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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1325**

State of Minnesota,
Respondent,

vs.

Peter James Nelson,
Appellant.

**Filed May 15, 2017
Affirmed
Larkin, Judge**

Ramsey County District Court
File No. 62-CR-15-2486

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Larkin, Judge; and Reilly,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of possession of child pornography, arguing that the district court erred by denying his motion to suppress evidence found on his cell phones. We affirm.

FACTS

On July 18, 2014, St. Paul Police Department Officer Neil Anderson stopped appellant Peter James Nelson as he rode a bicycle without a headlight in an alley in St. Paul around midnight.¹ Officer Anderson asked Nelson what he was doing in the area. Nelson told the officer that he was there to meet “Al the Roofer.” In response to questions from Officer Anderson, Nelson identified himself and told the officer that he had a knife. Officer Anderson pat searched Nelson and recovered the knife, as well as three cell phones.

Officer Anderson determined that Nelson had an outstanding felony warrant for his arrest and arrested Nelson based on the warrant. Officer Anderson informed Nelson that he would be taken into custody and asked Nelson what he wanted to do with his bicycle. Nelson told Officer Anderson that Al’s phone number was on his cell phone and suggested that Al might be able to take the bicycle. When Officer Anderson used Nelson’s cell phone to find Al’s phone number, he immediately noticed an image of an unclothed prepubescent girl on the phone.

¹ Our recitation of the facts is based on findings made by the district court after a contested evidentiary hearing on Nelson’s motion to suppress.

In October 2014, the police obtained a search warrant authorizing a forensic examination of Nelson's cell phones. The examination revealed numerous child-pornography images.

Respondent State of Minnesota charged Nelson with possession of child pornography. Nelson moved to suppress the images on his cell phones, arguing, in part, that Officer Anderson's use of Nelson's phone was an unconstitutional warrantless search. The district court denied the motion after an evidentiary hearing. The district court appears to have treated Officer Anderson's use of Nelson's cell phone as a warrantless search and then found that Nelson voluntarily consented to that use. Nelson stipulated to the prosecution's evidence in a court trial to preserve review of the district court's ruling, and the district court found him guilty as charged. This appeal follows.

D E C I S I O N

I.

Nelson challenges the district court's denial of his motion to suppress, arguing that "the state failed to prove [he] voluntarily consented to a search of his cell phone." The state contends that Officer Anderson's use of Nelson's cell phone "did not constitute a search at all, and does not implicate the Fourth Amendment." For the purposes of this appeal, we assume, without deciding, that Officer Anderson's use of Nelson's phone was a search implicating the protections of the Fourth Amendment.

The United States and Minnesota Constitutions prohibit unreasonable government searches of "persons, houses, papers, and effects." U.S. Const. amend. IV; Minn. Const. art. I, § 10. "Warrantless searches are presumptively unreasonable unless one of 'a few

specifically established and well-delineated exceptions’ applies.” *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). The state bears the burden of establishing an exception to the warrant requirement. *Id.*

Consent is an exception to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44 (1973). To justify a warrantless search based on consent, the state must prove, by a preponderance of the evidence, that consent was voluntarily obtained. *State v. Harris*, 590 N.W.2d 90, 102 (Minn. 1999). “‘Voluntariness’ is a question of fact and it varies with the facts of each case.” *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). “Whether consent was voluntary is determined by examining the totality of the circumstances, including the nature of the encounter, the kind of person the defendant is, and what was said and how it was said.” *Harris*, 590 N.W.2d at 102 (quotation omitted).

Consent is not involuntary solely because “the circumstances of the encounter are uncomfortable for the person being questioned.” *Dezso*, 512 N.W.2d at 880. Likewise, “[c]onsent is not involuntary merely because the person giving the consent has been seized.” *Harris*, 590 N.W.2d at 104. But this court “infer[s] consent less readily after a seizure because once arrested, a person becomes more susceptible to police duress and coercion.” *State v. Diede*, 795 N.W.2d 836, 847 (Minn. 2011) (quotation omitted).

Whether consent was voluntary is a question of fact that we review for clear error. *Id.* at 846. “Findings of fact are clearly erroneous if, on the entire evidence, [this court is] left with the definite and firm conviction that a mistake occurred.” *Id.* at 846-47. When

reviewing a district court's findings of fact, this court defers to the district court's credibility determinations. *State v. Kramer*, 668 N.W.2d 32, 38 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003).

