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Jan 25, 2012
Court of Appeals
Division III
State of Washington

29871-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RUBEN ZAMORA JURADO, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Findings of Fact No. 4:

Ms. Deniz spoke limited English, but was able to communicate with the officers.

(CP 152).

2. The trial court erred in entering Findings of Fact No. 5:

Ms. Deniz opened the door, backed away and motioned with her arm for the officers present to enter the residence.

(CP 152).

3. The trial court erred in entering the following portion of

Findings of Fact No. 10:

While Detective Davis was in the living room of the residence, he observed in plain view two firearms on the coffee table as well as several rounds of ammunition.

(CP 152).

4. The trial court erred in entering Conclusions of Law No. 1:

The Detectives in this matter were given permission to enter the residence to contact the defendant regarding their assault investigation by the defendant's wife, Ms. Deniz[.]

(CP 152).

5. The trial court erred in entering Conclusions of Law No. 7:

Once in the home, after being given consent to enter, Detective Davis observed in plain view,

without moving or manipulating the firearm, the serial number on a firearm.

(CP 153).

6. The trial court erred in entering Conclusions of Law No. 8:

Based upon his observations, Detective Davis was then lawfully allowed to run the serial number on the firearm to ascertain if it was stolen.

(CP 153).

7. The trial court erred in entering Conclusions of Law No. 9:

The firearm was not seized until the search warrant was lawfully executed.

(CP 153).

8. The trial court should have suppressed the fruits of the warrantless entry into and unlawful search of the defendant's apartment.

9. The trial court erred in not listing the total legal financial obligation owed by Mr. Jurado.

B. ISSUES

1. Three police detectives arrived at Mr. Jurado's apartment, and his wife, Aracellia Carrillo Deniz, answered the door. She is a Spanish speaker, and there is conflicting testimony regarding the detectives' interactions with her. She stepped

back, and the detectives entered the apartment. Did the detectives violate provisions prohibiting unreasonable searches and seizures, Const. art. I, § 22 and the Fourth Amendment, by entering the apartment without a warrant and not obtaining valid consent from Ms. Deniz?

2. Once inside Mr. Jurado's apartment, a detective observed two firearms. The detectives had no information that these firearms were illegally possessed. A detective ran the serial number on one of the firearms, discovered it was stolen, and used this information to obtain a search warrant. Did the detectives violate provisions prohibiting unreasonable searches and seizures, Const. art. I, § 22 and the Fourth Amendment, by obtaining and running the serial number on the firearm, where the firearm was not immediately recognizable as contraband?
3. At sentencing, the trial court imposed legal financial obligations, but did not set forth the total owed. Should Mr. Jurado be relieved of paying the legal financial obligation or, at a minimum, should the case be remanded for entry of the total legal financial obligation owed?

C. STATEMENT OF THE CASE

Kennewick Police Department detectives John Davis, William Dramis and Mary Buchan went to Ruben Zamora Jurado's apartment to speak to Mr. Jurado regarding an assault investigation. (CP 151; RP¹ 4-5, 11, 21-22, 33, 44, 47, 50, 60-61). Mr. Jurado's wife, Aracellia Carrillo Deniz, answered the door. (CP 151; RP 5-6, 23, 28, 44-45, 60-61). Ms. Deniz, a Spanish speaker, was informed in English by the detectives that they were there to speak with her husband. (CP 151; RP 6, 23, 45, 56, 61-62). The detectives did not give Ms. Deniz *Ferrier*² warnings. (CP 152; RP 7, 23-24, 48, 62). The detectives entered the apartment. (RP 8, 23-24, 28, 45-46, 61). Ms. Deniz walked down the hallway toward a back bedroom, and the detectives followed her. (CP 152; RP 8, 28, 48-49, 61). Mr. Jurado was found in the bedroom, asleep in bed. (CP 152; RP 8, 13, 49, 52, 61). Mr. Jurado was handcuffed and taken out of his apartment. (CP 152; RP 13, 67, 71-73).

While inside the apartment, Detective Davis observed two firearms. (RP 29). He had no probable cause to believe the firearms were stolen. (CP 152). He had no knowledge of Mr. Jurado's immigration

¹ Except where the date is noted, citations to the RP refer to the transcript of the August 25, 2010 hearing.

² *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

status. (RP 25). Detective Davis read the serial number on one of the firearms, without touching it. (CP 152; RP 30, 34). He ran the serial number on the firearm, and discovered it was stolen. (CP 152; RP 30, 34). A search warrant was obtained for the apartment, and two firearms and ammunition were seized. (CP 152; RP 16, 26-27). Both firearms were found to be stolen. (CP 152).

