Appeal No. 2009AP1209-CR **Cir. Ct. No. 2006CF747**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN T. ST. MARTIN,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, P.J., Anderson and Snyder, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2007-08)[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Whether the rule regarding consent to search a shared dwelling in ***Georgia v. Randolph***, 547 U.S. 103 (2006), which states that a warrantless search cannot be justified when a physically present resident expressly refuses consent, applies where the physically present resident is taken forcibly from his residence

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

by law enforcement officers but remains in close physical proximity to the residence such that the refusal is made directly to law enforcement on the scene?

BACKGROUND

On June 8, 2006, Latoya M. made a complaint of domestic abuse against Brian T. St. Martin at the Racine police department. She spoke with Officer Andrew Matson, who then called Officer John Spieker to accompany him to the apartment that Latoya shared with St. Martin. Spieker was driving the transport van, and he anticipated picking up St. Martin for further investigation or possibly making an arrest.

When Matson, Spieker and Latoya arrived at the apartment, they encountered a locked door. No one responded when they knocked. Latoya provided a key to Matson and, as he opened the door, they all observed St. Martin standing in the doorway. The officers then handcuffed St. Martin and took him into custody for domestic abuse. They placed St. Martin in the transport van parked outside.

After St. Martin was secured in the van, Spieker talked to Latoya. Latoya told Spieker that she and St. Martin had recently "broken up" and that she "had suspicions that [he] was dealing drugs." She said that on June 2, 2006, she had seen St. Martin "cutting out a kilo of cocaine in the bathroom probably about a week before" the domestic violence incident. Latoya stated that St. Martin had split up the cocaine and put it into plastic sandwich bags. She said she thought there might still be cocaine in the apartment. Latoya told Spieker that St. Martin was "making trips back and forth in the attic" and, if there was cocaine on the premises, it would be up in the attic. Latoya did not say she saw cocaine in the attic.

Latoya told Matson that she wanted to cooperate with a drug investigation and she gave her consent to search the attic. Matson then went to talk to St. Martin, who was outside in the transport van. Matson asked for St. Martin's consent to search and St. Martin refused.

Matson, Spieker and Latoya then went into the attic together. Matson recalled that they were not in the attic very long and that he "basically just walked through … [and] didn't see anything." Spieker described the attic as "messy" and in "disarray." As they were getting ready to go down the stairway from the attic, Spieker "noticed money beneath some clothing." Spieker "moved the clothing from above the money and below the clothing [were] two bags of cocaine."

After they found the cocaine, Matson took it to be tested and weighed. Spieker stayed at the apartment and waited for investigators to arrive and obtain a search warrant. Spieker talked to Investigator Sorenson, who prepared an affidavit to support the warrant. Sorenson's affidavit, paragraph Nos. 3-6, stated as follows:[2]

> 3. Your affiant states that Officers A. Matson and Spieker responded to 1012 College Avenue #4 with the intention of arresting St. Martin on domestic abuse related charges based on the statements provided by [Latoya]. When the officers arrived St. Martin was arrested on domestic abuse related charges.
>
> 4. That your affiant states that Officer A. Matson was approached by [Latoya] after St. Martin was in custody. [Latoya] told A. Matson that St. Martin regularly has large amounts of cocaine in the apartment and that he regularly

[2] We observe that Officer Matson's name is misspelled throughout the affidavit. We have taken the liberty of correcting the spelling in all quotations from the affidavit.

> brings kilograms of cocaine into the apartment, where he would divide it into smaller pieces and re-bag[] it into smaller bags for resale. [Latoya] further stated that St. Martin often hides that cocaine in the attic.
>
> 5. That your affiant reports that with [Latoya's] permission both Officers A. Matson and Spieker entered the attic from apartment #4. [I]n plain view in the attic A. Matson recovered a plastic baggie that contained a white[] powdery substance and that this baggie was next to a large amount of U.S. currency.
>
> 6. That your affiant reports that A. Matson transported this baggie to the Racine Police Department where he [weighed] it and conducted a field test for cocaine. The total gross weight was 64.9 grams and the field test was positive for cocaine.

