

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 1, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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No. 99-2613

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COUNTY OF GREEN LAKE,

PLAINTIFF-RESPONDENT,

v.

JOHN T. WELKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green Lake County: WILLIAM M. MC MONIGAL, Judge. *Affirmed.*

¶1 SNYDER, J.¹ John T. Welke appeals from a judgment finding him guilty of operating a motor vehicle while intoxicated (OWI) contrary to WIS. STAT. § 346.63(1)(a). He asserts that the arresting officer unlawfully entered the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

commercial building where he was situated in violation of his Fourth Amendment protections. The trial court denied Welke's suppression motion² on the basis that Welke lacked standing because he failed to show a legitimate expectation of privacy in the commercial building. We agree and affirm the judgment and the order.

¶2 The relevant facts are undisputed. On January 2, 1997, at approximately 10:11 p.m., Green Lake County Deputy Sheriff Mark Putzke received a report of a car in a ditch on County Highway T. He was also advised that the driver might be intoxicated. When he arrived at the scene, Putzke observed a large vehicle in the ditch that was blocking the eastbound lane. The vehicle had its flashers on and was warm to the touch. Putzke determined that the vehicle presented a road hazard and that Welke, who was not present at the scene, was the owner.³ Putzke called the county's vehicle tow unit of Mike's Mobil to remove Welke's vehicle from the ditch and road.

¶3 Putzke and City of Green Lake Police Sergeant Ratter proceeded to Welke's home in Green Lake, arriving at approximately 10:41 p.m. Welke's mother, Jane Welke, told the officers that Welke had come home at approximately 10:15 p.m., made a phone call and left again. Welke had called Unique Auto Salvage, instructed them to pick up his vehicle and deliver it to Ripon Auto Sales (RAS),⁴ and left to meet Unique's tow truck at RAS. Putzke established that Jane

² The trial court addressed both Welke's suppression motion and his reconsideration motion.

³ Deputy Sheriff Mark Putzke performed an inventory search of the vehicle and found a canister containing a potentially illegal substance. Citations for possession of marijuana and operating with an unlawful blood alcohol content were later dismissed, and a challenge to the legality of the vehicle search is not before us.

⁴ Ripon Auto Sales is a used car business.

Welke's vehicle, a 1991 four-door maroon Buick Century, was gone. Jane Welke advised the officers that she did not know why her son had left or where he had gone, that he might be at RAS where he practiced pool with RAS owner Bob Schwader, and that her son had no ownership interest in RAS, but did have a key to the building.

¶4 Putzke left the Welke home to look for Jane Welke's vehicle and was advised by the police dispatcher that "Unique had called the Sheriff's office, advising that there was a suspect[ed], intoxicated operator, at Ripon Auto Sales, calling for a wrecker." Putzke drove to RAS and arrived at approximately 11:00 p.m. He saw a vehicle parked in front of the building's doors, the lights on in the building and then the lights go off in the building as he approached within about fifty feet of the parked vehicle. Putzke called for backup, and as he walked towards the RAS building, he observed what appeared to be the periodic glow of a cigarette. As Putzke reached the door, he used his flashlight and saw a person sitting on a chair inside the building. The building's door was "completely unlocked and open."

¶5 Putzke then entered the business and made contact with Welke, who identified himself and admitted that he had operated the vehicle that was in the ditch. Welke was sitting at a desk with the light off waiting for Unique to show up with his vehicle. Welke had permission from RAS owner Schwader to be in the building and had a key to the building. Welke practiced shooting pool in the building and Schwader testified that Welke might have slept overnight a couple of times. Putzke never knocked on the door or asked permission to enter the building. Putzke observed that Welke's ability to operate a motor vehicle was "extremely impaired" and placed him under arrest for OWI.

¶6 Welke contends that Putzke's entry into the RAS building without a warrant was unlawful. The trial court denied the suppression motion after concluding that because Welke had no reasonable expectation of privacy in the RAS premises, he had no standing to invoke Fourth Amendment protections. A defendant must establish standing to challenge a search, that is, he or she must prove a legitimate expectation of privacy in the area searched. *See State v. Rhodes*, 149 Wis. 2d 722, 724, 439 N.W.2d 630 (Ct. App. 1989).

