IN THE SUPREME COURT OF THE STATE OF NEVADA

DERRICK ANTHONY ARMSTRONG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50615

FILED

JUL 31 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of trafficking in a controlled substance and one count of possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court sentenced appellant Derrick Anthony Armstrong to a term of life in prison with the possibility of parole after 10 years and two terms of 24 to 72 months in prison. On appeal from the judgment of conviction, Armstrong challenges the district court's denial of a motion to suppress evidence seized during a search of his residence.

Armstrong argues that the district court erred in concluding that a third party, Heather Hildebrand, had actual or apparent authority to consent to the officers' entry and search of Armstrong's apartment.[1] This court "reviews the lawfulness of a search de novo because such a review requires consideration of both factual circumstances and legal

[1]Although Judge Bell presided over the trial and signed the judgment of conviction, Judge Mosley ruled on the suppression motion.

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issues," but in doing so, we give deference to the district court's findings of fact during a suppression hearing. McMorran v. State, 118 Nev. 379, 383, 46 P.3d 81, 84 (2002); see also U.S. v. Almeida-Perez, 549 F.3d 1162, 1170 (8th Cir. 2008) (explaining that whether third party had common authority is question of fact reviewed for clear error but that reasonableness of officer's reliance on indicia of common authority presents question of law subject to de novo review).

The Fourth Amendment generally precludes the police from entering a person's home without a warrant. Georgia v. Randolph, 547 U.S. 103, 109 (2006). Consent exempts a search from the warrant requirement of the Fourth Amendment. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). As this court has recognized, it is the State's burden to prove consent. Howe v. State, 112 Nev. 458, 463, 916 P.2d 153, 157 (1996).

The police may enter and search a defendant's house with the voluntary consent of the defendant or a third party who has common authority over the area to be searched. Randolph, 547 U.S. at 106; United States v. Matlock, 415 U.S. 164, 170 (1974). Even when the police make a mistake of fact as to a third party's actual authority, a search is not unlawful if the police reasonably believed that the third party had common authority—i.e., the third party had apparent authority. Illinois v. Rodriguez, 497 U.S. 177, 184-86 (1990). The reasonableness of an officer's belief that a third-party has common authority "must 'be judged against an objective standard: would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises?" Id. at 188 (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (internal quotation marks

omitted)). In explaining the reasonableness standard, the Supreme Court has observed that police may not "always accept a person's invitation to enter premises" because "[e]ven when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry." Id.

Here, the district court heard argument but did not conduct an evidentiary hearing. In making its decision, the district court seemed to conclude that the officers reasonably relied on the following indicia of common authority: (1) Hildebrand and Armstrong "kn[e]w each other," (2) Hildebrand claimed that she lived in the apartment and wanted to get her property out of the apartment, and (3) Hildebrand asked the officers to wait while she gained entry to the apartment. We are not convinced that these are sufficient indicia of common authority for the officers to have reasonably believed that Hildebrand had common authority over the apartment. In particular, other circumstances indicate that the officers' reliance on those indicia of common authority was objectively unreasonable: (1) Armstrong denied having a relationship with Hildebrand and claimed that she did not live with him, (2) Hildebrand indicated that she had lived in the apartment on and off and that her relationship with Armstrong was in the process of ending, (3) Hildebrand indicated that most of her belongings were at another location, (4) Hildebrand indicated that she wanted to retrieve the rest of her belongings from Armstrong's apartment but he would not let her, (5) Hildebrand did not have a key to the apartment, and (6) Hildebrand was only able to gain entry to the apartment after a maintenance worker described how to remove the screws from a window and enter through the

window. Although there is other evidence in the record to suggest that the officers may have had additional information that made their belief in Hildebrand's authority reasonable, the record is insufficient to allow for meaningful review by this court because the district court did not conduct an evidentiary hearing or make specific written findings on the suppression motion.[2] Given the lack of specific findings and the failure to conduct an evidentiary hearing, we cannot conclude that the State met its burden of proving that Hildebrand had authority to consent to the search. Cf. State v. Ruscetta, 123 Nev. 299, 163 P.3d 451 (2007) (reversing district court order granting suppression motion where district court did not conduct evidentiary hearing or make specific written findings); State v. Rincon, 122 Nev. 1170, 147 P.3d 233 (2006) (similar).

The State suggests that this court can nonetheless uphold the district court's denial of the suppression motion on another ground, namely that the officers did not actually search the apartment until they had obtained a telephonic search warrant. The State represents that before the warrant was issued, the officers had merely entered the apartment, confirmed that Hildebrand's belongings were in the apartment, and looked in a kitchen cabinet that Hildebrand showed them contained a controlled substance. The difficulty with the State's

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[2]For example, the search warrant affidavit indicates that the apartment manager had confirmed that Hildebrand was living in the apartment. But the detective who made that representation testified at the preliminary hearing that he had been unable to reach the apartment manager. The district court had this conflicting information when it resolved the suppression motion but did not conduct an evidentiary hearing to resolve the conflict.

argument, however, is that it involves factual determinations that cannot be made in the first instance by this court. See Rincon, 122 Nev. at 1177, 147 P.3d 248 (observing that "[t]his court does not act as a finder of fact"). Accordingly, we can express no opinion on the validity of the search warrant or whether it cures any initial unlawful entry or was the fruit of the poisonous tree. See Murray v. United States, 487 U.S. 533, 537-43 (1988) (discussing scope of independent source doctrine); U.S. v. Hill, 55 F.3d 479, 481 (9th Cir. 1995) (explaining that for a search pursuant to a warrant to be untainted by an earlier unlawful search, what was learned during the unlawful search must not be what prompted the decision to seek the warrant, i.e., the court must find that the officers would have sought the warrant if they had not entered the defendant's house earlier).

Having determined that the district court erred in denying Armstrong's motion to suppress evidence without conducting an evidentiary hearing thereon, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Eighth Judicial District Court Dept. 7, District Judge
Brent D. Percival
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk