

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

VAUGHN ROBERT BIBY,

Defendant and Appellant.

G045189

(Super. Ct. No. 10NF0897)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Edward Rogan and James A. Stotler, Judges. Affirmed as modified.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Gary W. Brozio, Deputy Attorneys General, for Plaintiff and Respondent.

*

*

*

Defendant Vaughn Robert Biby appeals from a judgment of conviction after pleading guilty following the denial of his motion to suppress evidence. He pleaded guilty to possession of child pornography (count 1; Pen. Code, § 311.11, subd. (a); all further statutory references are to this code) and sexual exploitation of a child by printing, duplicating, or developing computer generated photographic images of child pornography (count 2; § 311.3, subd. (a)). Defendant also admitted he had seven prior strike convictions in Orange County (§ 288, subd. (a)), two prior strike convictions in Los Angeles County (§§ 288, subd. (a), 288.5, subd.(a)), and one prison prior. The court sentenced him to 25 years to life on count 1, a concurrent 25 years to life on count 2, and struck the prison prior. The court awarded defendant credit for 405 actual days but denied conduct credits.

Defendant argues the court should have granted his motion to suppress because the consent to search he and his sister gave the officers was coerced. A review of the record shows that substantial evidence supports the trial court's conclusion that defendant's consent was not coerced. Defendant also contends the court erred in failing to give him conduct credits. We agree, as does the Attorney General, that defendant is entitled to 202 days of conduct credit and modify the judgment accordingly but otherwise affirm.

FACTS

Four law enforcement officers, Detectives Laura Markoski and Robert Barnes, Probation Officer Enrico DeRamos and ICE Agent Maddox, arrived at defendant's residence to conduct a compliance check of registered sex offenders. All officers wore bullet proof vests and carried side arms, pepper spray, handcuffs and collapsible batons. Defendant answered the door along with his sister, Brenda Biby.

Markoski introduced herself and her team and asked defendant if he was in compliance with his registration requirements. Defendant said he was. Markoski inquired whether there was anything in his home or living area that would put him out of compliance; defendant stated there was not.

Markoski asked defendant's consent for her team to enter the residence to look around. Defendant opened the front door and ushered the four officers in. Markoski asked defendant where his room was and he responded "it is right back here, come on." Markoski remained in the living room to speak with Brenda while Barnes, DeRamos and Maddox followed defendant down the hallway and into his bedroom. Once they entered defendant's room, Barnes told him to "just go ahead and sit down, please." When Barnes asked defendant if he had any weapons, defendant said he had a knife. Barnes asked defendant to remain seated and stated one of the officers would recover the knife.

Barnes and DeRamos noticed a laptop computer in defendant's bedroom and asked defendant if he had viewed any child pornography sites on it. Defendant denied viewing such sites and offered to show the officers the sites he visited if he could log onto the computer. Barnes noticed the computer was already turned on and characters had already been entered into the password field but defendant turned the computer on and off several times claiming he could not log on. Barnes told defendant to tell him if he did not want them looking at the computer. Defendant reiterated that the officers could look at the computer if he could log on. Barnes asked if defendant had viewed any pornography on the computer and defendant answered he had viewed adult pornography. Barnes left the bedroom to call Sergeant Siko to determine if viewing adult pornography violated section 290.

While Barnes was out of the room, DeRamos asked defendant if he would mind if DeRamos searched the computer. Defendant responded, "Yes, I do mind." When Barnes returned he asked if there was any child pornography on the computer.

Defendant then admitted he had “accidentally” looked at some child pornography after doing an Internet search for “anal.” When Barnes again asked to look at the computer, defendant reiterated he could look if he was able to log on. Defendant proceeded to turn the computer on and off several more times. Barnes eventually took the computer from defendant because he was concerned about the possible destruction of evidence.

Barnes asked defendant to wait in the living room. Defendant was not handcuffed or physically restrained in any manner and was seated in the middle of a couch with Maddox standing over him. Some minutes later, Barnes walked into the living room and asked defendant if he had any child pornography in his bedroom. At first, defendant denied there were any. Barnes repeated, “Is there anything there?” Defendant responded, “I’m going to tell you, I’ll show you where it is.” When Barnes asked whether defendant had printed images from his computer, defendant admitted he had. Thereupon defendant said they were in a box on his closet shelf and stated he would get them. Barnes testified “the room hadn’t been searched and I was concerned about him going into an unsearched area, so I retrieved the images.”

Barnes and Maddox were the only law enforcement agents near defendant during this conversation. Barnes went into defendant’s bedroom, retrieved the box from the closet, and found images of children and young adults in different states of undress performing sexual acts with other children or adults.

