

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
Filed 6/28/2023 10:37 AM

STATE OF NEW MEXICO,

Plaintiff-Appellee,



Mark Reynolds

v.

No. A-1-CA-40534

MARK A. HEITZ,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY

Dustin K. Hunter, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Allison H. Jaramillo, Assistant Appellate Defender
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

DUFFY, Judge.

{1} Defendant appeals from the district court's judgment and sentence, convicting
him of possession of visual medium of sexual exploitation (child under thirteen),
pursuant to NMSA 1978, Section 30-6A-3(A). [5 RP 1193] Unpersuaded by
Defendant's docketing statement, we issued a notice of proposed summary

1 affirmance. Defendant has responded to our notice with a memorandum in
2 opposition, which we have duly considered. We remain unpersuaded and affirm.

3 {2} In response to our notice, Defendant contends that his consent to turn over his
4 cell phone to officers, while the officers were executing a search warrant of his
5 home, was invalid because his consent was not voluntarily given and was instead a
6 mere acquiescence to a coercive show of authority. [MIO 5-11] “We review the trial
7 court’s factual determination that Defendant’s consent was voluntary, given the
8 totality of the circumstances, for substantial evidence.” *State v. Chapman*, 1999-
9 NMCA-106, ¶ 19, 127 N.M. 721, 986 P.2d 1122. Defendant analogizes the
10 circumstances of this case to those in *State v. Lovato*, 2021-NMSC-004, 478 P.3d
11 927, and *State v. Pierce*, 2003-NMCA-117, 134 N.M. 388, 77 P.3d 292. [MIO 7-10]
12 Defendant also distinguishes the circumstances of the current case from those in
13 *State v. Shaulis-Powell*, 1999-NMCA-090, ¶¶ 10-12, 127 N.M. 667, 986 P.2d 463,
14 in which this Court held that the officer obtained the defendant’s consent to the
15 search by assessing the situation without coercion and having probable cause for the
16 search. We are not persuaded by Defendant’s analogy to *Lovato* and *Pierce* or his
17 attempt to distinguish *Shaulis-Powell*.

18 {3} In *Lovato*, our Supreme Court held that the defendant’s consent was invalid
19 where the officers made an unequivocal assertion that a search was inevitable and a
20 refusal would be futile. 2021-NMSC-004, ¶ 21. The Court concluded that the

1 officer’s statement “that he had obtained over 222 search warrants and had never
2 once been denied,” combined with the officer’s presentation of two options to the
3 defendant—that he could consent or the officer “would get a search warrant and [the
4 d]efendant would be kicked out of the residence pending the arrival of the
5 warrant”—communicated to the defendant that a search of his property was
6 inevitable and his refusal would be futile. *Id.*; see also *State v. Davis*, 2013-NMSC-
7 028, ¶ 23, 304 P.3d 10 (“When an officer unequivocally asserts that he will be able
8 to obtain a warrant, a defendant’s belief that refusal to consent would be futile
9 demonstrates involuntary consent.”). Accordingly, our Supreme Court held that the
10 defendant’s consent was rendered involuntary. See *Lovato*, 2021-NMSC-004, ¶ 21.
11 In *Pierce*, under notably restrictive and coercive circumstances, this Court held that
12 where two officers detained the defendant for over twenty minutes in handcuffs on
13 a curb, stood over the defendant while repeatedly asking for consent to a search, and
14 continued to press the defendant for information, the defendant’s eventual
15 capitulation to remove the object from his pocket was not free from coercion and
16 duress. 2003-NMCA-117, ¶ 21.

17 {4} Here, officers were finishing a search of Defendant’s home pursuant to a valid
18 search warrant when Defendant and his father entered the residence. [2 RP 450]
19 Defendant and his father were treated respectfully. [2 RP 455] An officer explained
20 to Defendant what the officers were doing at his house and what they were looking

1 for, and the officer asked if Defendant had his cell phone on him. [2 RP 450]
2 Defendant indicated that he did and immediately removed the cell phone from his
3 pocket. [2 RP 451] The officer asked if she could have the cell phone, and Defendant
4 immediately, and without any hesitation or pause, handed the cell phone to the
5 officer. [*Id.*] The officer did not demand that Defendant turn over his cell phone.
6 [*Id.*] There was no use of force, no brandishing of weapons, no lengthy or abusive
7 questioning, and no threat of force or arrest. [2 RP 456] *See State v. Chapman*, 1999-
8 NMCA-106, ¶ 21 (noting that defining duress or coercion in the context of consent
9 to search borrows from considerations associated with coerced confessions, such as
10 a threatening display of weapons, improper use of force, deprivation of food and
11 water, improper promise of leniency, or threat to prosecute for crimes not
12 committed). During the search, Defendant was directed to sit on the couch in his
13 living room, and although Defendant did not testify that he was not free to leave,
14 there is evidence to suggest Defendant was not permitted to move throughout the
15 house while the search was ongoing. [MIO 4; 2 RP 455; 3 RP 529] The officers
16 made no statement indicating that Defendant could not or should not refuse to hand
17 over his cell phone, no coercive tactics were employed, and Defendant was not
18 physically restrained or placed in handcuffs.

