

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREG SCOTT DAILY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38946

FILED

JUN 18 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

Appellant, Greg Scott Daily, appeals from a judgment of conviction pursuant to a guilty plea.¹ Daily pleaded guilty to one count of trafficking in a controlled substance, but reserved his right to appeal the district court's denial of his motion to suppress evidence. We affirm Daily's conviction and the denial of his motion to suppress.

Factual and Procedural Background

Daily lived in a three-bedroom home in Reno with his girlfriend, her son, and a tenant named Louis Bank. As of June 2001, the Financial Crimes Section of the Reno Police Department and the United States Secret Service (collectively "the police") were in the process of investigating Bank for uttering fictitious U.S. currency, payroll checks, and notes, and for possessing false identification.

On June 13, 2001, the police received information that Bank was conducting a counterfeiting operation from Daily's home in Reno. Around 5 p.m., the police applied for a warrant to search the home for items related to Bank's illegal activities.² This latter request

¹See NRS 177.015(4); NRS 174.035(3).

²See NRS 179.045(6).

notwithstanding, the justice of the peace neither made a specific statement that probable cause supported post-7 p.m. service nor checked the box on the warrant form permitting such service.

The police executed the warrant shortly after 7 p.m., at which time Daily was in his bedroom. Daily cooperated when the police asked him to move into the dining room while they conducted their search. Because the warrant authorized a search of the entire premises, the police searched throughout the house looking for Bank's possessions.

The police department's initial information was that Bank occupied a separate bedroom and that the evidence they sought was in that room. Upon entering, however, they found some of Bank's possessions in the communal areas of the home. The police brought items to the dining room and Daily assisted the police in identifying Bank's property.

At some point, the police removed Daily to his bedroom to speak with him further about an unrelated outstanding warrant for his arrest and placed him in handcuffs. At that time, the police observed Coleman fuel in a milk jug and a camping torch in plain view, which they believed Daily used to manufacture methamphetamine. The police then removed everyone from the home because of concerns about the volatility of the chemicals.

Fifteen minutes later, a police officer told Daily that if a methamphetamine lab was in the house and any officers injured, they would charge him in connection with any injuries sustained. Without informing Daily of his Miranda³ rights, the police requested that Daily

³Miranda v. Arizona, 384 U.S. 436 (1966).

sign a consent form for a further search of his home and informed him that if he did not consent, they could or would obtain an amendment to the warrant to allow them to search for methamphetamine paraphernalia. Daily signed the consent form because he believed that the police were going to search his home no matter what he did.

Upon his execution of the form, Daily advised the officers that he produced methamphetamine for his own personal use; he owned some items used to manufacture methamphetamine; his girlfriend was not involved with the drugs; and the items in his house were harmless. The police ultimately found methamphetamine and other items used to manufacture the substance.

The State charged Daily in an information with one count of trafficking in a controlled substance, a violation of NRS 453.3385(1),⁴ and

⁴NRS 453.3385 states in pertinent part:

Except as otherwise authorized by the provisions of NRS 453.011 to 453.552, inclusive, a person who knowingly or intentionally sells, manufactures, delivers or brings into this state or who is knowingly or intentionally in actual or constructive possession of flunitrazepam, gamma-hydroxybutyrate, any substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate precursor or any controlled substance which is listed in schedule I, except marijuana, or any mixture which contains any such controlled substance, shall be punished, unless a greater penalty is provided pursuant to NRS 453.322, if the quantity involved:

1. Is 4 grams or more, but less than 14 grams, for a category B felony by imprisonment in the state prison for a minimum term of not less

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one count of possession of a majority of the ingredients to manufacture a controlled substance, a violation of NRS 453.322.⁵

Daily filed a motion to suppress the evidence seized from his home under NRS 179.085(1)(d).⁶ On August 20, 2001, the district court held a suppression hearing. The district court issued its order denying Daily's motion to suppress on September 12, 2001, concluding that Daily voluntarily consented to the search of his home:

Daily was aware of the search warrant[,] he assisted the police in identifying the property of Bank, he was informed of the dangerous propensities of the materials found in his bedroom, and he was made aware that the police could and would get an extension to the warrant to have it include controlled substances.

... continued

than 1 year and a maximum term of not more than 6 years and by a fine of not more than \$50,000.

⁵Cf. Sheriff, Washoe County v. Burdg, 118 Nev. ___, 59 P.3d 484 (2002) (holding that NRS 453.322(1)(b) is unconstitutional). Because Daily pleaded guilty to a violation of NRS 453.3385(1) and not NRS 453.322, this court's recent holdings concerning the latter provision do not affect this appeal.

⁶NRS 179.085(1)(d) states:

1. A person aggrieved by an unlawful search and seizure may move the court having jurisdiction where the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that:

....

(d) The warrant was illegally executed.

On October 9, 2001, Daily pleaded guilty to a violation of NRS 453.3385(1), reserving his right to appeal the denial of his motion to suppress. The district court accepted Daily's guilty plea to one count of trafficking in a controlled substance.⁷ The district court sentenced Daily to imprisonment for a maximum term of forty-eight months with a minimum parole eligibility of twelve months, with credit for 130 days time served. The district court ordered Daily to pay a fine of \$500.00, a \$25.00 administrative fee, a \$60.00 chemical analysis fee, and a \$150.00 DNA testing fee, and to pay \$500.00 in attorney fees to the Washoe County Public Defender's Office. Daily appeals.