Nelson contends that the state failed to prove that he voluntarily consented to the search of his cell phone. He notes that he had been arrested and was handcuffed when Officer Anderson used his phone. He asserts that he never gave Officer Anderson permission to look through his phone. And he points out that the district court described the testimony as "a little confusing."

The district court noted that although the evidence was unclear regarding how Officer Anderson came to use Nelson's phone, "[w]hat is clear is that [Officer Anderson] at all times had [Nelson's] consent or permission to access the cell phone." The district court reasoned that Officer Anderson "had no reason to access [Nelson's] cell phone other than to assist [him]," and that "[a]ll of the evidence indicates that [Officer Anderson] was accessing the cell phone with [Nelson's] consent."

As to the totality of the circumstances, the district court found that the encounter between Officer Anderson and Nelson "was at all times cordial," that there was no indication that Officer Anderson "pulled his weapon out," and that there was "nothing to indicate [Officer Anderson] used any threats or intimidation during the encounter." The district court also found that "there is no indication that [Officer Anderson] handcuffed [Nelson]." With the exception of the handcuff determination, the district court's findings are supported by the record.

Officer Anderson's testimony regarding his efforts to arrange for the care of Nelson's bicycle was as follows. Before discussing the bicycle, Officer Anderson handcuffed Nelson and informed him that he was under arrest. Officer Anderson told Nelson that he needed to "do something with his bike." Officer Anderson offered to either bring the bicycle back to Nelson's home or take it to the impound lot. Nelson stated that he wanted to take the bicycle to Al's house. Officer Anderson asked Nelson if he had Al's phone number, so the officer could call Al and let Al know that the officer would deliver the bicycle to his home. Nelson said that he did not know Al's number. Officer Anderson therefore asked Nelson if he could use Nelson's cell phone, and Nelson agreed that the officer could do so.

Nelson testified that he did not ask Officer Anderson to look through his phone for Al's phone number or to call Al. Instead, Nelson testified that he was sitting in Officer Anderson's squad car when his phone rang. Officer Anderson handed Nelson his phone. Nelson spoke to Al. Al hung up after hearing that Nelson had been arrested, and the phone turned off. Nelson also testified that the phone in question had a pattern lock on it. Nelson's reliance on his testimony is unavailing because the district court did "not find [Nelson's] self-serving testimony credible or relevant," and this court defers to that credibility determination.

Nelson's reliance on *State v. Barajas*, 817 N.W.2d 204, 218 (Minn. App. 2012), review denied (Minn. Oct. 16, 2012), and *State v. Dezso*, 512 N.W.2d at 880, is also unavailing because both cases are readily distinguishable on their facts.

In *Barajas*, the police received a report that a possible trespasser was living in an apartment. 817 N.W.2d at 210. Officers entered the apartment, encountered Barajas, learned that he was unlawfully residing in the United States, detained him, and transported him to jail. *Id.* The officers recovered two cell phones when they pat searched Barajas. *Id.* An officer found a third cell phone on the kitchen counter in the apartment. *Id.* When the officer examined the phone's content to identify its owner, the officer observed an image of Barajas lying on a bed with a large amount of money. *Id.*

Border patrol agents transported Barajas from jail to a border patrol station. *Id.* There, agents presented Barajas with a consent form, written in English, seeking his permission to search the phones. *Id.* Barajas, who “spoke little English,” signed the form, and the search of the phones revealed evidence of drug trafficking. *Id.*

This court determined that Barajas's consent was involuntary under the totality of the circumstances. *Id.* at 218. We reasoned that a border patrol agent gave Barajas the consent form after law enforcement had detained him, transported him to jail, transported him to a border patrol station, confiscated his wallet and cell phones, and questioned him multiple times. *Id.* This court noted that Barajas “was in a vulnerable position because of his citizenship status, his lack of proficiency in English, and the absence of a neutral interpreter.” *Id.*

Unlike Barajas, Nelson was not subjected to repeated questioning before Officer Anderson asked to use his phone. And he was not asked to consent while detained in a border patrol station as an unlawful resident of the United States. Moreover, there is no

evidence that Nelson did not understand Officer Anderson's questions or was otherwise in a vulnerable position akin to that of Barajas.

