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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER JOHN KEHOE, Defendant and Appellant.	2d Crim. No. B278624 (Super. Ct. No. 14C-25837) (San Luis Obispo County)

An amended information charged appellant Christopher John Kehoe with possession of more than 600 child pornography images portraying sexual sadism and masochism (Pen. Code, § 311.11, subd. (c)[1]; counts 1 and 5); possession and transmission of child pornography (§ 311.1, subd. (a); counts 2 and 6); exhibiting a minor in pornography (§ 311.2, subd. (b); counts 3 and 7); possession of matter depicting a minor engaging in sexual conduct (§ 311.11, subd. (a); counts 4 and 8); possession

[1] All further statutory references are to the Penal Code unless otherwise stated.

of methamphetamine for sale (Health & Saf. Code, § 11378; count 9); and possession of psilocybin mushrooms (*id.*, § 11377, subd. (a); count 10). It was further alleged that appellant was released from custody on bail or his own recognizance at the time of the commission of these offenses (§ 12022.1).

After appellant's motion to suppress evidence was denied, appellant waived his rights and pled no contest to counts 1 and 9. The remaining counts were dismissed and the enhancement was stricken. The trial court suspended imposition of sentence and placed appellant on probation for 5 years with 270 days in county jail. Thereafter, appellant violated the terms of his probation, and the court ordered him to serve an additional 30 days in county jail, for a total of 300 days.

Appellant contends the trial court erred by denying his motion to suppress evidence obtained during and following a search of a hard drive that was attached to a television in his home. The court found appellant had voluntarily consented to the search, and that his consent was sufficiently attenuated from any taint of an earlier illegal search of the television and hard drive. Appellant argues the court should have found from the totality of the circumstances that his consent was involuntary. We conclude substantial evidence supports the court's finding and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

On March 7, 2014, appellant was living at a home in Cambria with two roommates. One of the roommates, Heidi Silknitter, was under investigation for child abandonment. As part of the investigation, Detective Jason Caron of the San Luis Obispo County Sheriff's Department (Department) accompanied a social worker, Terrie Humphrey, to the home to speak with

Silknitter. Detective Caron also planned to investigate a report "regarding child pornography being seen on the TV at the residence."

Detective Caron and social worker Humphrey knocked on the front door, and Silknitter let them into the house. Humphrey and Silknitter went into Silknitter's bedroom to speak privately. Humphrey told Silknitter about the child pornography report, and Silknitter said she had not seen any child pornography.

While the two women were speaking in Silknitter's bedroom, Detective Caron went into the living room area to look for evidence supporting the child pornography report. He noticed that the television in the living room was connected to a DVD player, which was connected to an external hard drive. The hard drive appeared to be homemade. Detective Caron did not know whether the television or hard drive belonged to appellant. Without asking for permission, he turned on the television to see if it was connected to the DVD player and hard drive. Detective Caron noticed the hard drive was accessible through the DVD player, and used the remote control to view electronic files that contained titles of adult pornography. He then turned off the television. He did not see any child pornography.

A few minutes later, Detective Caron knocked on appellant's bedroom door. Appellant answered the knock, and Detective Caron explained that he had received a report of child pornography on the television in the residence and that he had personally seen a hard drive connected to the television. Appellant admitted the hard drive belonged to him. Appellant did not admit or deny that the hard drive contained child pornography.

Detective Caron asked for permission to take the hard drive to the crime laboratory to have it searched. After orally consenting to the search, appellant signed a Consent to Search Independent of Search Warrant. The form authorized the Department to conduct a complete search of "a[n] externally attached harddrive [sic]." It stated: "This written permission to a search is being given by me, voluntarily, and without threats or promises of any kind." The form also acknowledged that appellant was "informed of [his] constitutional right not to have a search made of the [hard drive] without a search warrant and of [his] right to refuse to consent to such search."

Detective Caron provided the hard drive to Jeff Joynt, a computer forensic specialist, who found it contained child pornography. Detective Caron also learned of a report regarding the downloading and transmission of child pornography from appellant's internet protocol (IP) address. He subsequently obtained a warrant to search appellant's home.

Appellant moved to suppress all evidence seized as a result of the search of the hard drive, including all evidence obtained through the search warrant. The trial court denied the motion. It found that Detective Caron's initial search of the television and hard drive was unlawful because he turned on the television and viewed materials on the hard drive without permission. The court noted, however, that there was nothing to suppress from that search because it did not reveal any incriminating evidence. The court further found that the subsequent consensual search of the hard drive was sufficiently attenuated from the taint of the initial unlawful search. The court reasoned: "[Appellant's] consent to search the hard drive was not influenced by the search of the TV. [Appellant] was in

his room when Deputy Caron searched the TV. Deputy Caron explained to [appellant] that he had a report that there was child pornography being displayed on the television, he saw the hard drive connected to the television, and he wanted to search it. The deputy did not say that he had seen anything illegal on the hard drive and did not imply that he had seen anything illegal on the hard drive when he spoke to [appellant]. So, based on that, I'm making a finding that [appellant's] consent was voluntary under the totality of the circumstances."

