STATE OF MINNESOTA
IN COURT OF APPEALS
A09-627

State of Minnesota,
Respondent,

vs.

James Arthur Mallett,
Appellant.

Filed June 15, 2010
Affirmed
Halbrooks, Judge

Ramsey County District Court
File No. 62-CR-08-4514

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Johnson, Judge.

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

HALBROOKS, Judge

Appellant James A. Mallett challenges the district court's (1) denial of his motion to suppress firearms obtained in a search of his apartment and (2) refusal to depart from

the presumptive sentence for his conviction of possession of a firearm by an ineligible person. Because we conclude that the police officers had consent to enter appellant's apartment and search the room containing the firearms, we affirm the district court's denial of appellant's motion to suppress. Because we conclude that the district court acted within its discretion in sentencing appellant, we affirm appellant's sentence.

FACTS

On June 17, 2008, Officers Price, Wanshura, Chouinard, and Beaudette of the St. Paul Police Department responded to a call that a domestic assault was in progress. Dispatch informed the officers that a male was leaving the area in a purple Chrysler and that the vehicle had pulled out of the back alley. All four officers arrived at the location at the same time; they were let into the apartment building by a woman sitting on the front step. Officer Price testified at the *Rasmussen* hearing that when they reached the apartment unit, he heard yelling from inside. The officers began to knock, and the victim, K.D., opened the door and gestured to the officers. The officers interpreted K.D.'s gesture as an invitation to enter the apartment.

K.D. was upset, and according to Officer Price, she was pointing to the back bedroom yelling, "Guns are back there, guns are back there." Officer Price told both K.D. and another occupant of the unit, M.T., to enter the living room. During Officer Price's conversation with K.D., he learned that appellant had assaulted K.D. and that appellant's brother had brought guns over to the apartment earlier in the day. K.D. stated that those guns were in the back.

While Officer Price was speaking with K.D. and M.T., Officer Chouinard and Officer Wanschura went into the back area of the apartment to look for a suspect. Upon entering one of the bedrooms, Officer Wanschura noticed that an air mattress was pulled away from the wall, and he thought that an individual could be hiding behind it. When he moved the air mattress, Officer Wanschura found two firearms on the floor.

After finding the weapons, Officer Wanschura retrieved a consent-to-search form. Officer Price asked K.D. if she would sign the form; according to Officer Price's testimony, K.D. signed the form voluntarily. Officer Beaudette also testified that K.D. signed the consent form voluntarily.

M.T. testified at the *Rasmussen* hearing that she did not recall K.D. mentioning anything about guns when the officers arrived. But M.T. stated that she was present when K.D. signed the consent form and that K.D. did so voluntarily.

K.D. testified that she did not tell the officers that there were firearms in the apartment. According to K.D., the officers "just went straight to the back room," after asking a few questions and then lifted up the air mattress and pulled the guns out from beneath it. K.D. stated that Officer Price told her that she would be arrested for possession of the firearms if she did not sign the consent form.

Appellant moved to suppress the firearm evidence as the product of an unlawful search and seizure. The district court denied the motion, specifically finding that K.D. "motioned with her arms for the police to enter the apartment," and that she informed the officers that there were guns in the back of the apartment. The district court also found that K.D. voluntarily signed the consent-to-search form. Based on these findings, the

district court concluded that the "officers had consent to enter the residence" and consent to search for the firearms. The district court further determined that "[e]ven in the absence of consent to search, sufficient reasonable suspicion existed to render a protective sweep of the apartment appropriate and necessary," based on the circumstances of the 911 call.

Appellant waived a jury trial and submitted the case to the district court in a stipulated-facts proceeding. Based on the stipulated facts, the district court found appellant guilty of possession of a firearm by an ineligible person, interference with a 911 call, and domestic assault. The district court's order also noted that appellant "has two prior felony convictions from Cook County, Illinois," both for manufacturing/delivering a controlled substance. Appellant moved for a downward dispositional sentencing departure. A staff member from Teen Challenge testified at the sentencing hearing about the program as an alternative to incarceration. But after hearing the testimony, the district court concluded that there were not substantial and compelling factors to justify a departure. Appellant was sentenced to the commissioner of corrections for 60 months. This appeal follows.

