[Cite as *State v. Trotter*, 2011-Ohio-418.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94648

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

DAVID C. TROTTER

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-525504

BEFORE: Kilbane, A.J., Celebrezze, J., and Cooney, J.

RELEASED AND JOURNALIZED: January 27, 2011

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MARY EILEEN KILBANE, A.J.:

{¶ 1} Plaintiff-appellant, the state of Ohio ("State"), appeals the trial court's decision suppressing evidence taken from a computer from the home of defendant-appellee, David Trotter ("Trotter"). Finding merit to the appeal, we reverse and remand.

{¶ 2} On March 27, 2009, the victim, a middle-school aged female, and some friends attended a party at Trotter's home. The victim alleged that while she was intoxicated, she was sexually assaulted by Trotter at the party.

On April 2, 2009, Detectives David Sheridan ("Sheridan") and Dan Ciryak ("Ciryak") of the Parma Police Department drove to Trotter's home, where they set up surveillance on him. They approached Trotter in the driveway and arrested him. Afterwards, the detectives spoke with Trotter's son who was also home at that time. They asked him to call his mother and Trotter's wife, Jacqueline Trotter ("Jacqueline"). When Jacqueline arrived, the detectives advised her why Trotter was arrested and asked for her consent to take clothing from the home and to take photos of the home. Jacqueline voluntarily consented to the search. The detectives took a sweatshirt that was soiled with the victim's vomit.

{¶ 3} Approximately an hour later, Parma police returned to Trotter's home and Jacqueline voluntarily consented to a complete search of the home. Jacqueline signed a consent form authorizing the officers to take letters, papers, material, or other property that the police desired. During this search, the officers removed a computer.

{¶ 4} The next day, Ciryak telephoned Jacqueline asking for her consent to search the contents of the computer. Jacqueline agreed, but advised that she was at work. Ciryak then visited her at work, where she voluntarily signed the consent form allowing the officers to the search the computer's contents. After obtaining Jacqueline's consent, Ciryak took the computer to the Bureau of Criminal Identification and Investigation, where

Special Agent Rick Warner ("Warner") completed a cursory search of the computer's contents. This search revealed images that Warner suspected were child pornography. Ciryak then applied for a search warrant based on the results of this cursory search. A Parma Municipal Court judge signed the warrant, which allowed the officers to perform a complete search of the computer's contents.

{¶ 5} As part of their investigation, Sheridan and Ciryak interviewed Trotter. He told them that the victim came over to his house with some friends. He stated that she came to his house already intoxicated and drank more alcoholic beverages that he provided. While at Trotter's house, the victim began to vomit on herself. Trotter told her that she needed to get out of her clothes. He removed all of her clothes, put a shirt on her, and took her to a bedroom upstairs. Trotter also informed the detectives that he was on the computer (which was seized by the police) with a person named Sean. He stated that there was child pornography on the computer.

{¶ 6} Trotter was subsequently charged in a multi-count indictment for the offenses committed against the victim and the pictures found on his computer. Counts 1-4 charged him with rape, Counts 5 and 6 charged him with kidnapping, Counts 7 and 8 and 13-15 charged him with illegal use of a minor in minor in nude material, Counts 9-12 and 16 charged him with pandering sexually oriented material involving a minor, Count 17 charged

him with possessing criminal tools, and Counts 18 and 19 charged him with corrupting a minor with drugs.[1]

{¶ 7} The matter proceeded to a bench trial on January 27, 2010. On the sixth day of trial, during the testimony of the State's last witness (Sheridan), the trial court sua sponte raised an issue with respect to the jurisdiction of a Parma municipal judge sign a warrant for a felony case.[2] At that time, defense counsel asked that all of the evidence seized from the computer be suppressed.[3] The court then stopped Sheridan's testimony and ordered counsel for both sides to address whether the Parma municipal judge had jurisdiction to issue the warrant. The court set the suppression hearing later that afternoon, at which time the court raised another issue — whether

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[1]Counts 1-6 each carried a sexually violent predator specification, and Counts 5 and 6 also carried a sexual motivation specification. Counts 7-17 each carried a forfeiture specification.

[2]The complete transcript is not before this court; however, the State advised at oral argument that Sheridan was its last witness.

