent is an established exception to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44 (1973); *State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985). The state bears the burden of demonstrating the applicability of an exception to the warrant requirement. *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001).

Consent to search property will be valid only if the person giving the consent has either the actual or the apparent authority to do so. *Illinois v. Rodriguez*, 497 U.S. 177, 188, 110 S. Ct. 2793, 2801 (1990); *State v. Hummel*, 483 N.W.2d 68, 73 (Minn. 1992).

Actual Authority

A person "has actual authority to consent to a search if [the person] 'possess[es] common authority over or other sufficient relationship to the premises or effects sought to be inspected.'" *Licari*, 659 N.W.2d at 250 (second alteration in original) (quoting *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 993 (1974)); *see also State v. Hatton*, 389 N.W.2d 229, 233 (Minn. App. 1986), *review denied* (Minn. Aug. 13, 1986). But "[c]ommon authority is, of course, not to be implied from the mere property interest

the [consenting person] has in the property." *Matlock*, 415 U.S. at 171 n.7, 94 S. Ct. at 993 n.7. Nor does it rest in property law. *Id.* Common authority "rests rather on *mutual use* of the property by persons generally having *joint access or control for most purposes*, so that it is reasonable to recognize" that the consenting person, or a co-inhabitant, "has the right to permit the inspection in his own right" and that the other co-inhabitants would have assumed the risk that the consenting person might permit such inspection. *Id.* (emphasis added).

Thus, the supreme court in *Licari*, analyzing actual authority, said: "The precise question is whether actual authority can be based solely on rights of *access* or requires, in addition, some rights of *use*." *Licari*, 659 N.W.2d at 250. In *Licari*, the supreme court noted that the proposition that common authority can be based entirely on joint access "conflict[s] with Minnesota case law holding that mutual use" is the essential ingredient of effective consent. *Id.* at 251. The supreme court also rejected as inconsistent with Minnesota law the proposition that mere joint access is sufficient because it is, as stated in *Matlock*, "'[an] other sufficient relationship to'" the premises to be inspected. *Id.* (quoting *Matlock*, 415 U.S. at 171). So, actual authority to consent to a search of property arises from joint access or control but also requires mutuality of use. *Id.*; *see also United States v. Whitfield*, 939 F.2d 1071, 1073-74 (D.C. Cir. 1991) (holding that a mother's joint access to her adult son's room was not sufficient to show common authority where there was no evidence that she also had mutual use of the room).

Although arguably John Kise might have had joint access with his son to the basement of the home, this record indisputably shows that he did not have mutual use of

the basement area. John Kise testified that, although he did not consider the basement to be "a private area" for his son, it "was his downstairs. I was upstairs." And Kise testified that his father never went down into the basement because "[h]e can't get up and down the stairs . . . ." Kise acknowledged that, if his father were able, he could go into the basement and use the washer and dryer and "tour the basement if he wanted to." At best, the facts presented to the district court support an inference that John Kise had joint access to the basement area. Therefore, we hold that John Kise had no actual authority to consent to the search of Kise's basement living quarters.

Apparent Authority

Kise also argues that his father lacked apparent authority to consent to the search. Even though a person does not have actual authority to consent to the search of property, consent might yet be valid if the person has the apparent authority to consent, that is, when "under an objective standard, an officer reasonably believes the [consenting person] has authority over the premises and could give consent to enter." *State v. Thompson*, 578 N.W.2d 734, 740 (Minn. 1998) (citing *Rodriguez*, 497 U.S. at 188, 110 S. Ct. at 2801). But the "apparent authority doctrine can apply only when investigators make mistakes of fact, as distinguished from mistakes of law." *Licari*, 659 N.W.2d at 253. Whether a person has actual or apparent authority to consent to the search of property is a legal question, albeit one dependent on facts. As discussed above, actual authority does not exist without mutuality of use. The court in *Licari*, discussing *Whitfield*, stated the test to be applied: "[I]f the facts possessed by police would not establish actual authority to consent under the law, police reliance on those facts cannot be reasonable." *Id.* Thus,

even if the police have a good-faith belief that the consenting person has the authority to consent to the search, that belief is not sufficient to show apparent authority if the facts the police have do not establish mutual use under *Matlock*. *Id.* at 253-54.

Chief of Police Reed Schmidt testified that he had been with the Atwater Police Department for 11 years and had come to know John Kise "real well" through the Meals on Wheels program. Chief Schmidt testified as follows:

> Q. Okay. Now the house that is at this 110 South Main Street belongs to John Kise. Is that right?
> A. Yes, it does.
> Q. So he's the owner?
> A. Yes, John is the owner.
> Q. Were you aware that at some point his son Darryl was living with him?
> A. Yes, I was aware that he had been living at the residence. I didn't see Darryl a lot but I did know he was at the residence.
> Q. Okay. So from your perspective, Officer, is that a – was that – is that a single-family residence?
> A. Yes, it is.
> Q. And so the person you went to for your consent was the person you knew to be the homeowner.
> A. Yes.

On cross examination, when being questioned about the basement area, Chief Schmidt testified as follows:

> Q. All right. So this was – was this an area that was separate from the – obviously from the upstairs.
> A. Yes, yes, it was.
> Q. And did you learn that Mr. John Kise did not reside downstairs?
> A. He did not reside down there but it was a common area. It was a washer and dryer area down there.

Agent Travis Peterson of the Drug Task Force also testified. Agent Peterson stated that he received a phone call in the early morning hours of February 7, 2008. He was informed that Kise had been stopped outside of Granite Falls and that items associated with the manufacture of methamphetamine had been found in the car. Agent Peterson went to John Kise's residence with Chief Schmidt. Agent Peterson testified as follows:

> Q. Did [John Kise] acknowledge that his son was living at the residence?
> A. Yes, he did.
> Q. And did he describe where his son might live in the residence?
> A. In the basement area.
> Q. Did you inquire about the circumstances of him living there, the [appellant] living with his father?
> A. Yes, I did. I asked why he was living with his father and he said that he was – Darryl went through a divorce and has been living with John ever since.
> Q. Did he indicate to you whether or not there was rent being paid?
> A. No. John told me that Darryl doesn't pay any rent and sometimes he helps out with the bills, but that doesn't happen very often.
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> . . . .
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> Q. If you would, please, describe what you did and where you went [in the residence].
> A. We went downstairs by the – there was a bedroom down there. Everything was partitioned off by curtains, sheets. There was a washer and a dryer down there, and a bed and some TVs and a couch all partitioned off by sheets.
> Q. Okay.
> A. We – then we searched the downstairs area.

Nothing in the facts the officers had before entering Kise's basement residence showed, expressly or impliedly, any mutuality of use of that area. Their belief that John Kise as owner of the entire house would likely have joint access with his son to all areas of the house, even if correct, was nevertheless insufficient as a matter of law to demonstrate apparent authority to consent to a search of Kise's living quarters.

Because John Kise had neither actual nor apparent authority to consent to the search of the residence where the police found the evidence on which the district court based its pretrial ruling and its finding of Kise's guilt, we conclude that the district court erred in both determinations.

Reversed and remanded.