While Barnes was retrieving the box, defendant asked Maddox for permission to go outside to smoke. Maddox, DeRamos, and defendant walked into the backyard together. While outside DeRamos came across a box of pictures of children next to a door leading into the garage. When DeRamos asked defendant about the box, he stated he had purchased it at a swap meet. DeRamos then went into the garage and discovered additional images of child pornography inside one of the cars.

Around this time, Detective Daniel Castillo arrived at defendant's residence with Detective Hamell and spoke with Brenda. Brenda told them she had purchased the computer found in defendant's room and that she owned the car in the garage. Defendant told them he was the only one who used the car. Defendant admitted Brenda purchased the computer but claimed she had given it to him as a gift. Brenda signed a form granting officers consent to search both the computer and the car. After Castillo informed defendant that Brenda had already given consent to search the computer, defendant also granted him permission to search it.

Defendant was subsequently placed under arrest by Detective Castillo and transferred to the police station where Castillo read defendant his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

DISCUSSION

1. Motion to Suppress

Consent provides an exception to the constitutional requirement of a warrant before a search may be conducted. (*People v. Woods* (1999) 21 Cal.4th 668, 674.) When “the prosecution relies on consent to justify a warrantless search it bears the ‘burden of proving that the defendant’s manifestation of consent was the product of his free will and not a mere submission to an express or implied assertion of authority. [Citation.]’ [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 341.) The question of voluntariness of consent is one of fact, to be determined by the trial court. (*People v. Williams* (2007) 156 Cal.App.4th 949, 961.) The trial court “‘sits as a finder of fact with the power to judge credibility, resolve conflicts, weigh evidence, and draw inferences . . . ’” and we must affirm the court’s decision if it is supported by substantial evidence. (*People v. Needham* (2000) 79 Cal.App.4th 260, 265.)

Defendant moved to suppress (1) all law enforcement observations at his residence, (2) all defendant's postdetention statements, and (3) all evidence police seized from his residence and car. However, defendant's trial counsel agreed the question could be restricted to whether the initial search of the closet was legal because, if it was, the other searches could be justified under the inevitable discovery rule. Counsel argued that, if defendant's will was overborne regarding his consent to search the closet, the other evidence discovered at the residence should be excluded as fruit of the poisonous tree.

The trial court ruled that the initial entry by the officers into defendant's bedroom was consensual, and that defendant was detained when he admitted to viewing child pornography on the computer. But the court held that, despite the detention, defendant's will was not overborne and thus his subsequent consent to search the closet was consensual. We therefore consider whether substantial evidence supports the trial court's conclusion that the consent defendant gave for the search of the closet was voluntary.

And we conclude there was substantial evidence to show defendant voluntarily consented to the search of his closet. The trial court heard testimony from four law enforcement officers regarding the conduct of defendant and the other officers. The evidence demonstrates defendant voluntarily allowed Markoski and her team to enter the apartment and freely led Barnes, DeRamos and Maddox into his bedroom. Once inside the bedroom, the officers asked defendant to sit down. But they let him manipulate his computer after defendant volunteered to show them his Internet search history. Defendant contends his detention began in the bedroom because he was not allowed to move about freely within the room. Even if this is so, the evidence supports the conclusion that his will was not overborne as shown by his refusal to let Barnes and DeRamos search his computer. Defendant advised he would let Barnes and DeRamos

view his Internet search history but did not want them to touch his computer. If his will was overborne while in his bedroom, he would not have resisted Barnes's and DeRamos's requests to manipulate his computer.

It was only after defendant told DeRamos he had "accidentally" looked at child pornography that the officers removed the computer from him and asked him to move to the living room to prevent the possible destruction of evidence. Even though defendant was detained, law enforcement used only such force as was necessary to ensure officer safety. Defendant was not handcuffed, restrained, or touched by officers in any way. He was allowed to eat his dinner, go to the bathroom, and smoke cigarettes at his convenience. After he admitted to viewing child pornography on his computer, he was escorted by between one and two law enforcement officers throughout the house, but there is no evidence to suggest officers employed coercive techniques at any time during the search of the residence and the computer.

2. *Conduct Credits*

Defendant next argues he is entitled to 202 days of section 4019 conduct credits in addition to the 405 days of actual credits. The Attorney General concedes this point and agrees the trial court erred in failing to grant the defendant 202 days of section 4019 presentence conduct credit. We also agree the trial court erred. *People v. Buckhalter* (2001) 26 Cal.4th 20 held that "restrictions on the rights of Three Strikes prisoners to earn term-shortening credits do not apply to confinement in a local facility prior to sentencing." (*Id.* at pp. 32.)

DISPOSITION

The judgment is modified to provide for defendant to receive 202 days of conduct credit. As so modified, the judgment is affirmed. The clerk of the trial court is ordered to amend the abstract of judgment to reflect the 202 days of conduct credit and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.