STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0506

State of Minnesota,
Respondent,

vs.

David John Sundrum,
Appellant.

Filed February 10, 2014
Reversed and remanded
Johnson, Judge

Hennepin County District Court
File No. 27-CR-11-22811

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

Mark J. Schneider, Jeffrey D. Bores, Chestnut Cambronne P.A., Minneapolis, Minnesota (for respondent)

Ethan P. Meaney, Derek A. Patrin, Meaney & Patrin, P.A., Maple Grove, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Johnson, Judge; and Toussaint, 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

JOHNSON, Judge

David John Sundrum was convicted of driving while impaired based on evidence obtained by police officers after they entered his home without a warrant. Sundrum moved to suppress the evidence, but the district court denied the motion on the ground that Sundrum's father consented to the officers' warrantless entry. On appeal, Sundrum argues that the officers did not have consent to enter the home. We conclude that the record of the suppression hearing does not support the district court's finding of consent. Therefore, we reverse and remand.

FACTS

During the evening of March 31, 2011, Officer Randy Mahlen received a report that a stalled vehicle was blocking an intersection in the city of Golden Valley. Another officer informed Officer Mahlen that an apparently intoxicated person was seen walking away from the vehicle. Officer Mahlen arrived at the intersection and observed an abandoned vehicle with damage to a front wheel. He checked the vehicle's registration and learned that the owner, Sundrum, resided at an address only three blocks from the intersection.

Officer Mahlen went to the home at the address associated with the vehicle and knocked on the front door. The front entry to the home consists of an interior solid door, which opens toward the inside of the home, and an exterior screen door, which opens away from home and is equipped with a spring so that it closes automatically.

Sundrum's father answered the knock by first opening the interior door and then opening the exterior screen door and holding it open while talking to Officer Mahlen, who was standing outside the threshold. After a brief exchange, Officer Mahlen learned from Sundrum's father that Sundrum lived in the home and drove a vehicle of the same type that was found at the nearby intersection. Sundrum's father stated that he did not believe that Sundrum was home at the time. Officer Mahlen asked Sundrum's father whether he would be willing to check inside the home to determine whether Sundrum had returned home recently without his knowledge. Sundrum's father agreed to do so. He walked away from the front door, into the nearby kitchen, and then down a flight of stairs, which the district court found was six to ten feet away from the front door. Sundrum's father testified that before he went to the basement, he told Officer Mahlen to "wait here," though the district court did not make a finding on that particular point.

After Sundrum's father walked away from the front door, Officer Mahlen stepped inside the home. Shortly thereafter, Sergeant Jeff Johnson also entered the home. Sundrum's father found Sundrum in the basement and informed him that police officers were present and wished to speak with him. As Sundrum and his father walked up the stairs, Sundrum's father saw Officer Mahlen standing at the top of the stairs.

After Sundrum and his father reached the top of the stairs, the officers questioned Sundrum and learned that he had been driving the car that was found at the intersection that evening. The officers also observed that Sundrum smelled of alcohol, had bloodshot and watery eyes, and was leaning against a doorway to steady himself. Officer Mahlen asked Sundrum to perform field sobriety tests, which he failed. A preliminary breath test

indicated an alcohol concentration of .21. The officers arrested Sundrum and transported him to the Golden Valley Police Department. He provided a urine sample, which revealed an alcohol concentration of .19.

In May 2011, the state charged Sundrum with two counts of third-degree driving while impaired, in violation of Minn. Stat. § 169A.26 (2010). In January 2012, Sundrum moved to suppress the evidence obtained by the officers at his home on the ground that the officers did not have a warrant and did not have consent to enter the home. The district court held a suppression hearing in February 2012. Officer Mahlen testified on behalf of the state, and Sundrum's father testified on behalf of the defense. In June 2012, the district court denied the motion to suppress. The district court reasoned that, under the totality of the circumstances, it was "reasonable for Officer Mahlen to believe he had non-verbal consent to enter" the Sundrum residence and that the consent was voluntary.

In November 2012, the case was tried to the district court. The district court found Sundrum guilty of one count of third-degree driving while impaired. In January 2013, the district court sentenced Sundrum to serve 30 days in the county workhouse and to pay a fine of $580. Sundrum appeals.

D E C I S I O N

Sundrum argues that the district court erred by denying his motion to suppress evidence because his father did not consent to the officers' warrantless entry into their home.

