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FILED
JAN 26 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed January 26, 1983

vs.)

DENNIS MICHAEL PAGLIA,) 2-416/67772

Defendant-Appellant.)

Appeal from Marshall District Court - David R. Hansen, Judge.

Defendant appeals his conviction of theft in the first degree in violation of Iowa Code §§ 714.1(4) and 714.2(1). AFFIRMED.

Joseph C. Johnston and Frank L. Fowler of Johnston & George, Iowa City, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and John Messina, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

PER CURIAM

Defendant appeals his conviction of theft in the first degree in violation of Iowa Code §§ 714.1(4) and 714.2(1). He claims that the trial court erred in overruling his motion to suppress evidence obtained as the result of a warrantless search and seizure where his alleged consent thereto was not voluntarily given. We affirm.

On February 17, 1981, defendant was charged by information with first degree theft in exercising control over certain property stolen from a school, knowing or having reason to know such property was stolen. He filed a motion to suppress the evidence resulting from a search of his residence and seizure of the stolen property, alleging the unconstitutionality of the search and seizure in that it was done without a search warrant. The State resisted the motion, claiming that defendant consented to the search. After a hearing, the court overruled defendant's motion, ruling that the State had proved by a preponderance of the evidence that defendant consented to the search. The challenged evidence was admitted at trial. Defendant was found guilty of the offense charged, and on November 5, 1981, he was sentenced to an indeterminate term not to exceed ten years and a $2,500 fine. The sentence of confinement was suspended and defendant was put on probation. He brought this appeal.

Defendant presents one issue—he claims that the trial court erred in overruling his motion to suppress on the basis of a consent search, and therefore, the admission of the seized evidence violated his fourth amendment rights. In examining constitutional questions of this nature, our review is **de novo.** State v. Jones, 274 N.W.2d 273, 275 (Iowa 1979). "Warrantless searches are per se unreasonable unless one of three exceptions are present: (1) the search is incident to an arrest; (2) the search is consented to; or (3) exigent circumstances require an immediate search. (citations)." State v. Folkens, 281 N.W.2d 1, 3 (Iowa 1979). When, as here, the State relies on the consent exception to justify a warrantless

search, the State has the burden of proving consent by a preponderance of the evidence. Id. In determining whether the trial court erred in overruling a motion to suppress, we may consider not only the evidence presented at the hearing on the motion, but also the evidence presented at trial. State v. Brown, 253 N.W.2d 601, 603 (Iowa 1977).

Defendant claims that he did not validly consent to the search since he was told by the police that they had a search warrant. It is clear that consent obtained only after the official conducting the search states that he has a warrant is not effective: "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." Bumper v. North Carolina, 391 U.S. 543, 548-49, 88 S. Ct. 1788, 1791-92, 20 L. Ed. 2d 797, 802 (1968).

We must therefore determine whether defendant consented to the search before or after he was told by the officers that they had a search warrant. Upon examining the records made in the suppression hearing and at trial, we conclude that he consented to the search before he was told of the search warrant. Although defendant's wife testified to the contrary at the suppression hearing, we deem more persuasive defendant's own testimony at trial:

> Q. Now, what time did the police arrive?
>
> A. It was I believe three o'clock that afternoon.
>
> Q. What did they say to you when they arrived?
>
> A. Well, they came to the house and knocked on the back door; and I was in the garage so I walked out to see what they wanted, and they told me that they understood that I had some TV sets that were stolen from the high school in my basement. And I said yes I do. I said would you like to see them, and they said would you show them to us and I said yes. And then they told me they had a search warrant for the house. (emphasis added)

The clear import of this testimony is that defendant gave his oral consent to the search; indeed, even offered to show the officers the stolen property, before he

was told about the warrant. There is nothing in his testimony at the suppression hearing which contradicts his testimony at trial; the few statements he made on this issue were either vague on the question of the sequence of events or dealt with his signing a search consent form which occurred after he orally consented to the search.

Since defendant freely and voluntarily consented to the search before being told of the search warrant, this case does not present a Bumper problem. Therefore, the trial court did not err in overruling defendant's motion to suppress. The conviction and sentence are affirmed.

AFFIRMED.