[3]We note that Trotter's counsel requested that the child pornography pictures on the computer be suppressed at trial, but Trotter never filed a formal written motion to suppress prior to trial. Instead, the trial court, sua sponte, ordered a suppression hearing. Since no objection was raised, we will not consider the propriety of the trial court, sua sponte, ordering such a hearing. See *State v. Myers* (May 2, 1990), Washington App. No. 89 CA 3. However, this court has previously held that: "[a] motion to suppress is the proper avenue for invoking challenges to exclude evidence that is the product of police conduct that results in a constitutional violation. Crim.R. 12(C)(3) mandates that a defendant file a motion to suppress evidence with the trial court prior to trial and the failure to do so 'shall constitute waiver of the defenses or objections' for purposes of trial." (Citations omitted.) *State v. Freeman*, Cuyahoga App. No. 92286, 2009-Ohio-5226, ¶23.

Jacqueline had authority to consent to the cursory search of the computer. The court then set the matter for a suppression hearing the next day.

{¶ 8} At this suppression hearing, the court heard testimony from Jacqueline, Ciryak, and Warner. The trial court concluded that the Parma municipal judge in fact had authority to sign the warrant and that Jacqueline's initial consent to search the computer was valid. However, the trial court was concerned with the lack of probable cause to obtain the search warrant. The court stated that the requests for consent were based on nothing more than "inarticulate hunches" and that there was no nexus between obtaining the computer and the rape investigation. The trial court was not "convinced that the consent was full and voluntary because it was not based on a nexus between the crime investigated and the evidence sought." As a result, the court suppressed Counts 7-17 because those counts are based on the evidence produced by the search warrant. The trial court clarified that it did not suppress the evidence "based upon the defense's assertion that Jacqueline Trotter did not have authority to consent to the taking of the computer."

{¶ 9} The State now appeals, raising the following assignment of error.

> **"The trial court erred in suppressing evidence of child pornography on a computer seized pursuant to valid consent."**

{¶ 10} In its sole assignment of error, the State argues that the trial court erred when it suppressed the evidence seized from the computer, as it relates to Counts 7-17.

{¶ 11} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8. In deciding a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve factual questions and evaluate the credibility of witnesses. Id., citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. The reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Id., citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583. With respect to the trial court's conclusion of law, the reviewing court applies a de novo standard of review and decides whether the facts satisfy the applicable legal standard. Id., citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539.

{¶ 12} In the instant case, the trial court was not "convinced that [Jacqueline's] consent was full and voluntary because it was not based on a nexus between the crime investigated and the evidence sought." The State argues that Jacqueline's consent was voluntary, and no such nexus is required to justify asking Jacqueline to search the computer. We agree.

{¶ 13} The Fourth Amendment of the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless certain exceptions apply. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576. One exception is a search conducted pursuant to consent. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854.

{¶ 14} When relying on the consent exception, "[t]he state must prove that the consent was freely and voluntarily given, as demonstrated by a totality of the circumstances. [*Bustamonte.*] The essential question is whether the consent was voluntary or the product of express or implied duress or coercion, as determined from the totality of the circumstances. Id. at 227." *Freeman* at ¶16.

{¶ 15} "The standard for measuring the scope of consent under the Fourth Amendment is objective reasonableness, i.e., what a typical reasonable person would have understood by the exchange between the officer and the suspect. *Florida v. Jimeno* (1991), 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297. 'Police officers act in full accord with the law when they ask citizens for consent.' *United States v. Drayton* (2002), 536 U.S. 194, 207, 122 S.Ct. 2105, 153 L.Ed.2d 242." Id. at ¶17.

{¶ 16} Here, the testimony is clear that Jacqueline voluntarily and freely gave her consent to the police to search the home, to take the computer,

and to search the computer's contents. Jacqueline testified that no threats or promises were made to obtain each consent and that she was not under any type of duress when she gave each consent.

{¶ 17} In reaching its decision, the trial court relied on *Terry v. Ohio* (1960), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, stating that in *Terry*, "courts will not condone intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches." However, this court has stated that: "[p]olice officers do not need a warrant, probable cause, or even a reasonable, articulable suspicion to conduct a search when a suspect voluntarily consents to the search." *State v. Melvin*, Cuyahoga App. No. 88611, 2007-Ohio-3779, ¶36, citing *State v. Riggins*, Hamilton App. No. C-030626, 2004-Ohio-4247; *Bustamonte*; *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640.

{¶ 18} Once Jacqueline voluntarily gave her consent to the Parma police, probable cause was not necessary in order to search the computer's contents. We note that the officers did obtain a search warrant in the event that Jacqueline withdrew her consent, but the warrant was not required to search the computer's contents. Therefore, we find that the trial court erroneously suppressed the evidence relating to Counts 7-17 because the evidence on the computer was found pursuant to a valid consensual search.

{¶ 19} Accordingly, the sole assignment of error is sustained.

{¶ 20} Judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., and
COLLEEN CONWAY COONEY, J., CONCUR