**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

September 14, 1999

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.**

**No. 98-1963-CR**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DERRON HAYNES,**

**DEFENDANT-APPELLANT,**

**SHANNON S. SMITH AND**
**MILTON S. THOMAS,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Derron Haynes appeals from a judgment of conviction for possession of cocaine with intent to deliver. In this appeal, he

challenges the order denying a motion to suppress evidence of cocaine found on his person. Haynes contends that the trial court erred when it concluded that he did not have a legitimate expectation of privacy in an upstairs residence of a duplex that was the object of a search by City of Milwaukee police officers. Because Haynes did not have a legitimate expectation of privacy in the upstairs residence of his friend, we affirm.

## I. BACKGROUND

On September 3, 1997, Haynes was the guest of a friend named Rick, in Rick's upper duplex residence located at 2723 West Auer Avenue in the City of Milwaukee, for the purpose of playing video games. There was one other companion present. Sometime between forty-five minutes to one hour after the three arrived at the premises, Rick left to go to the store. While Rick was absent, police entered the residence without a warrant to investigate a drug complaint. The door to the upper flat where Haynes and the companion were playing video games was unlocked and off its hinges. The police entered the upper flat and searched Haynes. Cocaine was discovered on his person. The State charged him with possession of cocaine with intent to deliver contrary to §§ 961.16(2)(b)1 and 961.41(lm)(cm)1, STATS.

Haynes moved to suppress the evidence of cocaine on the basis that, under the Fourth Amendment, he had a legitimate expectation of privacy while in the upstairs residence of his friend when the warrantless entry occurred. The trial court denied the motion. Haynes then pled guilty to the charges and now appeals.

## II. ANALYSIS

When reviewing an order denying a motion to suppress evidence obtained as a result of an alleged unlawful entry, we shall sustain the trial court's

findings of fact unless such findings are clearly erroneous. We, however, independently determine whether the facts underlying a particular search and seizure satisfy constitutional demands. *See* ***State v. King***, 175 Wis.2d 146, 150, 499 N.W.2d 190, 191 (Ct. App. 1993).

To challenge a warrantless search or seizure, one must show a legitimate expectation of privacy in the thing or place searched or seized. *See* ***State v. Fillyaw***, 104 Wis.2d 700, 710, 312 N.W.2d 795, 800-01 (1981). This showing entails both a manifestation of a subjective expectation of privacy as well as an indication that the privacy interest is one that society is willing to recognize as reasonable. *See* ***State v. Rewolinski***, 159 Wis.2d 1, 13, 464 N.W.2d 401, 405 (1990). This standing requirement reflects the fact that Fourth Amendment rights are personal, and thus may not be asserted vicariously. *See* ***Fillyaw***, 104 Wis.2d at 710, 312 N.W.2d at 800. The burden of establishing that the search or seizure violated the challenger's rights, and not those of some third party, is on the challenger. *See* ***Rakas v. Illinois***, 439 U.S. 128, 130 n.1 (1978). Whether a party has standing to challenge the constitutionality of a search is a question of law we review independently. *See* ***Fillyaw***, 104 Wis.2d at 711, 312 N.W.2d at 801.

In determining whether an accused has an expectation of privacy that society is willing to recognize as reasonable, courts look at the "totality of the circumstances." ***State v. Whitrock***, 161 Wis.2d 960, 974, 468 N.W.2d 696, 702 (1991); ***State v. Dixon***, 177 Wis.2d 461, 469, 501 N.W.2d 442, 446 (1993). Under the totality of the circumstances approach, the following factors are relevant, though not controlling: (1) whether the accused had a property interest in the premises; (2) whether the accused is legitimately (lawfully) on the premises; (3) whether the accused had complete dominion and control and the right to exclude others; (4) whether the accused took precautions customarily taken by

those seeking privacy; (5) whether the property was put to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy. *See* ***Dixon***, 177 Wis.2d at 469, 501 N.W.2d at 446.

Haynes proffers two bases for his claim of trial court error. First, he relies on ***Minnesota v. Olson***, 495 U.S. 91 (1990), where the Court found an overnight guest has the expectation of privacy. *See* ***id.*** at 95-97. He argues that the facts of this case are analogous to the facts in ***Olson***. Second, he argues that he had a legitimate expectation of privacy under the totality of circumstances precept. We shall examine each basis in turn.

In ***Olson***, the United States Supreme Court declared that an accused's status as an overnight guest is alone sufficient to show that he had an expectation of privacy in his host's home. The Court explained that "[s]taying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society." ***Id.*** at 98. From this explanation, Haynes reasons that because he was a guest in his friend's home to engage in a social custom of playing video games, he acquired a status entitling him to a legitimate expectation of privacy. The analogy suffers from a debilitating limp for several reasons.

First, in ***Olson***, the accused was an overnight guest whom the Court reasoned was seeking shelter in his host's home because it provided him with a measure of privacy. Second, in contrast to an overnight guest, Haynes was a day guest seeking only the camaraderie and fellowship that may attend a round of video games. Third, he was not in Rick's home to seek shelter. Fourth, a social guest invited to participate in some video games does not presume the level of privacy required for a place to sleep or to store personal possessions while sleeping takes place. Thus, unlike the guest in ***Olson***, Haynes's status as an

invited guest alone is not sufficient to show that he had a legitimate expectation of privacy. Haynes's argument by analogy fails.

The second basis for Haynes's Fourth Amendment challenge is his claim that he had a reasonable expectation of privacy under the "totality of circumstances" doctrine. We are not convinced for several reasons.

From our review of the record, we find no evidence that Haynes had any type of property interest in the upstairs premises. Although he was an invited guest for the purpose of engaging in some video games, there is no evidence that he was living there. There is no evidence that he had a key to the premises or that he had authority to exclude other individuals from the premises. Thus, there are no indicia of any dominion and control, even though Rick allowed him to remain in the residence while he went to a store. Furthermore, there is no evidence to support a finding that he took any steps to create or insure any privacy. *See* ***Whitrock***, 161 Wis.2d at 977, 468 N.W.2d at 702. It is significant that the door to the premises was off its hinges when the police approached the residence. Lastly, there is no evidence that Haynes brought any of his own possessions to the premises to demonstrate his intention to establish the circumstances of privacy. For all of these reasons, Haynes's argument fails the "totality of circumstances" test.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.