Discussion

Daily contends that his consent to search was involuntary because he was intimidated, the police told him that a warrant would issue if he did not give consent, and the police failed to inform him of his right to refuse consent.

We will not disturb a district court's findings of fact in a suppression hearing if supported by substantial evidence.⁸ Further, we review a district court's findings of fact under a deferential standard.⁹ We conclude that Daily freely and voluntarily consented to the search of his home and thus the district court correctly denied Daily's motion to suppress.

⁷The State dropped the NRS 453.322 charge in exchange for Daily's guilty plea.

⁸State v. Johnson, 116 Nev. 78, 80-81, 993 P.2d 44, 45-46 (2000).

⁹Id. at 81, 993 P.2d at 46.

“The Fourth Amendment to the United States Constitution and the Nevada Constitution proscribe all unreasonable searches and seizures.”¹⁰ “Subject only to a few specific exceptions, searches conducted without prior approval by a judge or magistrate are per se unreasonable.”¹¹ A search pursuant to valid consent is one of those exceptions.¹²

Consent to search is valid if given as a result of a person’s “essentially free and unconstrained choice,”¹³ *i.e.*, if the consent is voluntary. The state must prove voluntariness by clear and convincing evidence.¹⁴ “Voluntariness is determined by ascertaining 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”¹⁵ “Whether in a particular case an apparent consent to search without a warrant was voluntarily given is a question of fact.”¹⁶

In the current case, the district court reviewed the testimony at the suppression hearing and concluded, after considering the totality of the circumstances, that Daily’s consent was voluntary. Substantial

¹⁰McMorran v. State, 118 Nev. ___, ___, 46 P.3d 81, 83 (2002).

¹¹Id.

¹²See id.

¹³Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973).

¹⁴McMorran, 118 Nev. at ___, 46 P.3d at 84.

¹⁵State v. Burkholder, 112 Nev. 535, 539, 915 P.2d 886, 888 (1996) (citing Florida v. Bostick, 501 U.S. 429, 434 (1991)).

¹⁶Peck v. State, 116 Nev. 840, 846, 7 P.3d 470, 474 (2000) (quoting State v. Plas, 80 Nev. 251, 253, 391 P.2d 867, 868 (1964)).

evidence supports this ruling: Daily was thirty-six years old with a high-school education, signed a written consent form, and knew of the police concerns for their safety and the safety of the other residents from the possibly dangerous methamphetamine laboratory. Further, the police engaged in no verbal or physical threats and clearly informed Daily that they could and would obtain an extension to the warrant to have it include controlled substances.

Daily submits that this case is similar to McMorran v. State.¹⁷ In McMorran, one of the inhabitants of a motel room initially consented to a search, but another inhabitant later revoked the consent. Nevertheless, the officers remained in the room and stated that they would remain until they obtained a warrant. At that point, the police, acting only upon an anonymous tip, had no probable cause for securing the room and detaining its occupants.¹⁸ Thus, we held that the police threat that a warrant would automatically issue, without having probable cause to believe that a crime occurred or was about to occur, rendered a later consent to search involuntary.¹⁹ Here, when the police found the items used to manufacture methamphetamine in Daily's bedroom, probable cause existed for an extension of the warrant to issue. Therefore, unlike McMorran, the threat to seek an amendment to the warrant in this case was not unsubstantiated or unreasonable and did not obviate Daily's consent.

¹⁷118 Nev. ___, 46 P.3d 81. The district court did not have the assistance of McMorran in analyzing this case.


¹⁸McMorran, 118 Nev. at ___, 46 P.3d at 82-84; see also United States v. Ocheltree, 622 F.2d 992, 993 (9th Cir. 1980); State v. Jones, 591 P.2d 796, 800 (Wash. Ct. App. 1979).

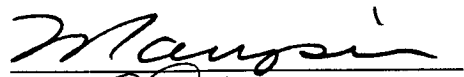
¹⁹McMorran, 118 Nev. at ___, 46 P.3d at 84.

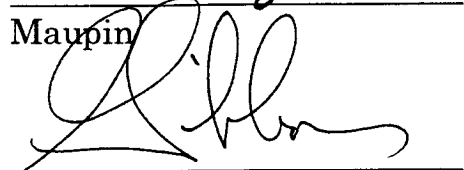
CONCLUSION

After the police presented Daily with the relevant facts, Daily made his “essentially free and unconstrained” choice to permit the police to search his home for drug evidence. Therefore, we conclude that the district court correctly ruled that the evidence seized by the police in a search of Daily’s home was admissible as the product of a consensual search.²⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²¹


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

²⁰In oral argument before this court, Daily’s counsel conceded that if Daily validly consented to the search, then his conviction was proper. Thus, we need not reach Daily’s other arguments on appeal.

²¹We agree with the State that execution of the warrant at approximately 7:05 p.m., during actual daylight hours, effected substantial compliance with NRS 179.045(6).