DISCUSSION

Standard of Review

Whether a consent to search was voluntary is a question of fact to be determined from the totality of the circumstances. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1578.) The People bear the burden of showing by a preponderance of the evidence that the defendant's manifestation of consent was the product of his free will, rather than a mere submission to an express or implied assertion of authority. (*Florida v. Royer* (1983) 460 U.S. 491, 497.) We uphold a trial court's finding of voluntary consent if the finding is supported by substantial evidence. (*People v. Ratliff* (1986) 41 Cal.3d 675, 686.)

Appellant's Consent to Search the Hard Drive was Voluntary

It is undisputed that Detective Caron's living room search of the television was unlawful. The question posed by appellant is whether the taint of that illegal search vitiated his consent to the subsequent seizure and search of the hard drive. We conclude it did not because substantial evidence supports the trial court's finding that appellant's assent to the seizure and

search of his hard drive was not the product of the unlawful living room search. (See *Burrows v. Superior Court* (1974) 13 Cal.3d 238, 251 (*Burrows*).)

In *Burrows*, police officers illegally searched the defendant's office. (*Burrows*, *supra*, 13 Cal.3d at pp. 248-251.) The defendant was present during the search, which uncovered check stubs without the corresponding checks. (*Id.* at pp. 241-242, 251.) An officer asked the defendant for permission to search his car. The defendant responded, "'Go ahead . . . be my guest . . . .'" (*Id.* at p. 251.) A search of the car revealed a checkbook, which was seized. (*Ibid.*)

The trial court found that the defendant had consented to the search of the automobile. (*Burrows*, *supra*, 13 Cal.3d at p. 251.) The Supreme Court noted that the fact the defendant consented to the search did not end the inquiry. It also must be "ascertain[ed] whether [his] consent was given voluntarily or was induced by the illegal search of his office." (*Ibid.*) The Court concluded the motion to suppress the evidence should have been granted because the defendant's "assent to the search of his car was the product of the unlawful search of his office." (*Ibid.*)

Similarly, in *People v. Lawler* (1973) 9 Cal.3d 156, 161-163 (*Lawler*), superseded by statute on other grounds as stated in *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223, a police officer engaged in an unlawful pat-down of the defendant's sleeping bag. Believing the sleeping bag contained an automatic weapon, the officer immediately asked the defendant to show him what was in the bag. The defendant unrolled the sleeping bag, which revealed several plastic bags of marijuana. (*Id.* at pp. 159-160.)

The Supreme Court concurred with the trial court that the defendant's consent to the search and the prior illegal search of the sleeping bag were inextricably joined. (*Lawler*, *supra*, 9 Cal.3d at p. 164.) The Court observed that "the consent, being itself the fruit of an illegal assertion of authority, cannot justify a further illegal search." (*Ibid.*) It emphasized that the officer's request to open the sleeping bag "followed on the heels of an illegal search involving an improper assertion of police authority and bore the markings of a demand rather than of a mere inquiry." (*Id.* at pp. 164-165.)

Burrows and *Lawler* are distinguishable because in both cases, the defendant was aware of what turned out to be the officers' illegal search. Having already been subjected to a search, each defendant's consent to a further search was involuntary because "it is inseparable from the unlawful conduct of the officers." (*Burrows*, *supra*, 13 Cal.3d at p. 251.) Here, appellant did not know of Detective Caron's unlawful search of the television at the time he consented to the seizure and search of the hard drive. Thus, Detective Caron's request to search the hard drive was in the form of an inquiry rather than an actual demand. (See *Lawler*, *supra*, 9 Cal.3d at p. 165.) This conclusion is buttressed by appellant's acknowledgment on the consent form that he was "informed of [his] constitutional right not to have a search made of the [hard drive] without a search warrant and of [his] right to refuse to consent to such a search."

People v. Haven (1963) 59 Cal.2d 713, also is distinguishable. In that case, the defendant's consent to a search was obtained immediately after five officers suddenly entered his home without permission. The Court determined that "[a] search and seizure made pursuant to consent secured immediately

following an illegal entry or arrest . . . is inextricably bound up with the illegal conduct and cannot be segregated therefrom." (*Id.* at pp. 718-719.) Here, by contrast, only one officer approached appellant, and Silknitter had allowed him to be present in the home. (See *People v. Haskett* (1982) 30 Cal.3d 841, 856-857 [third party with common authority over the place searched may validly consent to its entry].) There was no illegal entry or arrest and, as discussed above, appellant had no knowledge that any search had already taken place.

Nor are we convinced by appellant's alternative argument that "even if [Detective] Caron did not expressly tell appellant his drive was searched, appellant's consent was compromised by [Detective] Caron's continued invasion of the home." Silknitter, as a cohabitant of appellant's residence, consented to Detective Caron's entry into the home. (See *People v. Haskett*, *supra*, 30 Cal.3d at pp. 856-857). Detective Caron knocked on appellant's bedroom door immediately after Silknitter and Humphrey completed their conversation. At no point did appellant or Silknitter indicate that Detective Caron was not allowed in the home. Indeed, appellant did not object to Detective Caron's continuing presence even after he went out to his vehicle to retrieve the search consent form.

In sum, substantial evidence supports the trial court's finding that appellant's consent to the seizure and search of the hard drive was voluntary and not induced by the illegal living room search. In other words, there was sufficient attenuation such that the evidence discovered on the hard drive was not the fruit of the unlawful search of the television. Accordingly, the court properly denied appellant's motion to suppress the evidence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Donald G. Umhofer, Judge
Superior Court County of San Luis Obispo

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