A.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV; *see also* Minn. Const. art. I, § 10. The United States Supreme Court has stated that "at the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Payton v. New York*, 445 U.S. 573, 589-90, 100 S. Ct. 1371, 1382 (1980) (alterations and quotation omitted); *see also Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). For that reason, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States Dist. Court*, 407 U.S. 297, 313, 92 S. Ct. 2125, 2134 (1972). "The requirement of a warrant duly issued by a magistrate upon probable cause . . . reflects the principle of English Common Law that a person's home is his or her castle . . . ." *State v. Lohnes*, 344 N.W.2d 605, 610 (Minn. 1984); *see also State v. Morin*, 736 N.W.2d 691, 695 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007). The warrant requirement also ensures that "no state authority may intrude [into a home] without first having convinced an impartial magistrate that probable cause exists that the person has committed a crime and that other reasons exist justifying the intrusion." *Lohnes*, 344 N.W.2d at 610.

Accordingly, a warrantless search of a person's home is "presumptively unreasonable." *Payton*, 445 U.S. at 586, 100 S. Ct. at 1380. The presumption of unreasonableness can be rebutted only if a warrantless search is justified by an exception to the warrant requirement, such as the consent of a homeowner, tenant, or other person with authority to consent. *State v. Pilot*, 595 N.W.2d 511, 519 (Minn. 1999). Because the home is at the core of the Fourth Amendment's protection, however, "[c]ourts are particularly reluctant to find exceptions to [the warrant requirement] in the context of a warrantless [entry] in a home." *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). If a warrantless search is not justified by consent or by any other exception to the warrant requirement, the evidence obtained in the warrantless search must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 415-16 (1963); *Othoudt*, 482 N.W.2d at 222.

Whether a person consented to an officer's warrantless entry is determined "based on all relevant circumstances." *Othoudt*, 482 N.W.2d at 222. Consent need not be express or verbal; consent may be implied from a person's conduct. *Id.* The "critical fact" in determining whether a person has consented to an officer's warrantless entry is whether the person provided some "manifestation of consent, either verbally or by welcoming actions." *Id.* at 223; *see also State v. Ulm*, 326 N.W.2d 159, 162 (Minn. 1982) (holding that homeowner consented to warrantless entry by motioning for officers to follow and leading them inside home). If an authorized person has not given a law-enforcement officer an indication that the officer is welcome to enter a home, there is no consent. *See, e.g.*, *Othoudt*, 482 N.W.2d at 222-23 (holding that homeowner did not

consent because officers failed to knock or seek permission to enter and person made no physical gestures for officers to enter); *Pullen v. Commissioner of Pub. Safety*, 412 N.W.2d 780, 782 (Minn. App. 1987) (holding that homeowner did not consent because officer entered home without any interaction with resident).

If the state seeks to justify a warrantless entry on the basis of consent, the state bears the burden of proving that an authorized person consented. *Othoudt*, 482 N.W.2d at 222. On appeal, this court applies a clearly-erroneous standard of review to a district court's finding as to whether an authorized person consented to an officer's warrantless entry of a home. *See State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012) (stating that clearly-erroneous standard of review applies to questions of fact); *Ulm*, 326 N.W.2d at 162 (referring to district court's determination of non-verbal consent as "finding"); *State v. Capelle*, 285 Minn. 205, 207, 172 N.W.2d 556, 557 (1969) (stating that existence or non-existence of consent is question of fact); *Pullen*, 412 N.W.2d at 782 (treating district court's determination of non-verbal consent as question of fact).

B.

In this case, Officer Mahlen conceded at the suppression hearing that Sundrum's father did not give express, verbal consent to his warrantless entry. Officer Mahlen testified that Sundrum's father's consent "wasn't verbal, but the way he was acting it was implied." The district court found that Sundrum's father gave non-verbal consent to the officers' warrantless entry. The question for this court is whether the evidentiary record supports the district court's finding.

As an initial matter, the parties dispute whether the front screen door was open or closed immediately before Officer Mahlen entered the home. Sundrum's father testified that the screen door closes automatically because it is spring-loaded, and he also testified that he closed the screen door or allowed it to close when he went to look for Sundrum. Officer Mahlen, on the other hand, testified that the front door was open before he entered. The district court essentially made no finding on this point, stating "It is not clear . . . if the front screen door was closed or opened when [officers] entered the residence." The burden of proof at the suppression hearing was on the state. *See Othoudt*, 482 N.W.2d at 222. The absence of a finding that the door was open means that we may not credit Officer Mahlen's testimony to that effect.

