COURT OF APPEALS
DECISION
DATED AND FILED

September 11, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2007AP1485-CR **Cir. Ct. No. 2005CF252**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DAVID W. JOHNSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County: PATRICK TAGGART, Judge. *Affirmed.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. David Johnson is charged with second-degree sexual assault in violation of WIS. STAT. § 940.225(2)(d) (2005-06)[1] for allegedly

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

having sexual intercourse with his wife, Leah, while she was unconscious and a patient at the Divine Savior Nursing Home. The State appeals from an order granting Johnson's motion to suppress evidence of the alleged sexual assaults. The circuit court ruled that Johnson had a reasonable expectation of privacy in his wife's room at the nursing home, and, therefore, Johnson's Fourth Amendment rights were violated by videotaping of Johnson's actions in the room. We agree and therefore affirm.

¶2 The following facts are taken from the testimony at the suppression hearing and are not disputed. Leah was admitted to the nursing home in 2005, after suffering a stroke. Leah, who was given her own room, was unable to speak or sit up and required total care. Nursing home staff fed, cleaned and turned her, and entered her room every two hours at a minimum.

¶3 WISCONSIN ADMIN. CODE § HFS 132.31(1)(f)1 (Oct. 2004) provides that all nursing home residents have the right to privacy for visits by spouses. Johnson was Leah's husband and legal guardian and he visited her frequently. During some of these visits, he closed the door to his wife's room. Divine Savior Nursing Home Administrator, Jennifer Bieno, testified that she did not have a problem with someone closing the door during visits unless she knew the resident was in danger. She explained that nursing home policy was to honor the rights of residents during spousal visits and that, if a resident was having a closed door visit with a spouse, staff would knock before entering. Bieno testified that she did not and could not prevent Johnson from having closed door visits with his wife.

¶4 After receiving a report from staff about an incident that staff perceived as a sexually inappropriate interaction by Johnson with his wife, Bieno felt that Leah was in danger from Johnson. Bieno obtained from the Department

of Health and Family Services a waiver for Leah's room so that the staff would not have to comply with WIS. ADMIN. CODE § HFS 132.31(1)(f)1. Johnson was not told of the waiver. Bieno also reported Johnson's actions to authorities, and the police department obtained a search warrant to videotape Leah's room. The video camera was installed and a videotape of the room ran for approximately three weeks. Bieno testified that Johnson was not informed there would be a hidden camera recording his actions with Leah, nor was he ever told that he could no longer have closed door visits. Bieno further testified that no information was given to Johnson that would have made it unreasonable for him to assume that he still had privacy when visiting his wife.

¶5 Johnson did not testify at the suppression hearing, but the court allowed his attorney to make an offer of proof as to what Johnson would have said if he testified. His attorney stated that Johnson would have testified that Bieno advised him that he could have private time with Leah with the door closed and that they would not be interrupted without a staff member knocking first. His attorney stated that Johnson would have testified that throughout the entire time Johnson visited his wife, including the time of the videotaping, staff respected his privacy, allowed him to close the door and never entered without knocking and receiving permission to enter. His attorney also stated that Johnson would have testified that until the time of Johnson's arrest, he was never told that the privacy of these visits had changed.

¶6 The circuit court ruled that the search warrant was improperly executed; the State does not contest that determination. The court also ruled that Johnson had a reasonable expectation of privacy in his wife's nursing home room and therefore granted Johnson's motion to suppress the fruits of the search on Fourth Amendment grounds. The State appeals this ruling.

¶7 When reviewing a circuit court's decision on a motion to suppress evidence on Fourth Amendment grounds, we will uphold the circuit court's findings of fact unless they are clearly erroneous. ***State v. Bruski***, 2007 WI 25, ¶19, 299 Wis. 2d 177, 727 N.W.2d 503. The State does not dispute the circuit court's factual findings in this matter, and we conclude that the court's findings are not clearly erroneous.

¶8 Whether a defendant has a reasonable expectation of privacy, and therefore has standing to raise a Fourth Amendment claim, is a question of law that we review de novo. ***Id***., ¶¶19, 22. Johnson bears the burden to demonstrate by a preponderance of the evidence that he had a reasonable expectation of privacy. *See* ***State v. LaCount***, 2008 WI 59, ¶40, 750 N.W.2d 780.

