IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID FRANKLIN BLACKBURN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52014

FILED

FEB 04 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of use of a controlled substance. Third Judicial District Court, Lyon County; David A. Huff, Judge. The district court sentenced appellant David Franklin Blackburn to a prison term of 12 to 36 months.

First, Blackburn contends that the district court erred in denying his motion to suppress statements he made to Lyon County Sheriff deputies in violation of Miranda v. Arizona, 384 U.S. 436 (1966). Specifically, he claims that he was in custody for purposes of Miranda when deputies approached him with weapons drawn in his backyard.

Initially, we note that, generally, the entry of a guilty plea waives any right to appeal from events occurring prior to the entry of the plea. See Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975). "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. . . . [A defendant] may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Id. (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)) (alteration in original). However, Blackburn preserved the right to appeal from the order denying his motion

to suppress in the guilty plea agreement. See NRS 174.035(3). Therefore, we address the merits of his claims.

The Fifth Amendment privilege against self-incrimination provides that statements made by a suspect during a custodial interrogation are inadmissible unless the police first provide a Miranda warning. State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998); see also Miranda, 384 U.S. at 478-79. "[A]n individual is deemed 'in custody' where there has been a formal arrest, or where there has been a restraint on freedom of movement of the degree associated with a formal arrest so that a reasonable person would not feel free to leave." Taylor, 114 Nev. at 1082, 968 P.2d at 323. However, "[a]n individual is not in custody for purposes of Miranda where police officers only question an individual on-scene regarding the facts and circumstances of a crime or ask other questions during the fact-finding process." Id. Further, under Terry v. Ohio, 392 U.S. 1 (1968), a police officer is permitted to briefly detain an individual and make a reasonable inquiry into that person's conduct where that conduct leads "the officer to believe 'that criminal activity may be afoot.'" State v. Conners, 116 Nev. 184, 186, 994 P.2d 44, 45 (2000) (quoting Minnesota v. Dickerson, 508 U.S. 366, 373 (1993)).

"We review a district court's factual findings pertaining to the circumstances surrounding an interrogation for clear error and the district court's ultimate determination of whether a person is in custody de novo." Casteel v. State, 122 Nev. 356, 361, 131 P.3d 1, 4 (2006), cert. denied, 549 U.S. 1119 (2007). We consider the totality of the circumstances in determining whether a defendant was in custody during police questioning. Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996),

overruled on other grounds by Rosky v. State, 121 Nev. 184, 111 P.3d 690 (2005). "Important considerations include the following: (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning." Id. at 154-55, 912 P.2d at 252.

We conclude that the district court did not err in determining that Blackburn was not subject to custodial interrogation when he was first approached by the deputies. Deputies questioned Blackburn and Clay White in the backyard of Blackburn's home after responding to a suspected burglary at the address. The questioning was brief and focused on the men's identities and what they were doing in the yard. While the deputies' weapons remained drawn after clearing the house, the weapons were pointed at the ground. Therefore, we affirm the district court's denial of Blackburn's motion to suppress statements he made after being approached by deputies but prior to his formal arrest.

However, we conclude that the district court erred in denying the motion to suppress with regards to Blackburn's statements that were made after he was arrested on an outstanding warrant. Once dispatch informed the deputies that Blackburn had an outstanding warrant, they formally arrested him and placed him in handcuffs. However, neither deputy provided Miranda warnings at the time of the arrest. Nevertheless, Deputy Paul Vandiver continued to question Blackburn about the ownership of the house and what the two men were doing in the backyard. Therefore, we reverse the district court's denial of Blackburn's motion to suppress with regards to the statements he made in response to

Deputy Vandiver's questioning after Blackburn was arrested on the outstanding warrant.

Second, Blackburn contends that the district court erred in denying his motion to suppress biological evidence seized from him in violation of the Fourth Amendment. Specifically, he claims that he only consented to provide a urine specimen because he was threatened by the police. Moreover, he asserts that he should not have been approached to consent to the test as he had invoked his right to remain silent under Miranda.