D E C I S I O N

I.

Appellant argues that he is entitled to a new trial because the district court erred in admitting the firearms evidence because the firearms were discovered as the product of an unconstitutional search. "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). To the extent that a pretrial ruling on a motion to suppress is based on a district court's credibility determination, that determination will only be overturned if clearly erroneous. *State v. Smith*, 448 N.W.2d 550, 555 (Minn. App. 1989), *review denied* (Minn. Dec. 29, 1989). A district court's findings of fact are likewise overturned only for clear error. *State v. Lee*, 585 N.W.2d 378, 383 (Minn. 1998).

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380 (1980) (quotation omitted). "Certain exceptions apply to the warrant requirement, however, and the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009) (quotation omitted). The state bears the burden of demonstrating that a search was justified by an established exception to the warrant requirement. *State v. Anderson*, 388 N.W.2d 784, 787 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986). Here, the district court determined that the officers' warrantless search of the apartment was justified under both the consent and the protective-sweep exceptions to the warrant requirement.

A search is constitutionally permissible when conducted pursuant to valid consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 2045 (1973). The state has the burden of proving that consent was "freely and voluntarily given." *Id.* The concept of "voluntariness" reflects a balancing of law enforcement's interest in

conducting investigations with an individual's constitutionally protected right to be free from unreasonable searches and seizures. *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). This balancing assumes that an individual may be intimidated while subject to police investigation. *Id.* It is only when the questioning is coercive so that "the right to say no to a search is compromised by a show of official authority" that elicited consent becomes involuntary. *Id*.

Generally, consent is voluntary if a "reasonable person would have felt free to decline the officer's requests or otherwise terminate the encounter." *Id.* (quotation omitted). Whether consent is voluntary is a question of fact to be determined by considering the totality of the circumstances. *Id*. In looking at the totality of the circumstances, the district court considers "the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *Id.* Voluntariness is a "judgment call based on the credibility of the witnesses." *State v. Bunce*, 669 N.W.2d 394, 399 (Minn. App. 2003), *review denied* (Minn. Dec. 16, 2003).

Appellant challenges the district court's conclusions of law but not its factual findings. The district court made several factual findings that are pertinent to our resolution of this issue. For example, the district court found that K.D. opened the apartment door after the officers knocked and then gestured to the officers to enter. In this finding, the district court credited the testimony of the officers and discredited K.D.'s contrary testimony. *See Umphlett v. Comm'r of Pub. Safety*, 533 N.W.2d 636, 639 (Minn. App. 1995) (noting that this court may infer credibility determinations based on the district court's resolution of an issue), *review denied* (Minn. Aug. 30, 1995). The

district court further found that after the officers entered, K.D. "yelled that the defendant had guns in the apartment and pointed toward the back bedroom of the apartment." This finding reflects that the district court found the officers' testimony to be more credible.

While consent may be implied by conduct, *State v. Powell*, 357 N.W.2d 146, 149 (Minn. App. 1984), *review denied* (Minn. Jan. 15, 1985), the failure to object or mere acquiescence to a claim of official authority is not the same as consent, *Dezso*, 512 N.W.2d at 880. But K.D. did not merely acquiesce to the officers; she actively waved them inside and pointed toward the back room, yelling that there were guns in the back. A reasonable officer would have construed this gesture and these statements as consent to enter and look for the guns. *See Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 1803-04 (1991) (stating that the scope of consent is judged objectively and is determined by what a reasonable officer would have understood the scope of consent to be). Therefore, we conclude that the officers had consent to enter and search the back bedroom of K.D.'s apartment and that the discovery of the firearms was not the result of an unlawful search. Because we resolve this issue on the basis of the consent exception to the warrant requirement, we do not address the state's additional argument that the officers' actions constituted a protective sweep.