¶9 Whether an individual had a reasonable expectation of privacy in an area subjected to a search depends on two prongs. The first is whether the individual has by his or her conduct exhibited a subjective expectation of privacy in the area searched and in the item seized. ***Bruski***, 299 Wis. 2d 177, ¶23**.** If the person had the requisite subjective expectation, courts must then determine whether the individual's expectation of privacy was legitimate or justifiable (i.e., one that society is willing to recognize as reasonable). ***Id.***

¶10 We have little difficulty concluding that, by closing the door to Leah's room, Johnson exhibited an actual subjective expectation of privacy while visiting his wife. Our analysis therefore focuses on the objective element, namely, whether under the facts of the case, Johnson's expectation of privacy was legitimate or justifiable.

¶11 The following factors are relevant to our inquiry:

> (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.

Id., ¶24 (citation omitted). The list of factors is not controlling or exclusive. ***Id.*** Rather, the totality of the circumstances is the controlling standard. ***Id.***

¶12 Johnson does not assert that he had a property interest in his wife's room at the nursing home; therefore the first factor does not strengthen his position. As to the third factor, Johnson had the right to exclude others from Leah's room, at least temporarily. However, staff were permitted to enter the room for emergency purposes and were required to enter the room at least every two hours to care for Leah. As a result, Johnson did not have complete dominion and control over the room. We therefore conclude that the third factor does not weigh heavily in Johnson's favor.

¶13 The second factor is lawful presence on the premises. Citing "overnight guest" cases such as ***State v. McCray,*** 220 Wis. 2d 705, 583 N.W.2d 668 (Ct. App. 1998), and ***State v. Trecroci,*** 2001 WI App 126, 246 Wis. 2d 261, 630 N.W.2d 555, the State argues that Johnson failed to prove that he had his wife's permission to be in the nursing home room with her.[2] We reject this argument. Even assuming that the overnight guest analysis did apply, it would be

[2] The State also cites ***State v. McCray,*** 220 Wis. 2d 705, 583 N.W.2d 668 (Ct. App. 1998), to argue that, even if Johnson had permission to be in Leah's room on other occasions, there was no evidence that he had permission to be in the room to sexually assault her. This assertion is nonsensical and we do not read ***McCray*** to require that Johnson offer evidence to this effect. We therefore reject this argument.

of no assistance because Leah was in essence unable to give permission for anything. Additionally, the test in the overnight guest cases refers to the guest's relationship to the host *and* the property. *See* ***Trecroci***, 246 Wis. 2d 261, ¶58. The undisputed evidence in the record demonstrates that the Divine Savior Nursing Home considered Johnson to be a legitimate guest in Leah's room, and his visits occurred with the nursing home's full knowledge and consent. Based on staff practice and communications, Johnson could reasonably have expected that he could spend time alone with Leah in private. Johnson was lawfully on the premises of the nursing home during his visits with his wife, and we conclude that this factor supports Johnson's claim.

¶14 The fourth factor is whether the accused took precautions customarily taken by those seeking privacy. The State does not dispute that, as a general matter, Johnson took precautions such as closing the door to Leah's room. Instead, it contends that Johnson was required, and failed, to prove that he took such precautions on the three specific dates on which the State alleges that Johnson had sexual intercourse with his wife. However, the only binding authority which the State cites, ***Minnesota v. Carter***, 525 U.S. 83, 88 (1998), and ***Bruski***,[3] 299 Wis. 2d 177, ¶23, do not support such a requirement.[4] Even if such a requirement existed, the circuit court implicitly found that at the times relevant to

[3] The State cites to ***State v. Bruski***, 2007 WI 25, ¶¶21-22, 299 Wis. 2d 177, 727 N.W.2d 503, but these paragraphs discuss the defendant's standing to assert his Fourth Amendment claim and make no reference to the area searched. We infer from the context of the State's argument that it is referring instead to ***Bruski***, ¶23.

