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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHELE LYNN HICKOK,

Defendant and Appellant.

C070460

(Super. Ct. No. 11F01301)

Defendant Michele Lynn Hickok pleaded no contest to possession of methamphetamine. She now contends the trial court erred in (1) denying her motion to suppress evidence, and (2) imposing a \$59 jail classification fee and a \$287 jail booking fee without determining defendant's ability to pay them.

We conclude (1) the trial court did not err in denying defendant's motion to suppress because she consented to the warrantless search of her bedroom; and (2) we will

remand the matter to permit a determination regarding defendant's ability to pay the booking and classification fees.

BACKGROUND

We summarize the facts adduced at the hearing on defendant's motion to suppress, but we will reference additional facts in the discussion as relevant to defendant's contentions.

Officer Nick Echeverria received information from a citizen that there was concern regarding the welfare of defendant's children. The information included accusations that defendant was using drugs and selling them from her residence.

The next day at 1:00 a.m., Officer Echeverria went to defendant's residence in full uniform with Officer Valenzuela and trainee Officer Lemoine. Officer Echeverria knocked on defendant's front door. When defendant opened the door, Officer Echeverria asked to come inside and conduct a welfare check on the children. Defendant gave her consent, but asked Officer Echeverria to be quiet because the children were sleeping. All three officers entered the home with no objection from defendant.

Officer Echeverria asked defendant if anyone else was present in the home. Defendant replied that someone was in her bedroom. Officer Echeverria requested defendant's permission to locate that person and to confirm there was no one else in the residence. Defendant gave him permission and Officer Echeverria performed a protective sweep of the home. Officer Echeverria contacted other people in the residence and asked them to go in the living room.

The officers conducted the welfare check. The children were sleeping in their respective beds, the apartment was appropriately heated, and there was food in the refrigerator.

Officer Echeverria told defendant he received information that she was using drugs and selling drugs from the home. Defendant denied selling drugs, but admitted there was methamphetamine in her bedroom. She told Officer Echeverria he would find

methamphetamine and some pipes in a pink Hello Kitty box under her bed. Officer Echeverria asked defendant if he could look under her bed and retrieve those items, and defendant said that he could.

Officer Echeverria looked under defendant's bed and found the pink Hello Kitty box. Inside the box he found "[l]ots of empty plastic baggies," four baggies with an "off-white substance" inside, and four glass pipes commonly used for smoking methamphetamine. The off-white substance was later determined to be methamphetamine with a total weight of .43 grams.

Defendant made a motion to suppress the drug evidence (Pen. Code, § 1538.5) and the People opposed the motion. At the hearing on the motion, defendant testified that she was in her bedroom when she heard a knock at the front door. The officers told her they were there to perform a welfare check on the children. Defendant said she only invited Officer Echeverria into the residence, but the other two officers also entered and began looking around the house without permission.

According to defendant, one of the officers confined her to the kitchen, another officer confined the other adults to the front room, and a third officer "ransacked" her bedroom. After her bedroom was ransacked, one of the officers told her he wanted to search the house for drugs. Defendant testified the officer also told her that if she did not allow them to search the house, he would "lock this house down and make [her] life a living hell." She denied giving any of the officers consent to search her bedroom, and she denied telling Officer Echeverria she used methamphetamine.

The trial court noted that the officers searched the residence without a warrant and that the issue was whether consent had been given. The trial court said it had to make a credibility finding regarding Officer Echeverria's testimony and defendant's testimony. The trial court found in favor of Officer Echeverria's credibility and denied defendant's motion to suppress. Defendant subsequently renewed her motion to suppress pursuant to Penal Code section 995, but the trial court denied that motion as well.

Defendant pleaded no contest to possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a).) Consistent with the plea agreement, the trial court sentenced her to five years of formal probation with 90 days in county jail, but stayed the jail sentence, referred defendant to “Proposition 36 court” and dismissed the remaining charge.