II.

Appellant contends that the district court abused its discretion by denying his motion for a downward dispositional sentencing departure. Appellant asserts that the district court was unaware of its authority to depart from the presumptive sentence and therefore his sentence should be remanded for reconsideration. But the district court

must impose the presumptive sentence provided in the sentencing guidelines unless the case involves "substantial and compelling circumstances" to warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *see also State v. Anderson*, 463 N.W.2d 551, 555 (Minn. App. 1990) (applying abuse-of-discretion standard in evaluating downward departure), *review denied* (Minn. Jan. 14, 1991). The supreme court has noted that "it would be a rare case which would warrant a reversal of the refusal to depart." *Kindem*, 313 N.W.2d at 7.

Appellant's conviction of felon in possession carries a presumptive sentence of "not less than five years," pursuant to Minn. Stat. § 609.11, subd. 5(b) (2006). *See* Minn. Sent. Guidelines II.E. (Supp. 2007) ("When an offender has been convicted of an offense with a mandatory minimum sentence of one year and one day or more, the presumptive disposition is commitment to the Commissioner of Corrections. The presumptive duration of the prison sentence should be the mandatory minimum sentence according to statute or the duration of prison sentence provided . . . [by] the Sentence Guidelines Grids, whichever is longer."). But the court may "sentence the defendant without regard to the mandatory minimum sentences established by this section if the court finds substantial and compelling reasons to do so." Minn. Stat. § 609.11, subd. 8(a) (2006). A downward departure is not permitted if "the defendant previously has been convicted of an offense listed in subdivision 9 in which the defendant used or possessed a firearm or other dangerous weapon." *Id.*, subd. 8(b) (2006).

We disagree with appellant's interpretation of the record. The district court stated that it was "faced with . . . a mandatory commit to prison under the sentencing guidelines

of 60 months for the felony sentence . . . [and] [t]he defense is requesting that I depart from that guideline requirement, and I'm happy to hear you out on that request." This statement reflects the district court's awareness of its authority to depart from the guidelines requirements. In addition, the district court specifically referred to the requirement of "substantial and compelling factors" to justify a sentencing departure. We therefore conclude that the district court was well aware of its authority to depart when sentencing appellant and acted within its discretion in not doing so.

Appellant argues that the district court erred by not imposing a durational departure from the presumptive 60-month commitment. While this issue is not clearly briefed, we note that appellant's motion for a sentencing departure did include a request for both durational and dispositional departures. But appellant filed no memorandum to the district court and did not argue that the district court should impose a durational departure during the sentencing hearing. To the contrary, when the district court stated that it had received "a motion for a dispositional departure at sentencing" along with supporting documentation from Teen Challenge and treatment options, appellant did not raise the issue of a durational departure. The entire sentencing hearing focused solely on appellant's request for a dispositional departure. Because appellant failed to properly raise this issue in the district court, we conclude that the issue is waived. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

III.

In his pro se supplemental brief, appellant alleges that he received ineffective assistance of trial counsel. In order to be successful on a claim of ineffective assistance

of counsel, "[t]he defendant must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

Appellant alleges three errors made by his trial counsel: (1) failure to introduce evidence at the suppression hearing of an interview between K.D. and Officer McPeak; (2) failure to call Officer McPeak at the suppression hearing to testify about the interview with K.D.; and (3) failure to effectively "redirect[] [K.D.] as a witness." All of appellant's alleged errors pertain to his counsel's trial strategy, and it is well established that "review of trial counsel's performance does not include reviewing attacks on trial strategy." *Pippitt v. State*, 737 N.W.2d 221, 230 (Minn. 2007). Because appellant's claimed errors concern his counsel's trial strategy, his claim of ineffective assistance of counsel is without merit.

Affirmed.