IN THE COURT OF APPEALS OF IOWA

No. 1-941 / 11-0580
Filed January 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NICHOLAS BRIAN PLAEHN,
Defendant-Appellant.

Appeal from the Iowa District Court for Allamakee County, David F. Staudt (motion to suppress) and John Bauercamper (trial), Judges.

Defendant appeals his conviction for possession of marijuana, second offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, David Arthur Adams, Assistant Appellate Defender, and Mary K. Conroy, Student Legal Intern, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Jill Jane Kistler, County Attorney, and Richard White, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Potterfield, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MAHAN, S.J.

I. Background Facts & Proceedings.

On June 6, 2010, Officer Whitney Jarvis of the Postville Police Department was contacted by Monica Vela to assist in a custody exchange of Vela's son with his father, Cesar Viera. There was a no-contact order between Vela and Viera, and Officer Jarvis had assisted in a previous custody exchange. Vela had attempted to pick up the child from daycare, but he was not there. She asked Officer Jarvis to check if the child was with Viera. Vela was upset because she was unaware of the child's location.

Officer Jarvis went to Viera's residence in Postville for the sole purpose of trying to locate the child. Viera lived with a roommate, Nicholas Plaehn, in the upstairs portion of the home. Officer Jarvis stated she was aware a Hispanic family lived in the downstairs area of the home. She testified:

> When I arrived at the residence, I could hear music coming from the house immediately after I exited my car. It was very, very loud. I walked up the stairs onto the porch where there was a screen door. The sun was hitting the screen door so that you couldn't actually see through the screen. The screen door was kind of tattered, and it didn't close all the way. I knocked on the door, and it kind of bounced back at me. I said, "Hello. Hello. Police department." It didn't appear that anybody could hear me. So I just opened up the screen door to see if I could see anybody in the living room. I didn't enter the house. No part of my body entered the house, and that's when another roommate that lived at the house approached me—or that I thought lived at the house approached me. And at that time I asked if Cesar was at the house, and he stated, "Yes." And I asked where he was, and he pointed upstairs, and then I asked the roommate if I could enter the house, and he stated, "Yes."
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> At that point I entered the house, and I walked up the stairs. And when I got to the top of the stairs, I looked down the hallway, and I could see Mr. Plaehn and Mr. Viera and another subject identified as Nathan Bueno sitting in a room, and they were—Mr. Plaehn appeared to be holding a—what I could identify as a joint.

Officer Jarvis stated she assumed the person she talked to in the doorway was the Hispanic roommate. She stated he came from the kitchen area and "he appeared to be cooking in the kitchen in the back." She did not ask for his name or ask if he lived at the house. Officer Jarvis testified she could smell marijuana when she came into the house but could not tell whether it had been smoked previously or if someone was smoking it at that time. She was unable to locate the child, who was not at the residence with the father.[1]

Nicholas Plaehn was charged with possession of a controlled substance (marijuana), second offense, in violation of Iowa Code section 124.401(5) (2009). He filed a motion to suppress. At the suppression hearing, Officer Jarvis testified as set forth above. The district court denied the motion to suppress. The court found Officer Jarvis received consent to search for Viera in the home from a person she reasonably believed to be a roommate. She had consent to be in a common area of the home, the hallway, when she observed in plain view illegal activity—Plaehn holding a marijuana cigarette.

Plaehn waived his right to a jury trial. The district court found him guilty of possession of marijuana, second offense. He was sentenced to two weeks in jail, and ordered to pay a fine. Plaehn appeals his conviction, claiming the district court erred in its ruling on his motion to suppress.

[1] Officer Jarvis testified Vela called her later after she located the child.

II. Standard of Review.

Our review of constitutional challenges is de novo. *State v. Shanahan*, 712 N.W.2d 204, 210 (Iowa 2006). In conducting a de novo review, we make an independent evaluation of the evidence based on the totality of the circumstances as shown by the entire record. *State v. Brooks*, 716 N.W.2d 197, 204 (Iowa 2009).

III. Motion to Suppress.

Plaehn claims Officer Jarvis violated his rights against unreasonable search and seizure under the United States Constitution and the Iowa Constitution.[2] In determining whether police conduct violates the Fourth Amendment, Iowa courts have a two-step approach. *State v. Fleming*, 790 N.W.2d 560, 564 (Iowa 2010). We first consider whether the person raising the challenge has shown a legitimate expectation of privacy in the area that was searched. *Id*. If there is a legitimate expectation of privacy, then we consider whether the State unreasonably invaded that interest. *Id*.

A search and/or seizure that is conducted without a warrant is considered to be per se unreasonable unless it comes within certain specifically established exceptions. *State v. Watts*, 801 N.W.2d 845, 850 (Iowa 2011). These exceptions include: (1) exigent circumstances; (2) consent; (3) search incident to arrest; and (4) plain view. *Id*. The State has the burden to show by a

[2] We note that generally the rights contained in the federal Constitution and the Iowa Constitution in the area of search and seizure are considered to be identical. *See State v. Groff*, 323 N.W.2d 204, 207 (Iowa 1982). Here, the parties do not raise any argument that the two constitutional provisions should be interpreted differently.

preponderance of the evidence that a warrantless search falls within one of these recognized exceptions. *Id*.