19 {5} We believe the facts here are more analogous to those in *Shaulis-Powell*,
20 where two officers wearing guns appeared at the defendant's door without a warrant

1 or uniforms, identified themselves, and asked for consent to search the premises for
2 marijuana plants. 1999-NMCA-090, ¶¶ 3-4. This Court noted that although there
3 were facts that weigh against voluntary consent—i.e., the defendant and his wife
4 were not advised of their rights until after the search, the officer stated a belief that
5 he had enough evidence for a warrant, and there was a threat of arrest if the defendant
6 did not consent—the officer’s statements simply reflected his assessment of the
7 situation, did not convey that refusal to consent would be futile, and constituted
8 lawful incentive for the defendant’s cooperation. *Id.* ¶¶ 11, 14-16. This Court also
9 stated that where there is probable cause to support a warrant, “the officer can inform
10 the suspect that he or she will get a warrant without invalidating subsequent
11 consent.” *Id.* ¶ 12 (“If a warrant is obtainable, [the] defendants’ privacy rights under
12 the Fourth Amendment are not violated.”).

13 {6} The facts of this case reflect that the officer told Defendant what was
14 happening at his residence, what they were looking for, and why they were
15 searching. The officers did not threaten to arrest Defendant and did not express any
16 opinion about whether they could get a warrant to search his person. As in *Shaulis-*
17 *Powell*, we believe that the officer in this case was simply stating an assessment of
18 the situation before she asked if Defendant had his cell phone and if she could have
19 it. We see no indication that the officers used coercion to obtain Defendant’s cell
20 phone. Additionally, Defendant makes no argument that the officers lacked probable

1 cause to search for the cell phone, and the search warrant for the home authorized
2 seizure of the cell phone. [2 RP 449]

3 {7} To the extent Defendant suggests that the officers' presence in his residence
4 pursuant to a search warrant was so intimidating that it invalidated his consent, we
5 are not persuaded. In a more intimidating show of authority than that in the current
6 case, our Supreme Court in *Davis* held that the defendant's consent was valid. 2013-
7 NMSC-028, ¶ 27. In *Davis*, there were six or seven law enforcement officers armed
8 with semi-automatic weapons, several government vehicles in a perimeter around
9 the defendant's house, and a helicopter hovering overhead. *Id.* ¶ 3. When one of the
10 armed officers confronted the defendant at the door and asked for permission to
11 search, the defendant expressed discontent with the officers searching, a belief that
12 the officers were searching anyway, and displeasure with that he did not have any
13 options. *Id.* ¶¶ 5-6. The Court reasoned that although there was a strong presence of
14 law enforcement, the officers conducted themselves in a professional manner, never
15 unholstered their weapons, directly addressed the defendant's concerns that a search
16 had already begun, and communicated in calm, slow tones to explain to the
17 defendant he was not required to consent. *Id.* ¶¶ 26, 32. In light of our Supreme
18 Court's holding that the strong show of authority in *Davis* did not invalidate the
19 defendant's consent, we are not persuaded that the presence of the officers in
20 Defendant's home pursuant to a valid search warrant, coupled with the seemingly

1 respectful, yet stern, manner with which the officers treated Defendant rose to the
2 level of coercion that would invalidate the voluntary nature of his consent.

3 {8} Furthermore, we note that “[l]awful, non-coercive police activity does not in
4 and of itself constitute the type of duress that makes consent involuntary.” *Chapman*,
5 1999-NMCA-106, ¶ 19. Our courts recognize that, under a limited set of
6 circumstances, the police have the authority to temporarily detain a resident during
7 searches conducted pursuant to a search warrant. *See State v. Madsen*, 2000-NMCA-
8 050, ¶¶ 14-17, 129 N.M. 251, 5 P.3d 573 (applying concept that “a warrant to search
9 for contraband founded on probable cause implicitly carries with it the limited
10 authority to detain the occupants of the premises while a proper search is conducted”
11 and that “the existence of the search warranted provides an objective justification
12 for the detention”); *see State v. Graves*, 1994-NMCA-151, ¶ 12, 119 N.M. 89, 888
13 P.2d 971 (recognizing that a resident may be lawfully detained during the execution
14 of a residential search warrant). Defendant has cited to no authority to suggest that
15 under the facts of this case, the officers overcame Defendant’s will by directing him
16 to sit down and remain in his living room while the search was ongoing. *See Lovato*,
17 2021-NMSC-004, ¶ 15 (stating that the essential inquiry in determining whether
18 consent to search is voluntary is whether, under the totality of the circumstances,
19 “the defendant’s will has been overborne” (alteration, internal quotation marks, and


1 citation omitted)); *see also State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d
2 1129 (stating that “given no cited authority, we assume no such authority exists”).

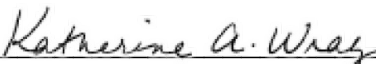
3 {9} Accordingly, and for the reasons stated in our notice of proposed disposition
4 and herein, we affirm.

5 {10} **IT IS SO ORDERED.**

6 
7 MEGAN P. DUFFY, Judge

8 **WE CONCUR:**

9 
10 J. MILES HANISEE, Judge

11 
12 KATHERINE A. WRAY, Judge