[4] In addition, the non-binding authority cited by the State, ***Granados v. State***, 85 S.W.3d 217, 225-26 (Tex. Crim. App. 2002), is an overnight guest case and analyzes whether a guest has a reasonable expectation of privacy once the host had asked him to leave. Of necessity, the court's inquiry focused on the specific time period in question. The case does not purport to set out a general rule for use in all contexts involving Fourth Amendment claims.

its analysis, the door was closed. Further, it is reasonable to infer from the evidence in the record that it would have been unnecessary to obtain a search warrant or to place a hidden video camera in the room if the suspicious conduct was visible to staff and visitors passing by Leah's room. We conclude that the fourth factor supports Johnson's claim.

¶15 The fifth factor is whether the property was put to some private use. The State contends that, because the nursing home had obtained a waiver of the privacy right conferred by the administrative code, it was not. We reject this argument because it incorrectly assumes that Johnson's only ability to put the room to a private use was derivative of Leah's rights under the administrative code. Although we agree that WIS. ADMIN. CODE § HFS 132.31(1)(f)1 recognized a privacy right as to Leah and not as to Johnson, Johnson was unaware of the waiver of his wife's privacy rights, and the waiver did not by operation of law extinguish Johnson's ability to put the room to a private use. The State also contends the property could not be put to private use in light of the fact that nursing home staff could enter Leah's room without permission if they believed she was in danger. While this is true and Leah's right to privacy could be compromised in exigent circumstances, it does not necessarily follow that Johnson could never put the room to some private use. The nursing home room was used for a visit between Johnson and his wife, which is plainly a private use.

¶16 The State cites ***State v. Orta***, 2003 WI App 93, ¶23, 264 Wis. 2d 765, 663 N.W.2d 358, for the proposition that where a person uses a location for an illegal activity rather than for its intended use, a court must reject any argument that the defendant has put the area to private use. We disagree that ***Orta*** sets out an "intended use" rule. Orta sought to suppress evidence of drug possession on Fourth Amendment grounds after a security guard observed Orta and another

individual together in an unlocked public restroom stall engaging in what appeared to be a drug transaction. ***Id.***, ¶¶1-4. We concluded that, among other factors, because Orta conducted his criminal activity with a second individual in the restroom stall of a public building and failed to latch or fully close the door, he did not demonstrate either a reasonable subjective or objective expectation of privacy. ***Id.***, ¶¶13-24. We did not conclude that the fact that Orta was engaged in criminal activity transformed his expectation of privacy from reasonable to unreasonable. Accordingly, we reject the State's argument regarding the applicability of ***Orta***, and we conclude that the fifth factor supports Johnson's reasonable expectation of privacy in his wife's room.

¶17 The sixth and final factor is whether the claim of privacy is consistent with historical notions of privacy. The State concedes that when Johnson visited Leah to care for and comfort her, his private visits may have been consistent with historical notions of privacy. However, citing ***Avery v. State,*** 292 A.2d 728, 734-36 (Md. Ct. Spec. App. 1972), it contends Johnson's visits were not consistent with historical notions of privacy when he used the room to have sexual intercourse with his comatose wife. We reject this argument because it improperly focuses on the alleged illegal act, proof of which has not been admitted,[5] rather than on an objective view of whether society is willing to recognize an expectation

[5] The State attempts to justify its use of the results of the search to support its arguments for two reasons. First, it argues that it is necessary to refer to the content of the videotape to identify the relevant time period. As we discussed in paragraph 13 above, however, the State has offered no precedent for the proposition that our privacy analysis must focus exclusively on the specific dates of the alleged criminal activity. Second, the State relies on ***United States v. Gray***, 491 F.3d 138 (4th Cir. 2007), in support of its position. Not only is ***Gray*** not controlling authority, but the majority's reference to the results of the search in the context of its Fourth Amendment analysis was roundly criticized by the dissent. *See* ***id.*** at 157-58 (Michael, J., dissenting). We reject the State's argument.

of privacy. The salient inquiry is whether Johnson's claim of privacy is consistent with historical notions of privacy involving a visit between spouses in a room in a nursing home. We conclude that it is.

¶18 Based on our review of the factors and the totality of the circumstances in this case, we are satisfied that Johnson's expectation of privacy while visiting his wife in her nursing home room is one that society would recognize as reasonable. We conclude that Johnson has established by a preponderance of the evidence that he had a reasonable expectation of privacy in his wife's room and that the search violated his Fourth Amendment rights.

By the Court.—Order affirmed.

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