The State charged Mr. Jurado with one count of second degree assault, later amended to one count of fourth degree assault; one count of alien in possession of a firearm; and one count of possession of a stolen firearm. (CP 1-2, 69-71). Mr. Jurado moved to suppress the evidence obtained during the detectives' warrantless entry into and unlawful search of his apartment. (CP 7-23, 25-34).

At the hearing held on Mr. Jurado's motion to suppress, Ms. Deniz told the court the detectives came to her door and asked if her husband was there. (RP 60-61). She said the detectives did not ask if they could come in, but rather followed her in when she went to call for Mr. Jurado. (RP 61). Ms. Deniz told the court the female detective did not say anything in Spanish. (RP 61-62, 64). She said the detectives asked for Mr. Jurado, which she understood later when her son explained it to her. (RP 64, 68-69). Ms. Deniz told the court the detectives spoke with her in English, and that she understood some words, but she could not follow

along with the conversations. (RP 64, 69). She said she did not know she had the right to exclude the detectives from her home. (RP 62-63). Ms. Deniz told the court she does not understand what *Miranda*³ warnings or *Ferrier* warnings are. (RP 63).

Detective Buchan told the court she arrived at Mr. Jurado's apartment with Detective Dramis and Detective Davis. (RP 5). She acknowledged that Ms. Deniz answered the door, and that she did not give her *Ferrier* warnings or *Miranda* warnings. (RP 5-7, 11). Detective Buchan said that she asked Ms. Deniz, "[m]ay I enter?" in Spanish. (RP 11-12, 19). She told the court that Ms. Deniz "backed away, was inviting and opened up her body as well as the door completely wide open[.]" and the detectives then entered the apartment. (RP 12). Detective Buchan acknowledged that she did not know whether Mr. Jurado was a legal resident or a United States citizen. (RP 8). She told the court she was aware that Detective Davis found a firearm, and that she did not determine whether this firearm was stolen. (RP 9-10).

Detective Davis told the court he arrived at Mr. Jurado's apartment with Detective Buchan and Detective Dramis. (RP 22). He acknowledged that a female answered the door, and that she was not given *Ferrier* warnings or *Miranda* warnings. (RP 23-24, 27-28). Detective Davis told

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

the court that Detective Dramis said something to the female in English; she backed up and walked inside; and the detectives entered the apartment. (RP 23, 28). Detective Davis said he did not recall hearing Detective Buchan use a Spanish phrase. (RP 28). He admitted he did not know whether one of the firearms he observed was stolen. (RP 25). He acknowledged he did not know whether Mr. Jurado was a legal resident or a United States citizen. (RP 25).

Detective Dramis told the court that at the apartment door, he asked Ms. Deniz her name, and told her he was there to speak to her husband. (RP 45, 56). He said Detective Buchan then asked Ms. Deniz a question in Spanish, “[a]t which time [Ms. Deniz] made a gesture stepping back. I took that gesture to be inviting us in.” (RP 44-45, 56). Detective Dramis told the court that Ms. Deniz made two gestures:

[Ms. Deniz] made two gestures. One was like this (indicating), and the other Detective Buchan was asking like this (indicating). So, it was a hand forward toward her face and one that was more permission when I was speaking.

(RP 52).

Detective Dramis acknowledged that he did not ask for permission to enter the apartment, but that he was given permission to enter. (RP 55-56). He admitted that Ms. Deniz was not given *Ferrier* warnings. (RP 48). Detective Dramis acknowledged that he did not know whether

Mr. Jurado was a legal resident or a United States citizen. (RP 49). He admitted he did not know that the guns were possessed illegally until the serial numbers were called in. (RP 54).

The trial court denied Mr. Jurado's motion to suppress. (CP 153; RP 80-87). The trial court entered findings of fact and conclusions of law on the motion. (CP 151-153).

Mr. Jurado was convicted as charged following a stipulated facts trial. (CP 98-124; RP (Apr. 27, 2011) 50). The trial court did not list the total legal financial obligation owed by Mr. Jurado, either in the Judgment and Sentence or in a subsequent order. (CP 125-135).

Mr. Jurado appealed. (CP 137).

D. ARGUMENT

1. THE TRIAL COURT SHOULD HAVE SUPPRESSED THE FRUITS OF THE WARRANTLESS ENTRY INTO AND UNLAWFUL SEARCH OF THE DEFENDANT'S APARTMENT.