After reviewing the evidentiary record presented at the suppression hearing, we conclude that it does not support the district court's finding that Sundrum's father gave non-verbal consent to the officers' warrantless entry to his home. Officer Mahlen attempted to justify his testimony that non-verbal consent was given by stating: "[Sundrum's father] did not verbally invite me into the home, but with our contact he was very cooperative, cordial, it was winter out, snow on the ground. It's common practice that . . . we step into the house." This testimony falls short of the necessary factual basis from which non-verbal consent may be inferred. To reiterate, the state had the burden of proof at the suppression hearing. *Othoudt*, 482 N.W.2d at 222. To carry that burden, the state needed to present evidence that Sundrum's father exhibited some "manifestation of consent, either verbally or by welcoming actions." *Id*. at 223. Officer Mahlen testified to

his own belief that non-verbal consent was given, but he did not testify to any particular outward manifestation of non-verbal consent by Sundrum's father.

Specifically, the fact that Sundrum's father was "cooperative" and "cordial" does not equate to non-verbal consent to a warrantless entry. A homeowner or tenant may be very courteous and cordial in his or her interactions with a law-enforcement officer without inviting the officer into the person's home. Likewise, a person may be cooperative with an officer's request to check on someone inside the home without giving the officer permission to enter the home. Thus, Sundrum's father's cooperative and cordial demeanor toward the officers, without more, is not a factual basis from which non-verbal consent may be inferred.

Furthermore, the fact that Officer Mahlen's "common practice" is to step inside a home without a warrant in this general type of situation also is not a factual basis from which Sundrum's father's non-verbal consent may be inferred. The fact that other persons previously have given Officer Mahlen consent in similar circumstances does not obligate Sundrum's father do so in the present circumstances, nor does it allow Officer Mahlen or the district court to infer that Sundrum's father did so. Rather, the caselaw requires a finding that Sundrum's father actually consented to Officer Mahlen's warrantless entry of this particular home, and such a finding requires evidence that Sundrum's father provided some outward manifestation of his consent. *See id.*

Finally, the fact that "it was winter out, [with] snow on the ground," also does not, by itself, imply non-verbal consent for a law-enforcement officer to enter a home without a warrant. There may be circumstances in which winter weather is so extreme that

practically everyone would invite a law-enforcement officer inside a home to avoid extreme discomfort or unhealthy danger. *See Jardines*, 133 S. Ct. at 1415-16 (noting that officers may approach entrance to home in same manner as members of public). But there is no indication in the record that the weather conditions were extreme on this particular evening, which was at the end of March. Thus, the season and the snow on the ground, without more, also does not create a factual basis from which Sundrum's father's non-verbal consent may be inferred.

The state argues that this case is factually similar to *State v. Howard*, 373 N.W.2d 596 (Minn. 1985). In that case, three police officers knocked on the appellant's front door. *Id.* at 599. The appellant turned on an outside light, opened the front door fully, and stepped back as if to make room for officers to enter. *Id.* The officers stepped over the threshold and arrested the appellant. *Id.* The facts of that case are unusual, however, because the appellant "knew the officers and had cooperated fully with them during their investigation" and had even "[given] them a key to the house so that they could gain access to search it if no one was home." *Id.* The supreme court affirmed a finding that the appellant gave non-verbal consent because, in light of the prior interactions, the "petitioner's act of opening the inner door completely and then stepping back as if to make room for the officers to enter can only be interpreted as constituting limited consent to enter." *Id.* The facts of this case, however, are significantly different from the facts of *Howard*. Sundrum's father did not have any prior relationship with the officers who knocked on his front door. In addition, the district court did not find that Sundrum's father opened the door in a manner that suggested an invitation to the officers to step

inside the doorway and enter the home. Furthermore, Officer Mahlen entered further than just the threshold and the entryway; he walked six to ten feet into the home, far enough to look down the basement stairs as Sundrum and his father were walking up the stairs.

The state also argues that this case is factually similar to *Carlin v. Commissioner of Pub. Safety*, 413 N.W.2d 249 (Minn. App. 1987). In that case, an officer knocked on the front door of a home after calling ahead and speaking to the appellant's father. *Id.* at 250. The appellant's mother went downstairs, opened the front door, and went back upstairs. *Id.* The officer followed the mother upstairs and encountered the appellant. *Id.* This court affirmed a finding of non-verbal consent because the mother had prior knowledge that the officer was coming to the home and left the door open to allow the officer to enter. *Id.* at 251. In this case, however, Sundrum's father testified that the front door was closed, and the district court did not find otherwise. Furthermore, in *Carlin*, the officer entered the home in the mother's presence, and it was undisputed that the mother knew that the officer was following her up the stairs. *Id.* In this case, however, the district court found that Officer Mahlen entered the home "[w]hile [Sundrum's father] walked down the basement stairs" and that Sundrum's father noticed that Officer Mahlen had entered the home only when he and Sundrum were walking up the basement stairs.