The circuit court issued the search warrant. The police then searched the premises and seized cash, a scale, cell phones and documents.

The State charged St. Martin with one count of battery, contrary to WIS. STAT. § 940.19(1) and one count of possession of cocaine with intent to deliver, contrary to WIS. STAT. § 961.41(1m)(cm)4. St. Martin moved to suppress all evidence obtained in the warrantless home entry and the subsequent search pursuant to the warrant.

The circuit court held a hearing on the motion.[3] The State conceded at the hearing that its initial search of the attic was improper.[4] In its written

[3] The circuit court judge who heard the pretrial motion to suppress was not the same circuit court judge who signed the search warrant.

[4] In its response brief, the State explains, "It should also be noted that, although the State 'conceded' in the lower court that the initial search of the attic was 'improper,' this alleged concession of law does not bind this court." *See* ***Lloyd Frank Logging v. Healy***, 2007 WI App 249, ¶15 n.5, 306 Wis. 2d 385, 742 N.W.2d 337 (we are not bound by a party's concession of law).

decision, the circuit court summarized its factual findings. It acknowledged the State's concession that the warrantless "search of the attic was illegal because Mr. St. Martin had specifically not consented to the search." With regard to the subsequent search, the court explained that statements made in paragraph No. 4 of Sorenson's affidavit, which provided the probable cause to issue a search warrant, "were not true." The State asked the court to "reform" paragraph No. 4 of Sorenson's affidavit to read:

> That your affiant states that Officer A. Matson was approached by [Latoya] after St. Martin was in custody. [Latoya] told A. Matson that St. Martin has large amounts of cocaine in the apartment and that he brings kilograms of cocaine into the apartment, where he would divide it into smaller pieces and re-bag[] it into smaller bags for resale. [Latoya] further stated that St. Martin hides that cocaine in the attic.

The revision removed the terms "regularly" and "often" from Latoya's description of St. Martin's drug activities. The court rejected the State's new version and concluded that it could not "simply reform" paragraph No. 4, but instead would redact all untrue statements from the paragraph and then assess what remained to determine whether it supported probable cause for a search warrant. Thus, the court considered the following statement:

> That your affiant states that Officer A. Matson was approached by [Latoya] after St. Martin was in custody. [Latoya] told A. Matson that St. Martin may have cocaine in the apartment. That she had seen St. Martin divide cocaine into smaller pieces and rebag it into smaller bags. [Latoya] further stated that St. Martin may hide cocaine in the attic.

The court then posed the question of whether a neutral magistrate would have found probable cause from the redacted statement. It characterized this as "a very close case," but ultimately held that "the redacted Paragraph 4 …

has sufficient information under the totality of the circumstances to justify a search of the apartment."

The circuit court denied St. Martin's motion to suppress. St. Martin pled guilty to one count of possession of cocaine with intent to deliver and pursued this appeal.

DISCUSSION

The certified issue asks whether the ***Randolph*** rule contemplates the refusal of a resident who has been removed from the premises by law enforcement but who is nonetheless in close proximity and has been asked by law enforcement to grant or refuse consent.[5] Federal Fourth Amendment jurisprudence has addressed warrantless search issues in the context of a shared dwelling before. In ***United States v. Matlock***, 415 U.S. 164, 170 (1974), the Supreme Court established that consent from one with "common authority ... is valid as against [an] absent, nonconsenting person with whom that authority is shared." More recently, the Supreme Court held that a warrantless search cannot be justified when a "physically present resident" expressly refuses consent. ***Randolph***, 547 U.S. at 120. The key distinction between ***Matlock*** and ***Randolph*** is the contemporaneous physical presence of the defendant at the time consent to search is requested. An absent party's refusal is not valid; however, a "physically present resident" may effectively refuse, even over a co-dweller's consent.

[5] On appeal, St. Martin also challenges the search warrant on grounds it was obtained using untrue allegations to support probable cause. St. Martin argues that the circuit court improperly redacted the untrue allegations and reassessed the document for probable cause, thereby nullifying the role of the neutral magistrate. He further argues that because the cocaine was seized during the warrantless search, it should have been suppressed regardless of the validity of the search warrant.