In reviewing the denial of a suppression motion, the court determines whether substantial evidence supports the challenged findings of fact, and whether the findings support the conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400,

168 L. Ed. 2d 132 (2007). “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Conclusions of law from an order on a suppression motion are reviewed *de novo*. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

As a general rule, warrantless searches and seizures are *per se* unreasonable under the Fourth Amendment and article I, § 7 of the Washington State Constitution. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The general rule is subject to a few jealously and carefully drawn exceptions, including consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002). The State bears the heavy burden of showing the search falls under one of these exceptions. *Garvin*, 166 Wn.2d at 250. It must establish an exception to the warrant requirement by clear and convincing evidence. *Id.*

The detectives’ entry into Mr. Jurado’s apartment and obtaining and running the serial number on the firearm do not fall under an exception to the warrant requirement.

a. The Detectives Did Not Obtain Valid Consent From Ms. Deniz To Enter Mr. Jurado's Apartment Without A Warrant.

“[W]hen the state is not employing the ‘knock and talk’ procedure, the court employs a ‘totality of circumstances’ test to determine whether consent to search is valid.” *State v. Thang*, 145 Wn.2d 630, 637, 41 P.3d 1159 (2002) (quoting *State v. Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999)). The State bears the burden of demonstrating that consent to search was voluntarily given. *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990). “[T]he voluntariness of a consent to search is a question of fact to be determined by considering the totality of circumstances surrounding the alleged consent.” *Id.* (quoting *State v. Shoemaker*, 85 Wn.2d 207, 211-12, 533 P.2d 123 (1975)) (alteration in original). Factors to be considered in determining whether consent was voluntarily given include: “(1) whether *Miranda* warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right to consent.” *Bustamante-Davila*, 138 Wn.2d at 981-82 (quoting *Shoemaker*, 85 Wn.2d at 212). No single factor is dispositive. *Id.* at 982. Further, “the mere opening of a door to see who is there is not the equivalent of freely consenting to entry by that person.” *State v. Counts*, 99 Wn.2d 54, 64, 659 P.2d 1087 (1983).

Ms. Deniz did not voluntarily consent to the detectives entering the apartment. The detectives did not give Ms. Deniz *Miranda* warnings. (RP 5-7, 11, 23-24, 27-28). They did not give Ms. Deniz *Ferrier* warnings, and Ms. Deniz did not know she had the right to exclude the detectives from her home. (CP 152; RP 7, 23-24, 48, 62-63). Ms. Deniz does not understand what *Miranda* warnings or *Ferrier* warnings are. (RP 63).

Given the language barrier between the detectives and Ms. Deniz, she was unable to give informed consent. Ms. Deniz spoke Spanish, and the detectives spoke English. (CP 151). Although Ms. Deniz spoke some English, she told the court she did not understand what was being asked. (RP 64, 69). The trial court's factual findings related to Ms. Deniz's consent to enter (findings 4 and 5) are not supported by substantial evidence. (CP 152). The evidence that Ms. Deniz was able to communicate with the officers during their entry into the apartment was not substantial. (CP 152). Ms. Deniz said she understood the detectives' request to speak to Mr. Jurado only when her son explained it to her. (RP 64, 68-69). Detective Buchan's testimony that she used a Spanish phrase demonstrates the detectives understood there was a language barrier. (RP 11-12, 19).

The evidence that Ms. Deniz affirmatively consented to the detectives' entry by motioning with her arm was not substantial. (CP 152). While the testimony of Detective Buchan and Detective Dramis described Ms. Deniz as gesturing to allow their entry, Ms. Deniz testified that the officers followed her into the apartment. (RP 12, 45, 52-53, 56, 61). Detective Davis testified that Ms. Deniz backed up and walked inside. (RP 23, 28). Detective Dramis described the gestures given by Ms. Deniz, but his testimony does not demonstrate that these gestures were given to grant permission to enter the apartment:

[Ms. Deniz] made two gestures. One was like this (indicating), and the other Detective Buchan was asking like this (indicating). So, it was a hand forward toward her face and one that was more permission when I was speaking.

(RP 52).

Ms. Deniz did not give the detectives permission to enter the apartment to contact Mr. Jurado regarding their assault investigation, as the trial court stated in Conclusions of Law No. 1. (CP 152; RP 45, 56, 61). Detective Dramis told the court he told Ms. Deniz they were there to speak to her husband. (CP 45, 56). There is no testimony that the detectives explained their purpose was an assault investigation. Absent testimony that the detectives explained the purpose of their visit before entering, and absent testimony that they did so in Spanish, there is no

evidence that any permission given by Ms. Deniz was for the purpose of allowing contact with Mr. Jurado regarding the assault investigation.

The totality of the circumstances does not establish voluntary consent to enter the apartment. Therefore, the trial court should have suppressed the fruits of the warrantless entry, the two firearms discovered inside. *See State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005) (evidence obtained during an illegal search is subject to suppression under the exclusionary rule and the fruit of the poisonous tree doctrine).

b. If The Detectives Obtained Valid Consent To Enter Mr. Jurado's Apartment, Obtaining And Running The Serial Number On The Firearm Did Not Fall Under The Plain View Exception To The Warrant Requirement.