In addition, the trial court awarded defendant one day of presentence custody credit and imposed various fines and fees, including a \$59 jail classification fee (Gov. Code, § 29550.2) and a \$287 jail booking fee (Gov. Code, § 29550.2). Defendant’s trial counsel represented to the trial court that defendant is on Social Security and does not have the ability to pay those fees. Trial counsel requested an indigent finding on defendant’s ability to pay unless a Penal Code section 987.5 hearing was scheduled. The trial court responded: “She can file the appropriate hearing. I find that [p]eople that are on Social Security do have funds, and they can pay. So she would have to request the appropriate hearing if the fines and fees are imposed.” When trial counsel asked again if defendant could get a fee waiver based on her low income, the trial court replied, “[s]he can fill out the form and request the appropriate fee waiver at the appropriate time.”

DISCUSSION

I

Defendant contends the trial court erred in denying her motion to suppress. In reviewing a ruling on a motion to suppress evidence, we view the record in the light most favorable to the trial court’s ruling. (*People v. Miranda* (1993) 17 Cal.App.4th 917, 922.) We defer to the trial court’s factual findings, whether express or implied, when supported by substantial evidence and we independently determine whether the facts of the challenged search and/or seizure violated defendant’s Fourth Amendment rights. (*People v. Lomax* (2010) 49 Cal.4th 530, 563; *People v. Ferguson* (2003) 109 Cal.App.4th 367, 372.)

Defendant claims (a) her consent was invalid because the officers gained entry to her residence through trickery and subterfuge, (b) her consent did not authorize the search and seizure of the drugs because the scope of her consent was limited, (c) her consent was invalid because it was the result of police coercion, and (d) her consent was invalid because she was unlawfully detained in her home. We address each argument in turn.

A

Defendant argues her consent was invalid because the officers gained entry to her residence through trickery, subterfuge and a ruse. She claims Officer Echeverria did not initially tell her the true purpose of the visit -- that defendant had been accused of using drugs and selling them from the residence.

Although Officer Echeverria did not initially inform defendant that she had been accused of using and selling drugs, the record does not support her assertion that the officers tricked her. Officer Echeverria asked defendant if he could enter and check on the welfare of the children. Defendant consented. Based on that consent, Officer Echeverria entered and conducted a welfare check. Once the check was completed, Officer Echeverria informed defendant that he received information that she was using and selling drugs. Defendant told him she had methamphetamine in her bedroom and gave Officer Echeverria permission to find and retrieve the drugs. The record indicates that Officer Echeverria asked defendant clear, straightforward questions and that she responded with clear, unambiguous consent.

The cases cited by defendant are inapposite. Cases that invalidate consent when the consent was obtained by ruse or trick all involve some “positive” act of misrepresentation on the part of the officers. (*Mann v. Superior Court* (1970) 3 Cal.3d 1, 9.)

For example, in *People v. Reeves* (1964) 61 Cal.2d 268, police officers arranged for a hotel manager to call defendant in his hotel room and to falsely inform defendant that there was a registered letter for him that he should come and pick up at the front

desk. (*Id.* at p. 271.) The defendant said he would be down after he got dressed and the officers positioned themselves outside his door. (*Ibid.*) When the defendant opened the door to go to the front desk, one of the officers saw a marijuana cigarette inside the room. (*Ibid.*) The officers entered the defendant's hotel room without his consent, searched the room and arrested the defendant. (*Id.* at pp. 271-273.) The California Supreme Court held that on such facts the officers could not rely on information obtained by inducing the defendant to open the door by ruse or subterfuge. (*Id.* at p. 273.)

In *People v. Lathrop* (1979) 99 Cal.App.3d 967, an undercover police officer knocked on the defendant's door. (*Id.* at p. 970.) He told the defendant he was moving in next door and asked to use the defendant's phone. (*Id.* at pp. 970-971.) The defendant invited the undercover officer inside the residence. Once inside, the officer saw marijuana, cocaine, and drug paraphernalia. The officer bought drugs from the defendant twice before obtaining an arrest warrant. (*Id.* at p. 971.) The appellate court held that the initial entry was illegal because it was obtained by trickery, ruse, or subterfuge, and that the illegal entry tainted the subsequent arrest. (*Id.* at p. 972-973.)