A. Plaehn asserts Officer Jarvis engaged in an illegal search when she opened the closed screen door. The State counters that Plaehn did not have a reasonable expectation of privacy in the porch area. The district court did not address either of these issues. Furthermore, neither Plaehn nor the State filed a motion after the court's ruling on the motion to suppress asking for a ruling on these issues. We conclude the issue of whether Officer Jarvis acted unreasonably by opening the closed screen door has not been preserved for our review. *See State v. Talbert*, 622 N.W.2d 297, 300 (Iowa 2001) (finding issues must be presented to and passed upon by the district court before they can be raised and decided on appeal).

B. Plaehn also asserts Officer Jarvis acted unreasonably by entering the home because the consent to search was not given knowingly and voluntarily. He states even if the consent was voluntary, she could not have reasonably believed the person had authority to consent. Plaehn argues the State failed to meet its burden to show by a preponderance of the evidence the search came within the consent exception.

Consent is one of the exceptions to the warrant requirement. *Watts*, 801 N.W.2d at 850. The State has the burden to show that consent was free and voluntary. *State v. Ochoa*, 792 N.W.2d 260, 292 (Iowa 2010). "Consent is considered to be voluntary when it is given without duress or coercion, either express or implied." *State v. Reinier*, 628 N.W.2d 460, 465 (Iowa 2001). A court

considers the totality of the circumstances to determine whether consent was voluntary. *Id*. at 466.

We first note there is absolutely no evidence concerning whether the person who gave consent had knowledge of the right to refuse consent. *See id*. at 465 (noting this is a factor to consider). "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 277, 93 S. Ct. 2041, 2048, 36 L. Ed. 2d 854, 863 (1973).

Another factor to consider is whether there is evidence of duress or coercion. *Reinier*, 628 N.W.2d at 465. Officer Jarvis testified she knocked on the screen door and announced she was from the police department. *See id*. at 466 ("The 'knock and talk' procedure has generally been upheld as a consensual encounter and a valid means to request consent to search a house."). When a person approached, she asked if Viera was at home. When the person responded affirmatively, she asked if she could enter the home. Officer Jarvis did not assert any claim of authority prior to obtaining consent, use a show of force, or use deception. Looking at the totality of the circumstances, we conclude there is no evidence of duress or coercion. We conclude the State has sufficiently shown the consent was voluntary.

A separate issue is whether the person had authority to give consent. *See State v. Brandon*, 755 N.W.2d 548, 550 (Iowa Ct. App. 2008). A person who has common authority over the premises may consent to a search. *State v. Bakker*, 262 N.W.2d 538, 546 (Iowa 1978). We also consider whether a person has

apparent authority. *State v. Grant*, 614 N.W.2d 848, 854 (Iowa Ct. App. 2000). There is no constitutional violation "when officers enter without a warrant because they reasonably (though erroneously) believe that a person who has consented to their entry is a resident of the premises." *Illinois v. Rodriguez*, 497 U.S. 177, 186, 110 S. Ct. 2793, 2800, 111 L. Ed. 2d 148, 160 (1990). We apply an objective standard to determine whether the officer reasonably believed the consenting party had authority over the premises. *Id*. at 188, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161. Objectively, if there are reasonable doubts about the authority of the consenting party, officers have an obligation to make further inquiries. *Grant*, 614 N.W.2d at 854.

Plaehn contends Officer Jarvis was unreasonable in her belief that the person who gave consent to search the house had the authority to consent. He claims she had an obligation to make further inquiries. Officer Jarvis testified she was aware before she went to Viera's residence that a Hispanic family lived in the lower level of the home. She stated she assumed the person who gave the consent was the Hispanic roommate. She stated he came from the kitchen area of the home and "he appeared to be cooking in the kitchen in the back." From the evidence available to Officer Jarvis, we determine a person would reasonably believe the person who gave consent had authority to give that consent. The person was obviously making himself at home by using the kitchen, and under an objective standard, it would be reasonable to assume the person had authority to give consent to a search of the common areas of the house.

Plaehn's appellate brief states "if Officer Jarvis was lawfully on the top of the stairs in Plaehn's house, she would not have to be willfully blind to the group

of men smoking the marijuana cigarette." We conclude she was lawfully at the top of the stairs because she reasonably believed the person who had given her consent to enter the house had authority to do so. As the district court found, "the officer's intrusion was lawful as she had received consent to be in the common area where she was when she observed the illegal activity."

We affirm the decision of the district court denying the motion to suppress. We affirm Plaehn's conviction for possession of marijuana, second offense.

AFFIRMED.