¶7 The scope of an individual's expectation of privacy is ultimately determined by an expectation of privacy in the space or area invaded; it is not determined by property ownership or interest. *See United States v. Salvucci*, 448 U.S. 83, 92-93 (1980); *see also State v. Whitrock*, 161 Wis. 2d 960, 468 N.W.2d 696 (1991). Relevant considerations in determining a legitimate expectation of privacy are whether one had a property interest in the premises, whether one was legitimately on the premises, whether one had complete dominion and control and the right to exclude others, whether one took precautions that those seeking privacy customarily take, whether one put the property to some private use and whether the privacy claim is consistent with historical notions of privacy. *See Rhodes*, 149 Wis. 2d at 725.

¶8 Whether Welke had an interest protected by the Fourth Amendment in the RAS premises depends on whether he had a legitimate, justifiable or reasonable expectation of privacy in that space. *See State v. Rewolinski*, 159 Wis. 2d 1, 12, 464 N.W.2d 401 (1990). Unless he had a legitimate expectation of privacy in that area, the constitutionality of the police conduct in entering the building "does not come into question." *Id.* A reasonable expectation of privacy depends on whether Welke by his conduct exhibited an actual, subjective expectation of privacy and whether such expectation is legitimate or justifiable in

that it is one that society is willing to recognize as reasonable. *See id.* at 13. Welke has the burden of proving by a preponderance of the credible evidence that he manifested a subjective expectation of privacy in the RAS premises and that his expectation was reasonable. *See id.* at 16.

¶9 The expectation of privacy in commercial premises is somewhat less than that in a person's home. *See State v. Schwegler*, 170 Wis. 2d 487, 495, 490 N.W.2d 292 (Ct. App. 1992). Nonetheless, an owner or operator of a business has an expectation of privacy in commercial property which society is prepared to consider to be reasonable. *See id.* A trial court's factual findings underlying whether a defendant has an expectation of privacy will not be set aside unless clearly erroneous. *See State v. Abramoff*, 114 Wis. 2d 206, 209, 338 N.W.2d 502 (Ct. App. 1983). The trial court's conclusion, however, that these facts did not give rise to an individual's legitimate expectation of privacy is a question of law which we independently review. *See id.*

¶10 The trial court determined that Putzke had a legitimate reason for being at RAS because both Welke's mother and Unique told him that was where he might find the owner of the vehicle that had been abandoned in the ditch. The court found that RAS was a place of business, that Welke was not the owner of RAS, that the RAS building had the appearance of being open for business, that there was a car in the parking lot, that the building's lights were on and then went off, and that the door was not locked. The trial court also found that Welke had taken no precautions to establish an expectation of privacy in the entry area. Those findings are not erroneous. In addition, Welke testified that he had driven his mother's vehicle to RAS for commercial reasons—to receive his towed vehicle from Unique and to have the vehicle serviced by RAS the next day.

¶11 The trial court concluded that Welke’s relationship with the RAS owner, his possession of a key to RAS and the occasional invitation to be on the premises for social purposes, or very occasional sleeping purposes, did not establish that he had a legitimate expectation of privacy in the RAS building at the time of Putzke’s entry. We agree with that conclusion. Welke failed to meet his burden of establishing the requisite expectation of privacy in the RAS premises to invoke Fourth Amendment protections against a constitutionally unreasonable entry by Putzke, and, therefore, he lacks standing to challenge the entry.⁵

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

⁵ Because we conclude that Welke had no standing to assert Fourth Amendment protections in support of his suppression motion, we need not address his argument that Putzke’s entry into RAS was not validated under the community caretaker exception. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983). We note, however, that Welke was waiting for his vehicle to be delivered to RAS by one towing company, Unique, after Putzke had earlier summoned a different towing company, Mike’s Mobil, to remove the vehicle from the ditch. Putzke was aware of those circumstances prior to arriving at RAS.