The state also argues that non-verbal consent was given because neither Sundrum's father nor Sundrum told Officer Mahlen to leave. The supreme court has made clear, however, that the absence of an objection to an officer's warrantless entry is

not a basis for determining that an authorized person has consented to the entry. *Othoudt*, 482 N.W.2d at 223.

Thus, the district court erred by denying the motion to suppress.

C.

Ordinarily, a district court's erroneous denial of a defendant's motion to suppress evidence would cause an appellate court to reverse and remand for a new trial. *See, e.g.*, *State v. Carter*, 697 N.W.2d 199, 212 (Minn. 2005). Sundrum, however, asks this court to simply reverse his conviction, apparently on the ground that his guilt or innocence was submitted to the district court pursuant to rule 26.01, subdivision 4, of the Minnesota Rules of Criminal Procedure. Under that rule, a defendant and a prosecutor may agree that an appellate decision concerning a pre-trial ruling will be dispositive of the case such that a trial would be unnecessary if the defendant were to prevail on appeal with respect to the pre-trial motion. Minn. R. Crim. P. 26.01, subd. 4(c). In that event, a remand is not available to either party, and an erroneous pre-trial ruling results in outright reversal. *See, e.g.*, *State v. Yang*, 814 N.W.2d 716, 718, 722 (Minn. App. 2012).

It appears that Sundrum's case was not tried to the district court pursuant to subdivision 4 of rule 26.01. First, the district court's post-trial order expressly states, "Pursuant to Minnesota Rule of Criminal Procedure 26.01, subd. 3, the parties agreed to have the court determine Defendant's guilt or innocence based upon the stipulated facts . . . ." Second, the order states that Sundrum personally waived his rights "to trial by jury, to testify at trial, to have the prosecution witnesses testify in open court in his presence, to question the prosecution witnesses, and to have any favorable witnesses to

testify in his defense." These waivers mirror the common requirements of subdivision 3 and subdivision 4. *See* Minn. R. Crim. P. 26.01, subds. 3(a), 4(d). But the district court's order does *not* indicate that Sundrum and the state entered into the agreements required by subdivision 4. *See* Minn. R. Crim. P. 26.01, subd. 4(g). The best way to determine whether Sundrum agreed to a stipulated-evidence trial under subdivision 4 would be the trial transcript, but Sundrum, the appellant, did not provide one to this court. *See* Minn. R. Civ. App. P. 110.02, subd. 1(a). We are aware that the district court's order states, "Defense counsel indicated that an appeal would be filed pursuant to *State v. Lothenbach* . . . ," which we understand to be a reference to subdivision 4. *See State v. Christenson*, 827 N.W.2d 436, 438-39 n.1 (Minn. App. 2012), *review denied* (Minn. Feb. 19, 2013). But this statement is without effect because a defendant must "personally" agree to the conditions of a stipulated-evidence trial. *See* Minn. R. Crim. P. 26.01, subd. 4(g). Thus, given the appellate record, we conclude that Sundrum was not tried pursuant to subdivision 4 of rule 26.01.

It also appears that Sundrum was not tried on stipulated facts pursuant to subdivision 3 of rule 26.01. It appears that the parties did not stipulate to facts but merely to the admission of certain exhibits, and the district court made "findings of fact" in its post-trial order. Thus, we conclude that Sundrum's trial was a trial without a jury pursuant to subdivision 2 of rule 26.01. *See Dereje v. State*, 837 N.W.2d 714, 720-21 (Minn. 2013).

In an appeal following a trial without a jury under subdivision 2 or in a stipulated-facts trial under subdivision 3, the appellate remedies are not limited in the same manner

as in a stipulated-evidence trial under subdivision 4. Because Sundrum was convicted after a trial in which the state introduced unlawfully obtained evidence, Sundrum is entitled to a new trial. *See Carter*, 697 N.W.2d at 212. Accordingly, we reverse and remand to the district court for further proceedings.

Reversed and remanded.