And in *People v. Superior Court (Kenner)* (1977) 73 Cal.App.3d 65, police appeared at defendant's door and asked his brother if they could enter the residence to "talk" to the defendant. (*Id.* at p. 68.) The brother consented to the entry, but police then arrested the defendant without any conversation. (*Ibid.*) The appellate court said the record made clear that the officers had no intention of talking to the defendant, and hence the brother's consent did not authorize the arrest. (*Id.* at p. 69.) As the court explained, "[a] person may willingly consent to admit police officers for the purpose of discussion, with the opportunity, thus suggested, of explaining away any suspicions, but not be willing to permit a warrantless and nonemergent entry that affords him no right of explanation or justification." (*Ibid.*) Thus, the court did not find the officers entered by trickery, ruse, or subterfuge, but that the arrest exceeded the scope of the consent, which was limited to entering the home to "talk" to the defendant. (*Ibid.*)

Unlike the foregoing cases, there is no evidence that the officers in this case concealed their identities, made false statements or tricked defendant into giving consent. Under the circumstances, her consent was valid.

B

Defendant next argues her consent did not authorize the search and seizure of the drugs because she never gave Officer Echeverria consent to search her bedroom for drugs. She claims the scope of her consent was limited to Officer Echeverria and to the welfare check of the children.

Officer Echeverria's inquiry regarding drugs in the home did not exceed the scope of defendant's consent because the welfare check was based on the concern that defendant was using and selling drugs in the children's living environment. The welfare check included an inquiry into whether defendant was exposing her children to drugs, drug use or drug sales.

Nonetheless, the ruling on the motion to suppress hinges on whether defendant gave Officer Echeverria her consent to search for drugs in the bedroom. She claims on appeal, just as she did in her testimony at the suppression hearing, that she did not give consent to search her bedroom. But the trial court found that Officer Echeverria was more credible. Officer Echeverria testified that defendant consented to the initial entry, did not object to the presence of all three officers, consented to the welfare check of the children, and consented to the search in her room. We accept Officer Echeverria's version of events because we do not substitute our judgment for the credibility determinations of the trial court. (*People v. Oldham* (2000) 81 Cal.App.4th 1, 9.)

C

Defendant claims her consent was invalid because it was the result of police coercion. She asserts that two of the officers entered her home uninvited and one of the officers was already "rummaging around in her room" when Officer Echeverria asked if

there were drugs in the home. Again, however, we cannot accept defendant's contention because it relies on a version of events that the trial court did not find credible.

D

Defendant further contends her consent was invalid because she was unlawfully detained in her home. But defendant did not make this argument in the trial court, and she cannot assert it for the first time on appeal. (See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640 [legal theories in support of or in opposition to a motion to suppress cannot be raised for the first time on appeal].)

II

Defendant contends the trial court erred in imposing a \$59 jail classification fee and a \$287 jail booking fee without determining her ability to pay them. The Attorney General agrees and requests remand to the trial court on this issue.

“[A] prerequisite to the imposition of a booking fee . . . is a finding, whether express or implied, of the defendant's ability to pay.” (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1400.) Such a finding will be upheld on appeal if it is supported by substantial evidence. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 70-71 (*Phillips*).)

Defendant pleaded no contest to possession of methamphetamine, waived referral to the probation department for a presentence report, and requested immediate sentencing. Her trial counsel noted that defendant received Social Security, had an inability to pay the booking and classification fees, and requested an indigent finding. The trial court said, “I find that [p]eople that are on Social Security do have funds, and they can pay.”

Even if we were to construe the trial court's statement as a finding that defendant has the ability to pay the booking and classification fees, such a finding would not be supported by substantial evidence (*Phillips, supra*, 25 Cal.App.4th at pp. 70-71) because there is no probation report and no evidence regarding defendant's ability to pay the fees. Under the circumstances, we will strike the booking and classification fees and remand

the matter to the trial court for a determination regarding defendant's ability to pay those fees.

DISPOSITION

The \$59 jail classification fee and the \$287 jail booking fee are stricken from the judgment. The judgment is otherwise affirmed. The matter is remanded to the trial court for a determination regarding defendant's ability to pay the jail classification fee and the jail booking fee.

MAURO, J.

We concur:

BLEASE, Acting P. J.

HULL, J.