

Case Summary

The State appeals the trial court's granting of Mary McNeal's motion to suppress. We affirm.

Issue

The sole issue is whether the trial court properly suppressed evidence recovered following a search of McNeal's car.

Facts

The evidence most favorable to the trial court's ruling is that, shortly after midnight on December 5, 2008, Deputy Larry Hopper of the Vigo County Sheriff's Department pulled over a car that had no visible license plate. McNeal was the driver of the car, and Ron Davis was in the front passenger seat. When approaching the driver's side door, Deputy Hopper could see that there was a temporary license plate inside the car, lying flat underneath the rear window. After Deputy Hopper explained why he had stopped her, McNeal apologized and said that the car was a rental. After McNeal reattached the temporary tag to the back of the rear window so that it was visible from outside, Deputy Hopper asked McNeal for her license and a copy of the car rental agreement.

When Deputy Hopper went to his vehicle to run McNeal's information, he asked her to sit in his vehicle and talk to him. McNeal told Deputy Hopper that she was driving from Chicago to Evansville and that Davis was her fiancé. Meanwhile, Deputy Cerney of the Sheriff's Department arrived on the scene. Deputy Hopper asked Deputy Cerney to

write a warning ticket to McNeal while he talked to Davis. Davis allegedly told Deputy Hopper that McNeal was his sister and that they were coming from St. Louis.¹

Shortly thereafter, Deputy Cerney completed the warning ticket, which Deputy Hopper gave to McNeal, telling her that she was “good to go.” Tr. p. 18. However, as McNeal started walking back toward her car, Deputy Hopper asked if he could ask one more question, and McNeal walked back to him. Deputy Hopper was then holding a written consent to search form, and he asked McNeal if he could search the car. McNeal said that there was nothing in the car and that she would not sign the consent to search form. Deputy Hopper responded that if there was nothing in the car that it would not take long to search, and he explained why he was suspicious, i.e. because of the conflicting stories told by McNeal and Davis. Reiterating that he wanted to search the car, McNeal stated, “Do whatever you want to do.” *Id.* at 20. Deputy Hopper asked if that was a yes, and McNeal repeated, “Do whatever you want to do.” *Id.* at 21. McNeal never signed the written consent to search form.

Deputy Hopper then searched McNeal’s vehicle and discovered what was later confirmed to be 24.1 grams of cocaine hidden inside the spare tire compartment in the trunk. The State charged McNeal with Class C felony possession of cocaine. McNeal later filed a motion to suppress the cocaine found in the car. The trial court conducted a hearing on the motion and, on July 8, 2010, it granted McNeal’s motion to suppress. The State now appeals.

¹ At the suppression hearing, Davis denied telling Deputy Hopper that he was McNeal’s sister.

Analysis

The State is appealing the granting of the motion to suppress under Indiana Code Section 35-38-4-2(5), which permits the State to appeal “an order granting a motion to suppress, if the ultimate effect of the order is to preclude further prosecution.” We generally review a trial court’s decision to grant a motion to suppress similar to other sufficiency of the evidence matters. State v. Lucas, 859 N.E.2d 1244, 1248 (Ind. Ct. App. 2007), trans. denied. That is, we will not reweigh evidence or judge witness credibility. Id. The State appeals from a negative judgment when it challenges the granting of a motion to suppress, and it must show that the trial court’s ruling was contrary to law. Id. We will reverse the granting of a motion to suppress only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that reached by the trial court. Id.

The State contends that the warrantless search of McNeal’s car was valid under the Fourth Amendment to the United States Constitution because she consented to the search.² The State bears the burden of establishing that consent to a warrantless search was, in fact, freely and voluntarily given. Navarro v. State, 855 N.E.2d 671, 675 (Ind. Ct. App. 2006). “The voluntariness of a consent to search is a question of fact to be determined from the totality of the circumstances.” Id. A consent to search is invalid if it is procured by fraud, duress, fear, or intimidation, or if it is merely a submission to the supremacy of the law. Id. “To constitute a valid waiver of Fourth Amendment rights, a

² Given our holding today, we need not address whether the search of McNeal’s car violated the Indiana Constitution.

consent must be the intelligent relinquishment of a known right or privilege.” Id. Such waiver may not be conclusively presumed from a verbal expression of assent unless a court finds, based on the totality of the circumstances, that the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license that the person knew could be freely and effectively withheld. Id.

