IN THE SUPREME COURT OF THE STATE OF NEVADA

RYAN CHASE OLIVERI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47728

FILED

APR 04 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REMAND

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of felony possession of a controlled substance. Seventh Judicial District Court, Lincoln County; Steve L. Dobrescu, Judge. The district court sentenced appellant Ryan Chase Oliveri to a prison term of 12 to 32 months, but then suspended execution of the sentence and placed Oliveri on probation for an indeterminate period not to exceed 3 years.

Oliveri contends that the district court abused its discretion by denying his motion to suppress evidence of the marijuana found in search of his vehicle.[1] Specifically, Oliveri contends that the district court erred in ruling that the automobile exception to the warrant requirement was applicable to his case. We agree.

In Nevada, a police officer may conduct a warrantless search of a vehicle under the "automobile exception" to the warrant requirement if two conditions exist: "first, there must be probable cause to believe that criminal evidence was located in the vehicle; and second, there must be

[1]Oliveri expressly preserved the right to raise this issue in the plea agreement. See NRS 174.035(3).

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exigent circumstances sufficient to dispense with the need for a warrant."[2] This court has defined exigent circumstances as conditions which would cause a reasonable person to believe that a "'search was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.'"[3]

In this case, there was no true necessity to justify the warrantless search. Unlike in Fletcher v. State[4] and Hughes v. State,[5] there was no "roadside arrest" or "imminent arrest" at the time of the search that would have resulted in the impoundment and subsequent inventory of the vehicle.[6] Additionally, there were no other circumstances giving rise to an exigency such as the destruction of evidence or danger to the officer. In fact, Officer Garza testified at the preliminary hearing that he did not fear for his safety. And if he was truly concerned about Oliveri and his passenger destroying evidence or causing him harm, he could have detained them in the back of the patrol car while a telephonic warrant was

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[2]State v. Harnisch, 113 Nev. 214, 222-23, 931 P.2d 1359, 1365 (1997) (citation omitted); see also State v. Harnisch, 114 Nev. 225, 228-29, 954 P.2d 1180, 1183 (1998).

[3]Camacho v. State, 119 Nev. 395, 400, 75 P.3d 372, 374 (2003) (quoting Howe v. State, 112 Nev. 458, 466, 916 P.2d 153, 159 (1996)).

[4]115 Nev. 425, 990 P.2d 192 (1999).

[5]116 Nev. 975, 12 P.3d 948 (2000).

[6]Notably, the State did not allege that Officer Garza intended to arrest Oliveri for driving with a suspended license or for having outstanding warrants.

obtained.[7] Accordingly, the district court erred in ruling that the warrantless search was permissible under the automobile exception to the warrant requirement.

As an alternative basis for denying the motion to suppress, the district court ruled that Oliveri voluntarily consented to the search of his bag. Relying on McMorran v. State,[8] the district court found that Officer Garza's statement that he could conduct a warrantless search was not coercive because it was made in good faith and "Officer Garza did in fact have probable cause and exigent circumstances which justified the search." Oliveri argues that the district court erred because any consent was tainted by the coercive nature of the request when Officer Garza intimated the search was going to happen regardless of consent.

Preliminarily, we note that McMorran is inapposite. McMorran stands for the proposition that where there is probable cause for a search warrant, a police officer's threat to do something he could lawfully do, i.e., get a warrant, will not be deemed coercive.[9] In this case, however, Officer Garza did not merely threaten to get a warrant; he misinformed Oliveri that he had authority to conduct a warrantless search of the vehicle regardless of consent. The district court did not consider whether Officer Garza's misrepresentation that he had authority to

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[7]See generally Camacho, 119 Nev. at 398, 75 P.3d at 372 (noting that it was "extremely unlikely" that appellant could have destroyed evidence or reached a weapon in his vehicle given that he was handcuffed and removed from the vicinity of the car).

[8]118 Nev. 379, 46 P.3d 81 (2002).

[9]Id at 385, 46 P.3d at 85.

conduct a warrantless search vitiated Oliveri's subsequent consent to search. Other jurisdictions have held that consent based on a misrepresentation of a government official renders consent involuntary.[10]

The State has the burden to prove a defendant consented to a search by clear and convincing evidence.[11] A search based on consent is lawful where the State can show that the defendant's consent "was voluntary and not the result of duress or coercion."[12] Voluntariness depends on "whether a reasonable person in the defendant's position, given the totality of the circumstances, would feel free to decline a police officer's request."[13] In Schneckloth v. Bustamonte, the United States Supreme Court set forth numerous factors for analyzing whether the consent to search was voluntary, including the age, intelligence level, and education of the accused; the nature of the advisement given with respect to constitutional rights; the length of detention; the nature of the questioning; and the use of physical punishment.[14] The Fifth Circuit Court of Appeals has set forth additional factors, which are potentially relevant to the analysis in this case, including: (1) the extent and level of the defendant's cooperation with police; (2) the defendant's awareness of

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[10]See Bumper v. North Carolina, 391 U.S. 543 (1968); United States v. Molt, 589 F.2d 1247 (3rd Cir. 1978); Orhoraghe v. INS, 38 F.3d 488 (9th Cir. 1994); Samuels v. State, 318 So.2d 190 (Fla. Dist. Ct. App. 1975).

[11]McMorran, 118 Nev. at 383, 46 P.3d at 83.

[12]State v. Burkholder, 112 Nev. 535, 539, 915 P.2d 886, 888 (1996) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973)).

[13]Id. (citing Florida v. Bostick, 501 U.S. 429, 434 (1991)).

[14]Schneckloth, 412 U.S. at 226.

his right to refuse consent; and (3) the defendant's belief that no incriminating evidence will be found.[15]

In this case, the district court did not conduct a suppression hearing and the record is insufficient to determine whether the consent to search was voluntary. Accordingly, we remand this case to the district court for an evidentiary hearing. The district court should analyze whether, under the totality of the circumstances, the consent was voluntary or tainted by Office Garza's misrepresentation that he had authority to conduct a warrantless search. Therefore, we

ORDER this matter REMANDED to the district court for proceedings consistent with this order.

Parraguirre, J.

Hardesty, J.

Saitta, J.

[15]United States v. Williams, 365 F.3d 399 (5th Cir. 2004); see also 4 Wayne R. LaFave, Search and Seizure § 8.2 (4th ed. 2004).

cc: Hon. Steve L. Dobrescu, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General Catherine Cortez Masto/Carson City
Lincoln County District Attorney
Lincoln County Clerk