SUPREME COURT OF LOUISIANA

No. 95-K-1876

STATE OF LOUISIANA

Versus

FLOYD CARMICHAEL FRANKLIN

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FIRST CIRCUIT, PARISH OF TERREBONNE

LEMMON, Justice*

In this case involving convictions on five counts of attempted murder and one count of armed robbery, we granted certiorari primarily to consider whether defendant's motion to suppress the fruits of the crime seized in a warrantless search of his residence should have been granted. While both lower courts concluded that the evidence should not be suppressed, they did so for different reasons, the trial court on the basis of defendant's girlfriend's voluntary consent to the search and the court of appeal on the basis of the inevitable discovery exception to the exclusionary rule.

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*Because of the vacancy created by the resignation of Dennis, J., now a judge on the United States Court of Appeals for the Fifth Circuit, there was no justice designated "not on panel" under Rule IV, Part II, §3. Panel included Chief Justice Calogero and Justices Marcus, Watson, Lemmon, Kimball, Johnson and Victory.

Facts

Defendant's convictions involved a 1:00 a.m. armed robbery of a That Stanley store, while the store was closed for business. On duty was the night manager, Barry McGuire, and four stock clerks.

When the doorbell rang at the rear of the store, the employees assumed it was a truck driver making a delivery. McGuire, who had the keys to the store and access to the safe, opened the rear door. The other employees then observed a robber, who was wearing a ski mask and red jumpsuit, holding a gun to McGuire's head. The robber placed the four employees in the freezer. After forcing McGuire to open the store's safe and removing its contents, the robber ordered McGuire into the freezer with the other four employees, placing a forklift machine against the freezer door. The employees, after waiting several minutes, opened the freezer door from the inside and pushed the door until they opened it enough for them to climb out of the freezer.

An immediate investigation determined that $1,800 in food stamps, over $11,000 in cash and $44,000 in checks were missing from the safe. The investigating officers found a dark blue ski mask and a red jumpsuit at different locations within several blocks of the store.

Suspecting an "inside job," the police focused their attention on McGuire. Two days after the robbery, McGuire gave a videostatement identifying defendant as the robber and admitting that he immediately knew defendant by his voice.[1] McGuire then accompanied police to defendant's residence, whereupon McGuire was released.

Without obtaining either an arrest or a search warrant, the police surrounded the

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[1]According to other testimony, McGuire was defendant's uncle or cousin.

When McGuire refused to testify at trial, the prosecutor offered the statement as that of a co-conspirator, but the trial judge excluded the evidence.

residence and knocked on the front door. Someone peeked out the window, and the officers heard a lot of rustling inside. When defendant came to the door, officers immediately placed him under arrest and transported him to the police station. Shortly thereafter, two officers asked defendant's girlfriend, who also resided in the house, for consent to search the residence. The officers told her that if she refused to consent, no one would be allowed to leave the residence until the police obtained a search warrant. She signed a consent form, authorizing the search of the residence and car.

The search revealed a jacket in the bedroom closet, which an officer recognized as the jacket reported missing by a store employee on the night of the robbery. In the pocket of the jacket were check stubs with the robbery victim's name and address. The police also recovered $3,127.75 in cash from a bag.[2]

Confronted with this evidence, defendant admitted planning the robbery, but claimed he changed his mind and was given the bag to hold by the man who committed the robbery.

The trial court denied the motion to suppress, finding that the girlfriend validly provided consent for the warrantless search. After trial, the jury found defendant guilty of armed robbery and five counts of attempted second degree murder.

On appeal, the intermediate court affirmed in an unpublished opinion. As to the motion to suppress the evidence seized from defendant's house, the court concluded that the girlfriend's consent was vitiated by threats "amounting to coercion, duress and overreaching by the police."[3] The court further concluded that there were no exigent

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[2]Defendant's girlfriend testified that the money found in the house was their savings, providing proof of an insurance settlement for her car damage of $1,171.22. She claimed she kept the money in her house to avoid losing her welfare payments.

[3]As noted later in our discussion of the motion to suppress, the court of appeal seemed to accept the girlfriend's version of the request for consent, which was greatly different from the officers' testimony that the trial judge found credible.

circumstances justifying the warrantless search, noting that the police, even after approaching the residence and arresting defendant, could have secured the premises while one of the officers obtained a search warrant.

Nevertheless, the court of appeal affirmed the conviction, concluding that the motion to suppress should have been denied on the basis of the doctrine of inevitable discovery. Noting that the police clearly had probable cause to obtain a search warrant, the court concluded that the police, if the girlfriend had not consented to the search, would have obtained a warrant after securing the residence and inevitably would have discovered the evidence that was not easily susceptible of destruction.

One judge dissented from the application of the inevitable discovery doctrine. The dissenting judge observed that one officer testified he had decided not to apply for a search warrant because he believed (subjectively but erroneously) there was not probable cause to obtain a warrant. Because the officer had apparently rejected the acquisition of a warrant as a legitimate means of discovering the evidence, the dissenting judge concluded that the prosecution failed to prove the evidence inevitably would have been discovered.