The Fourth Amendment requires that a warrant be obtained before the State may collect a biological specimen from a suspect. See State v. Jones, 111 Nev. 774, 775, 895 P.2d 643, 644 (1995). A search conducted pursuant to a valid consent is exempted from the warrant requirements of the Fourth and Fourteenth Amendments. Davis v. State, 99 Nev. 25, 27, 656 P.2d 855, 856 (1983). To be valid, consent must be voluntarily given and not the product of coercion, express or implied. Id.; see Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973).

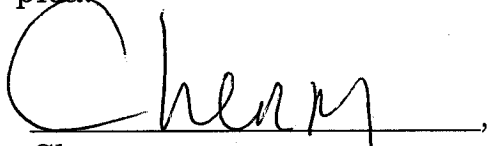
In evaluating Fourth Amendment challenges, "[w]e review the district court's findings of historical fact for clear error but review the legal consequences of those factual findings de novo." Somee v. State, 124 Nev. ___, ___, 187 P.3d 152, 157-58 (2008). The question of whether there was voluntary consent is "to be determined from the totality of the surrounding circumstances." Davis, 99 Nev. at 27, 656 P.2d at 856.

The district court did not err in denying Blackburn's motion to suppress with regard to the seizure of the biological specimen. While the district court did not make a specific factual finding as to the

voluntariness of Blackburn's consent, we may infer that it concluded that his consent was voluntary and not induced by threats. See State v. Ruscetta, 123 Nev. ___, ___, 163 P.3d 451, 455 (2007) (recognizing that "certain facts may be inferred from [a] district court's ruling"). At the suppression hearing, Blackburn testified that Lieutenant Robert Sherlock told Blackburn that if he did not consent to the urinalysis, several other officers would hold him down while they inserted a catheter into him to collect his urine. Therefore, Blackburn signed the consent form, but crossed out the word "threat" and initialed it. However, Lieutenant Sherlock denied that he threatened Blackburn and testified that he merely asked Blackburn if he would consent to the collection of his urine and Blackburn agreed. While Blackburn's testimony contradicted Lieutenant Sherlock's assertion that he did not threaten Blackburn, we recognize that "'the district court is in the best position to adjudge the credibility of witnesses and the evidence.'" Id. at ___, 163 P.3d at 455 n. 25 (quoting State v. Rincon, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006)). The district court did not clearly err in concluding that Blackburn voluntarily consented to providing the urine sample. Further, the fact that the consent was obtained after Blackburn invoked his Fifth Amendment right to remain silent did not render it involuntary. See United States v. Lemon, 550 F.2d 467, 472 (9th Cir. 1993) ("A consent to search is not the type of incriminating statement toward which the fifth amendment is directed."). Therefore, we affirm the district court's denial of Blackburn's motion to suppress with respect to biological evidence seized.

Having considered Blackburn's contentions and for the reasons discussed above, we

ORDER the judgment of conviction REVERSED and REMAND this matter to the district court with instructions to allow Blackburn to withdraw his guilty plea.



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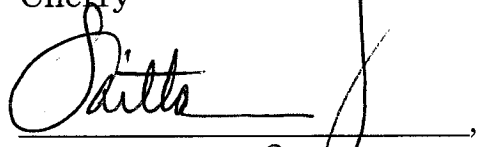

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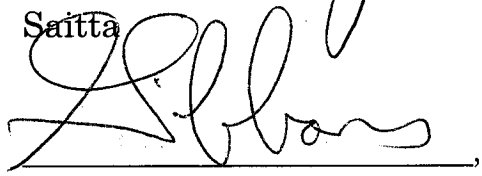

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Gibbons

cc: Hon. David A. Huff, District Judge
Law Office of Kenneth V. Ward
Attorney General Catherine Cortez Masto/Carson City
Lyon County District Attorney
Lyon County Clerk