

08CA0206 Peo v. Marzano 08-05-2010

COLORADO COURT OF APPEALS

Court of Appeals No. 08CA0206
Larimer County District Court No. 06CR1962
Honorable Daniel J. Kaup, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Frank Marzano,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE GRAHAM
Loeb and Criswell*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced August 5, 2010

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Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.
VI, § 5(3), and § 24-51-1105, C.R.S. 2009.

Defendant, Frank Marzano, appeals the judgment of conviction entered on jury verdicts finding him guilty of cultivation of marijuana and possession of over eight ounces of marijuana. We reverse and remand with directions.

I. Background

In their attempt to serve a federal arrest warrant upon the fugitive Randall Zandstra, United States Marshals received information that Zandstra was living at 1621 Firerock Court in Loveland. Assessor's office records showed that Carol Dugasz was the owner of the property beginning in August 2006.

When Carol Dugasz died, her son, Anthony Dugasz, became executor of her estate. Mr. Dugasz learned from a marshal's deputy that his mother owned the Firerock Court property and that Zandstra "was living there or had the property" through arrangements he had made with Ms. Dugasz. Mr. Dugasz replied that if the property was his mother's, no one should be living there because he had seen no evidence of a lease or the payment of rent. Mr. Dugasz then provided the United States Marshals with a letter consenting to a search by law enforcement of the property "for the

purpose of the search for an apprehension of one: Mr. Randall J. Zandstra.”

After receiving this letter, the United States Marshals, in cooperation with local law enforcement in Larimer County, sent officers to the residence in an attempt to apprehend Zandstra. Getting no response to their initial knock and announcement at the front door, officers entered through a broken sliding glass door in the back of the house.

Finding no one downstairs, but believing Zandstra might be elsewhere in the residence, officers decided to bring in a search dog. While waiting for the search dog to arrive, officers encountered defendant, who walked down the stairs. Defendant answered in the affirmative when asked if he had a lease or other arrangement with Ms. Dugasz to occupy the property. Officers testified that defendant was not asked for his consent to search the property nor did he offer it.

A search of the upstairs revealed a substantial marijuana growing operation containing over 100 plants. Officers then sought

and received a search warrant based upon their findings during the initial search.

Prior to trial, defendant moved to suppress evidence seized during the search, arguing that there was neither a warrant nor consent to the initial search. The trial court denied defendant's motion to suppress.

In pretrial orders relating to defendant's affirmative defense for the medical use of marijuana under the Colorado Constitution, article XVIII, section 14(2)(a), the trial court restricted defendant to calling only one patient witness who had affirmatively designated defendant as his primary caregiver on the state-issued registry card. Defendant was not permitted to call numerous patients to testify that he served as their primary caregiver because defendant was not designated on their registry cards.

After a jury trial, the jury acquitted defendant of possession with intent to distribute marijuana but convicted him of cultivation of marijuana and possession of over eight ounces of marijuana. This appeal followed.

II. Suppression Order

Defendant contends that the trial court erred in not suppressing evidence obtained from the warrantless search. We agree.

A. Standard of Review

When reviewing a trial court's suppression ruling, we must determine whether the trial court's factual findings are adequately supported by competent evidence in the record. If they are, we will not disturb them. *People v. Pitts*, 13 P.3d 1218, 1221 (Colo. 2000); *People v. Gennings*, 808 P.2d 839, 844 (Colo. 1991); *People v. Graham*, 53 P.3d 658, 661 (Colo. App. 2001).

We must also determine whether the trial court applied the proper legal standard to the facts of the case. *People v. Jordan*, 891 P.2d 1010, 1015 (Colo. 1995); *Graham*, 53 P.3d at 661. A trial court's legal conclusions are subject to de novo review. *People v. Gothard*, 185 P.3d 180, 183 (Colo. 2008); *Pitts*, 13 P.3d at 1222.