In ***Randolph***, the police responded to a domestic dispute and found both Randolph and his wife at the door. ***Randolph***, 547 U.S. at 107. While Randolph's wife gave the police consent to search the house, Randolph "unequivocally refused" consent. ***Id.*** The police searched the home while ignoring his protests. ***Id.*** The Court held "that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." ***Id.*** at 120. The Court reasoned that "there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders." ***Id.*** at 114.

Here, the facts demonstrate that St. Martin was in a van just outside the apartment when he refused consent to search his dwelling. He was in the van because the officers arrested him on the domestic violence complaint, took him from his apartment, and placed him in the van. Shortly thereafter, having talked to Latoya about possible drugs in the apartment, the officers asked St. Martin for consent to search his apartment. He refused.

Unlike the situation presented in ***Randolph***, St. Martin was not in the apartment when he refused to consent; rather, he was nearby in the police van. He was close enough for officers to ask him directly whether they could search his apartment. The ***Randolph*** court anticipated some of these twists on this issue:

> [W]e have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.

Id. at 121. Here, St. Martin was "nearby" and was directly invited to take part in the "threshold colloquy" by Matson, who asked St. Martin for consent to search.

The ***Randolph*** court also anticipated a problem if law enforcement preemptively removed a resident from a dwelling for the purpose of preventing that person's ability to refuse consent: "[E]vidence that the police have removed the potentially objecting tenant ... for the sake of avoiding a possible objection" might invalidate a subsequent search with respect to that tenant. ***Id.*** at 121-22. There is no suggestion here that the officers removed St. Martin from his apartment to avoid a possible objection; indeed, they sought out his consent even while he sat waiting outside in the van.

The State argues that the ***Randolph*** rule must be limited "to only those situations where the co-tenants are both present when the consent question is asked, with one objecting and one consenting." It directs us to several Seventh Circuit cases where the holding in Randolph was construed very narrowly. *See, e.g.*, ***United States v. Groves***, 530 F.3d 506, 511-12 (7th Cir. 2008) (***Randolph*** requires co-tenant's objection at the door and expressly disinvites anything other than the narrowest of readings); ***United States v. Henderson***, 536 F.3d 776, 783 (7th Cir. 2008) (the contemporaneous presence of the objecting and consenting co-tenants is indispensable to the decision in ***Randolph***); ***United States v. Hicks***, 539 F.3d 566, 569 (7th Cir. 2008) (***Randolph*** requires objector's physical presence at the time consent is originally sought to nullify a co-occupant's permission).

St. Martin argues that his detention "just outside the house is a red herring." He asserts that St. Martin was "physically present" as contemplated by ***Randolph*** and that the State's narrow interpretation elevates form over substance. He emphasizes that key factors derived from the Supreme Court's decision in

Randolph are present here: (1) St. Martin was nearby, (2) he refused consent after Latoya told officers they could search the attic, and (3) his refusal was made directly to officers on the scene. The ***Randolph*** court summarized the rule regarding refusal of consent by a "physically present resident" as follows:

> So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it.

Randolph, 547 U.S. at 121-22. The question here then comes down to what the United States Supreme Court meant by a "physically present resident" when it introduced that element into the inquiry. *See* ***id.*** at 120. Was St. Martin physically present when he was forcibly removed to a van just outside his apartment, yet was nearby and was invited to take part in the "threshold colloquy" regarding consent to search?

CONCLUSION

The interpretation of ***Randolph*** in this context implicates the constitutional right to be free from unreasonable search and seizure. This right is eroded when law enforcement can manipulate a situation in a way that invalidates a resident's refusal to consent to a search. Likewise, the state's ability to investigate and prosecute criminal activity is restrained when police officers are provided insufficient guidance regarding the proper execution of their duties. Because ***Randolph*** has not been interpreted or applied in the context of a resident who is removed from his residence but remains nearby and refuses consent when asked, law enforcement officers and the bench and bar would benefit from

guidance on the issue. We respectfully certify the question to the Wisconsin Supreme Court.