The “totality of the circumstances” from which the voluntariness of a defendant’s consent is to be determined includes, but is not limited to, the following: (1) whether the defendant was advised of his or her Miranda rights prior to the request to search; (2) the defendant’s degree of education and intelligence; (3) whether the defendant was advised of the right not to consent; (4) whether the defendant had previous encounters with law enforcement; (5) whether the officer made any express or implied claims of authority to search without consent; (6) whether the officer was engaged in any illegal action prior to the request; (7) whether the defendant was cooperative previously; and (8) whether the officer was deceptive as to his true identity or the purpose of the search. Id.

In the present case, we cannot conclude the trial court’s ruling was contrary to law. Most notably, we reiterate that “[d]eterminations of the validity of a consent are factual issues.” Williams v. State, 611 N.E.2d 649, 651 (Ind. Ct. App. 1993), trans. denied. That being the case, the record would support a finding by the trial court that McNeal never gave unequivocal consent to search the car. Rather, when presented with a written consent to search form, McNeal quite clearly stated that she would not sign the form. That constitutes an express rejection of a request for consent to search the car. And even

after Deputy Hopper explained why he wanted to search the car, the most that McNeal said was that Deputy Hopper could “[d]o whatever you want to do.” Tr. p. 20. When Deputy Hopper tried to clarify whether McNeal in fact was changing her mind about consenting to a search, she again responded, “Do whatever you want to do,” rather than responding with a clear, simple “yes.” Id. at 21.

It is certainly true, as the State argues, that consent to search may be given by an express oral statement and need not be in writing. See Williams, 611 N.E.2d at 651. Here, however, we cannot say McNeal gave an express oral statement of consent. Additionally, her highly equivocal statements of “do whatever you want do” followed her clear and unequivocal rejection of the written consent to search form. We note that any alleged consent to search must display more than mere acquiescence to the stated intentions of the police. State v. Jorgensen, 526 N.E.2d 1004, 1006 (Ind. Ct. App. 1988). Viewing the facts in a light most favorable to the trial court’s ruling, saying “do whatever you want to do” after having explicitly declined to sign a written consent to search form may fairly be construed as nothing more than mere acquiescence to the stated intentions of the police, or said another way, mere submission to the supremacy of the law, rather than a consent to search. We further observe that McNeal was never advised of her right to refuse consent, nor any other rights, and there is no evidence regarding McNeal’s level of education or intelligence and no evidence of prior law enforcement encounters. All of these facts weigh against the validity of her purported consent.

We find the facts here readily distinguishable from a case upon which the State relies, Callahan v. State, 719 N.E.2d 430 (Ind. Ct. App. 1999). In Callahan, a motorist was pulled over for a minor traffic violation. After the police officer finished writing a warning ticket to the motorist, he told the motorist that he was free to go. However, before leaving the motorist and police officer had a consensual conversation, which led to the police officer requesting consent to search the vehicle. The motorist responded, “You can search the inside of my car as much as you like.” Callahan, 719 N.E.2d at 433. After the officer discovered marijuana and the motorist was charged with dealing in marijuana, he filed a motion to suppress, arguing that his consent to search was involuntarily given. The trial court denied the motion to suppress, and we affirmed. Id. at 441.

There are some factual similarities between this case and Callahan, but several critical differences. Most importantly, there was no dispute in Callahan that the motorist made a very clear, express, unequivocal oral statement of consent to search his vehicle. There was no such statement here, as we have described. Moreover, the trial court in Callahan had reviewed the evidence and ruled against the defendant’s claim of involuntary consent; here, the trial court reviewed the evidence and reached the opposite conclusion. Given the State’s burden in proving the validity of a warrantless search and the voluntariness of any alleged consent to search, and the trial court’s factual ruling against the State, we perceive no basis upon which we may reverse the trial court’s granting of McNeal’s motion to suppress. The State essentially is asking us to reweigh

evidence and reach a different factual conclusion regarding whether McNeal validly consented to the search, and we may not do so.

Conclusion

The trial court's ruling granting McNeal's motion to suppress was not contrary to law. We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.