B. Warrantless Search

Warrantless searches are presumptively unconstitutional. U.S. Const. amend. IV; *Coolidge v. New Hampshire*, 403 U.S. 443,

454-55 (1971). However, a warrantless search may be justified and is constitutionally permissible when a citizen consents to the search. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *United States v. Matlock*, 415 U.S. 164, 171 (1974); *Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973); *People v. Breidenbach*, 875 P.2d 879, 888 (Colo. 1994); *People v. Drake*, 785 P.2d 1257, 1265 (Colo. 1990). The prosecution has the burden of proving that voluntary consent was given. *People v. Herrera*, 935 P.2d 956, 958 (Colo. 1997) (citing *Florida v. Royer*, 460 U.S. 491, 497 (1983)); *People v. Santistevan*, 715 P.2d 792, 795 (Colo. 1986). The admissibility of evidence seized pursuant to an allegedly consensual search must stand or fall on the basis of the consent given before the search. *People v. Mendoza-Balderama*, 981 P.2d 150, 156 (Colo. 1999) (citing 3 Wayne R. LaFare, *Search and Seizure* § 8.1 (3d ed. 1996)).

Here, Mr. Dugasz, as executor to his mother's estate, was acting on behalf of the owner of the property. Neither Mr. Dugasz nor the officers were aware of an arrangement in which anyone other than Mr. Zandstra was occupying the property. Therefore,

the officers' reliance upon Mr. Dugasz's letter as consent to enter the home to search for Mr. Zandstra was reasonable and the police were justified in initially entering the premises. *See People v. McKinstrey*, 852 P.2d 467, 470 (Colo. 1993) (the prohibition against warrantless searches does not apply to situations in which voluntary consent has been obtained, either from the individual whose property is searched, or from a third party who possesses common authority over the premises).

However, upon entering the home, officers found defendant, who answered in the affirmative that he had a lease or other arrangement with Ms. Dugasz to be on the property. The existence of such an arrangement without Mr. Dugasz's knowledge was certainly possible, given his limited knowledge of the property. At this point, the police should have obtained consent from defendant to continue searching the house or obtained a search warrant if he refused.

In oral argument, the People conceded that they relied exclusively on the consent of Mr. Dugasz for the warrantless search. However, a third party does not have the authority to consent to a

search simply by virtue of his ownership of the property. *Matlock*, 415 U.S. at 171 n.7. Defendant confirmed to police officers that he had a lease or other arrangement with Ms. Dugasz to occupy the property, and it is undisputed that he never expressly gave authorities consent to search. The People, therefore, had the burden to show that he was an occupant without permission, a burden which they did not meet. Accordingly, the initial search was unlawful because it was conducted without consent from the present occupant. *See Georgia v. Randolph*, 547 U.S. 103, 122-23 (2006) (warrantless search was unreasonable as to the defendant who was physically present and refused to consent).

Because probable cause for the search warrant was based upon the officers' discovery of a large marijuana growing operation in the house during an illegal initial search, the search warrant was also invalid. *United States v. Butts*, 729 F. 2d 1514, 1518 (5th Cir. 1984); *see also Alderman v. United States*, 394 U.S. 165, 176-77 (1969).

We therefore conclude that there was not valid consent to the initial search and that all evidence found during the initial search

and pursuant to the subsequent warrant must be suppressed. Accordingly, the trial court erred in denying suppression of the evidence.

III. Remaining Issues

Defendant has also contended error based upon his asserted right to a primary caregiver's affirmative defense provided under the Colorado Constitution, article XVIII, section 14(2)(a) and the trial court's restricting the number of witnesses he was able to call concerning the care each received. We have concluded that we need not reach these issues in light of our disposition.

When an appellate court reverses a trial court's suppression ruling, the case may be remanded for a new trial based upon the remaining untainted evidence. However, in this case it is apparent from the record that the charges against defendant are based entirely upon evidence obtained as a direct result of the unlawful search. Nothing in the record suggests that the evidence would inevitably have been discovered by other means. *See People v. Pahl*, 169 P.3d 169, 175 (Colo. App. 2006) (the inevitable discovery doctrine requires that at the time the illegal search occurred, the

police must be pursuing other lawful avenues which would have uncovered the evidence). Nor is there any evidence in the record before us that, after entry and before the unlawful search, the police officers had the slightest suspicion that defendant or the fugitive who was the subject of the officers' search, was growing marijuana. Therefore, we remand with directions to dismiss the charges against defendant.

The judgment is reversed, and the case is remanded with directions consistent with this opinion to dismiss the charges against defendant.

JUDGE LOEB and JUDGE CRISWELL concur.