A discovery made in "plain view" is not a search. *State v. Khounvichai*, 149 Wn.2d 557, 565, 69 P.3d 862 (2003). "Under the plain view doctrine, an officer must: (1) have a prior justification for the intrusion; (2) inadvertently discover the incriminating evidence⁴; and (3) immediately recognize the item as contraband." *Bustamante-Davila*, 138 Wn.2d at 982 (quoting *State v. Myers*, 117 Wn.2d 332, 346, 815 P.2d 761 (1991)).

⁴ This second prong is no longer a requirement for the plain view exception under the Fourth Amendment. *State v. Kull*, 155 Wn.2d 80, 85 n.4, 118 P.3d 307 (2005) (citing *State v. O'Neill*, 148 Wn.2d 564, 583 n.6, 62 P.3d 489 (2003)).

In *Bustamante-Davila*, our Supreme Court found that the defendant validly consented to entry into his home by a United States Immigration and Naturalization Service (INS) agent and police officers. *Bustamante-Davila*, 138 Wn.2d at 981-82. The court further found that the INS agent and police officers legally seized a rifle found in the defendant's home, under the plain view exception to the warrant requirement. *Id.* at 982-83. The police officer who seized the rifle knew the defendant was "an undocumented non-citizen and a convicted felon who may not lawfully possess a firearm." *Id.* at 982. The INS agent was also aware the defendant "was not a United States citizen, had been deported, and had unlawfully reentered the country, and therefore was not lawfully permitted to possess a firearm." *Id.* at 969.

Assuming, for the purpose of this argument, that the detectives lawfully entered Mr. Jurado's apartment, Detective Davis's obtaining and running of the serial number on the firearm did not fall under the plain view exception to the warrant requirement. Unlike the officers in *Bustamante-Davila*, the detectives did not immediately recognize the firearm as contraband, because they had no knowledge that it was illegal for Mr. Jurado to possess a firearm, or that the firearms were stolen. *See Bustamante-Davila*, 138 Wn.2d at 969, 982; *see also State v. Keefe*, 13 Wn. App. 829, 830, 832-35, 537 P.2d 795 (1975) (police officer could

not take letter samples from a typewriter under the plain view exception, because he did not have immediate knowledge that he had evidence before him). At the time the serial number was taken and called in, the detectives were not aware of Mr. Jurado's immigration status, or that he was otherwise prohibited from possessing a firearm. (RP 8, 25, 49, 54). Detective Davis did not know whether the firearms were stolen; this was discovered only after the serial number was ran. (CP 152; RP 25, 30, 34, 54).

Because it was not immediately recognized as contraband, obtaining and running the serial number on the firearm does not fall under the plain view exception to the warrant requirement. Therefore, the trial court should have suppressed the fruits of the unlawful search, the two firearms discovered inside the apartment. *See Gaines*, 154 Wn.2d at 716-17.

2. THE TRIAL COURT ERRED IN NOT LISTING THE TOTAL LEGAL FINANCIAL OBLIGATION OWED BY MR. JURADO.

Under RCW 9.94A.760:

Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence. The court *must* on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments

made for restitution, costs, fines, and other assessments required by law.

RCW 9.94A.760(1) (emphasis added).

The trial court did not list the total legal financial obligation owed by Mr. Jurado, either in the Judgment and Sentence or in a subsequent order. (CP 125-135). Under RCW 9.94A.760(1), the trial court must set forth the total. Accordingly, Mr. Jurado should be relieved of paying the legal financial obligation. At a minimum, the case should be remanded for entry of the total legal financial obligation owed, as mandated by RCW 9.94A.760(1).

E. CONCLUSION

The detectives' entry into Mr. Jurado's apartment did not fall under the consent exception to the warrant requirement. In the alternative, if this court finds the detectives lawfully entered Mr. Jurado's apartment, obtaining and running the serial number on the firearm does not fall under the plain view exception to the warrant requirement. Under either scenario, the trial court should have suppressed the fruits of the warrantless entry into and unlawful search of the defendant's apartment, and the two firearms. Mr. Jurado's convictions for alien in possession of a firearm and possession of a stolen firearm should be dismissed.

Mr. Jurado should also be relieved of paying the legal financial obligation, or the case should be remanded for entry of the total legal financial obligation owed, as mandated by RCW 9.94A.760(1).

Dated this 25th day of January, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29871-0-III
)	
vs.)	CERTIFICATE
)	OF MAILING
RUBEN ZAMORA JURADO,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on January 25, 2012, I served a copy of the Appellant's Brief in this matter by email on the following parties, receipt confirmed, pursuant to the parties' agreement:

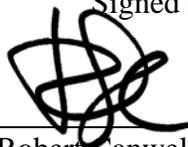
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