Dezso is similarly distinguishable on its facts. In *Dezso*, an officer spoke with a driver in the officer's squad car after stopping him for speeding. 512 N.W.2d at 879. While returning the driver's license to the driver, the officer noticed that the driver seemed to tilt his wallet away from the officer's view. *Id.* The officer asked the driver whether he had anything else with his name on it in the wallet. *Id.* As the driver "removed various cards from the wallet to show the officer," the officer leaned towards the driver and looked at his wallet. *Id.* The driver "evasively tilted the wallet away from the officer's gaze." *Id.* The officer then twice asked the driver whether he could take a look at the wallet. *Id.* The driver replied "No, it's just my stuff" and "Yeah, I got, ah . . . cards." *Id.* During that conversation, the driver handed the wallet to the officer. *Id.*

The supreme court determined that the driver's consent was not voluntary under the totality of the circumstances. *Id.* at 881. The supreme court noted that the officer's questions "though couched in nonauthoritative language, were official and persistent, and were accompanied by the officer's body movement in leaning over towards the defendant seated next to him." *Id.* The supreme court also noted that there was "no indication that [the driver] was aware that he could refuse to let the officer see the wallet." *Id.* The supreme court reasoned that the driver's answers to the officer's questions regarding the wallet "seem not so much to indicate willingness to allow the search as an effort, under intimidating circumstances, to fend off a search with equivocal responses." *Id.*

Unlike the driver in *Dezso*, Nelson did not give equivocal responses to persistent requests for consent. Officer Anderson testified that Nelson did not hesitate when he agreed that Officer Anderson could use his phone and that Nelson was “[v]ery cooperative,” “[d]idn’t argue” with him, “[d]idn’t resist at all,” and “[a]nswered the questions that [he] asked him.” Also, there is no evidence that Officer Anderson asked for consent in an intimidating manner, either through his tone of voice or body language. Indeed, Nelson concedes that “[Officer] Anderson’s questions about the bike were more casual than authoritative[.]”

In sum, even though Officer Anderson had arrested and handcuffed Nelson, the record does not suggest that Officer Anderson coerced Nelson into allowing the officer to use his phone. Instead, the record supports the district court’s determination that Officer Anderson “accessed the cell phone . . . to assist [Nelson]” with his bicycle. Under the totality of the circumstances, Nelson’s custodial status did not render his consent involuntary, and the district court’s finding that Nelson voluntarily consented to Officer Anderson’s use of his phone is not clearly erroneous. *See United States v. Bearden*, 780 F.3d 887, 895 (8th Cir. 2015) (upholding district court’s finding that defendant’s consent to a search was valid even though he was handcuffed when he consented).

Nelson argues that even if he authorized Officer Anderson to find Al’s contact information on his phone, such limited voluntary consent “does not authorize indiscriminate rummaging into a person’s possessions.” *State v. Bunce*, 669 N.W.2d 394, 399 (Minn. App. 2003) (quotation omitted), *review denied* (Minn. Dec. 16, 2003). The record does not suggest that Officer Anderson indiscriminately rummaged through

Nelson's phone. Officer Anderson testified that he either pushed a button to open the phone or swiped the screen and saw an image of what appeared to be an unclothed ten-year-old girl. Officer Anderson also testified that the image was the "first thing that came on once the phone was activated." We acknowledge that Nelson testified that the phone in question had a pattern lock on it, but the district court found Nelson's self-serving testimony not credible and Officer Anderson's testimony credible. We defer to that credibility determination.

II.

Nelson asserts additional errors in a supplemental pro se brief. For example, he argues that the state failed to prove that the relevant images depicted real people, that the chain of custody for one of the phones was broken, and that his right to a speedy trial was violated.

Nelson stipulated to the prosecution's evidence in a trial to the court to obtain appellate review of the district court's pretrial ruling under Minn. R. Crim. P. 26.01, subd. 4. Appellate review under this rule is "of the pretrial issue, but not of the defendant's guilt, or of other issues that could arise at a contested trial." See Minn. R. Crim. P. 26.01, subd. 4(f) (providing that the defendant must acknowledge the limited scope of appellate review of a court trial under Minn. R. Crim. P. 26.01, subd. 4). When Nelson agreed to proceed under Minn. R. Crim. P. 26.01, subd. 4, he expressly acknowledged that he had "the right to appeal any pretrial ruling rendered by the court" and that he could not "appeal any

finding of guilt, or of other issues that could arise at a contested trial.” Given the procedural posture of this case, Nelson’s additional claims of error are beyond the scope of this appeal.

Affirmed.