This court granted certiorari to consider the intermediate court's application of the inevitable discovery exception to the exclusionary rule. 95-1876 (La. 12/8/95); 664 So. 2d 409.

Validity of Consent

While we granted certiorari to address the inevitable discovery issue, that doctrine only comes into play when the pertinent evidence is the product of illegal government activity and would have been discovered inevitably by lawful means without regard to the illegality. Nix v. Williams, 467 U. S. 431 (1984). Upon

examining the record, we have determined that the evidence was not the product of illegal government activity, but rather was obtained legally by means of valid consent. We therefore need not address the inevitable discovery issue.

At the hearing on the motion to suppress, Officer Belanger testified that he asked defendant's girlfriend to sign a consent-to-search form, telling her only that if she refused permission, the police "would have to obtain a search warrant" and would "surround the house, nobody would be allowed to leave" until the officer returned with the warrant. He denied using any force, threats or coercion to obtain her signature, stating that "she read, understood, and then signed" the form without hesitating, emphasizing that "she wasn't a part of any robbery."

On the other hand, the girlfriend (who by that time was defendant's wife) testified that she signed the consent form after "they threatened me and told me if I didn't let them do it that they were going to bring me to jail." She identified Officers Belanger and Lopez as the officers who threatened her, added that they told her she would go to jail on the same charges for which defendant was arrested if she did not let them into the residence before the officer returned with the warrant.[4]

Officer Lopez testified he explained to the girlfriend that if they went through the procedure of securing the residence and obtaining a search warrant, and then found stolen goods, they would arrest her as an accessory. He added that he further told her they would stop the search at any time she requested them to stop. He denied using any form of coercion to obtain the consent.

A statement by police officers that they will apply for a warrant if refused consent for a search does not necessarily vitiate the voluntariness of the consent. State

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[4]The girlfriend also testified that the police during the next day threatened to take her children from her, but admitted they made no such threat on the day of the search, which was the only time relevant to the validity of her consent.

v. McDonald, 390 So. 2d 1276 (La. 1980); 3 William F. LaFave, Search and Seizure §8.2(c) (3d ed. 1996). The prosecution has the burden of proving valid consent. State v. Green, 376 So. 2d 1249 (La. 1979). The determination of the voluntariness of the consent turns on the overall facts and circumstances of the particular case. State v. Edwards, 434 So. 2d 395 (La. 1983). The trial judge's factual determination on this issue is entitled to great weight on appellate review. Id.

Under the girlfriend's version of the events, her consent was coerced. However, the trial judge rejected her version and credited that given by the police officers. According to the officers, they did not use threats or coercion, but merely told the girlfriend they would secure the house and obtained a warrant if she refused to consent. While Officer Lopez admitted he told her she would be arrested as an accessory if their search ultimately yielded evidence of the armed robbery in the home where she lived with defendant, the statement was not made in the context of a promise to forego arrest in exchange for consent or of a threat to make the arrest if she failed to consent.[5] Rather, the statement was made in the context of information on what to expect if the search, either with a warrant or with consent, yielded evidence of an armed robbery.

Under the officers' version, the trial judge had a reasonable basis for finding valid consent. The court of appeal erred in overturning that primarily factual decision.[6]

The conviction of armed robbery should be affirmed on the basis of valid consent to search.

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[5]Contrast State v. Green, 376 So. 2d 1249 (La. 1979), in which the police obtained the defendant's girlfriend's consent to search the residence by threats to arrest her for abetting a criminal if she refused consent.

[6]In United States v. Bolin, 514 F. 2d 554, 559-61 (7th Cir. 1975), the only authority cited by the court of appeal in support of its decision, the defendant's consent was obtained during a custodial interrogation by implications that his girlfriend would be arrested if he did not consent.

Sufficiency of the Evidence of Attempted Murder

A conviction of attempted second degree murder requires proof of specific intent to kill. La. Rev. Stat. 14:30.1 and 27. Here, defendant committed the robbery with a gun, but did not shoot or attempt to shoot any of the victims. Rather, he placed five men, one of whom was his close relative, in a freezer that opened from the inside. He made good his escape by placing a heavy forklift machine against the freezer door. After waiting a brief period, two of the five men, exerting a "lot of effort," pushed the door partially open to accomplish their escape.

A rational trier of fact could not have concluded beyond a reasonable doubt, on the basis of this evidence viewed in the light most favorable to the prosecution, that defendant specifically intended to kill the five men, including his relative. State v. Captville, 448 So. 2d 676 (La. 1984). There was at least a reasonable doubt that defendant only intended to assure himself a safe getaway.

Defendant's convictions and sentences on five counts of attempted second degree murder must be reversed.

Decree

The judgment of the court of appeal affirming the conviction and sentence for armed robbery is affirmed. The judgment of the court of appeal affirming the conviction and sentence for five counts of attempted second degree murder is reversed, and defendant is discharged on these charges.