COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2283-CR **Cir. Ct. No. 2012CF1143**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CHRISTOPHER D. MCNEAL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. The State of Wisconsin appeals the circuit court's order granting Christopher McNeal's motion to suppress and the related exclusion of all evidence gathered by the State following city of Kenosha police officers' unlawful entry into McNeal's residence. We affirm.

¶2 The following undisputed facts are from the testimony presented at the hearing on McNeal's motion to suppress. McNeal is the upper unit tenant of the duplex where the search at issue occurred. On October 12, 2012, 911 dispatch received a call from a woman claiming to be the lower unit tenant stating she was smelling a strong odor of marijuana coming from the upper unit, there was significant "traffic" going into and out of the upper unit, and access to that unit was through a door at the rear of the duplex. City of Kenosha police officers responded and before reaching the rear entry noted the strong odor of marijuana. Officers noticed that the entry had a storm door and inner door, both with handle-only locks, and that the inner door was open several inches. There was also a doorbell on the outside wall next to the storm door with the words "UP" posted nearby.

¶3 Officers entered through the unlocked doors, and at that time observed in the entryway two closed doors[1] in addition to a staircase they had previously seen, prior to entry, through the windows of the exterior doors. Officers proceeded up the staircase where they encountered another door. The officers knocked on that door and McNeal answered. Through the open door, police saw drug paraphernalia. Upon seeing the police, McNeal attempted to close the door but police blocked it and then entered the room and handcuffed McNeal. McNeal was ultimately arrested and officers subsequently obtained a search warrant and discovered illegal drugs. At no time did McNeal consent to law

[1] Officers testified that they thought at least one of the doors led to the lower unit and therefore the area they entered was "common area." The doors actually led to a closet and to the basement.

enforcement entering through the rear exterior doors of the duplex and into the entryway or proceeding up the stairs.

¶4 The defense called the owner of the duplex, who testified regarding its configuration and which tenants had occupancy and control over the various areas of the duplex. He testified McNeal was the tenant of the upper unit, and at the time he rented that unit to McNeal, he informed McNeal that the rear entry was exclusively for access to McNeal's unit; access from the basement to the inside of the rear entryway was restricted by a door that could be locked by only the upper unit tenant; and the only person with keys to the rear exterior doors was McNeal. A city of Kenosha detective also verified in his testimony that he spoke with the lower unit tenant months after the search and she advised him she never used and had no access to the rear entryway. The detective also confirmed that the owner of the duplex had informed him the rear exterior doors were "exclusively the entrance of the upstairs apartment."

¶5 McNeal was charged with possession of THC with intent to deliver near a school, possession of narcotics near a school, possession of drug paraphernalia, maintaining a drug trafficking place, and misdemeanor bail jumping, all as a repeater. He moved to suppress all the evidence gathered by police, arguing inter alia that the police illegally entered his home when they proceeded through the rear exterior doors without a warrant or lawful exception thereto. After the hearing, the circuit court granted the motion to suppress and, based on the lack of admissible evidence, granted McNeal's motion and suppressed all evidence. The State appeals.

¶6 The State makes three main arguments on appeal. First, McNeal failed to meet his burden of proof that he had a reasonable expectation of privacy

in the rear entryway and stairway of the duplex. Second, if we determine McNeal had met his burden, we should conclude that "the Fourth Amendment was not implicated because the officers' actions were reasonable." And finally, even if we conclude there was a constitutional violation in the officers' entry, the exclusionary rule should not be applied in this case. We conclude McNeal did have a reasonable expectation of privacy in the rear entryway and stairwell, the officers illegally entered McNeal's residence when they proceeded through the rear exterior doors into the entryway and up the stairs, and the circuit court properly applied the exclusionary rule.

¶7 In reviewing a circuit court's order granting a motion to suppress evidence, we uphold the court's factual findings unless they are clearly erroneous; whether those facts satisfy a particular constitutional standard is a question of law we determine independently. ***State v. Parisi***, 2014 WI App 129, ¶9, 359 Wis. 2d 255, 857 N.W.2d 472. "Whether a search or seizure … passes constitutional muster [is a] question[] of law, subject to independent review." ***State v. Guard***, 2012 WI App 8, ¶14, 338 Wis. 2d 385, 808 N.W.2d 718 (2011). The State has the burden of proving, by clear and convincing evidence, that an exception to the warrant requirement existed. ***State v. Kieffer***, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998).

¶8 The first issue is whether McNeal met his burden to show he had a reasonable expectation of privacy in the rear entryway and stairway. "A criminal defendant bears the burden of establishing both that he manifested a subjective expectation of privacy that was invaded by government action and that that expectation was legitimate." ***Guard***, 338 Wis. 2d 385, ¶17 (citations omitted); ***State v. Trecroci***, 2001 WI App 126, ¶35, 246 Wis. 2d 261, 630 N.W.2d 555 (stating the individual first must have exhibited a subjective expectation of privacy

in the area, and second, that expectation of privacy must be reasonable). The defendant's burden of proof is preponderance of the evidence, and whether the defendant "had a legitimate expectation of privacy depends upon the totality of the circumstances." ***Guard***, 338 Wis. 2d 385, ¶17 (citations omitted).

¶9 With respect to the first prong, whether McNeal had a subjective expectation of privacy, our decision in ***Trecroci*** provides guidance. In that case, we concluded the defendants exhibited a subjective expectation of privacy in the attic area of their apartment building because of the defendants' testimony that they had equipped the doorway entrance to the stairway with a deadbolt lock and there was no evidence suggesting third parties had unfettered access to the stairway. ***Trecroci***, 246 Wis. 2d 261, ¶35.

¶10 The State argues ***Trecroci*** is distinguishable because McNeal himself never testified in this case; there was a "small, handle only lock" on both rear exterior doors, not deadbolt locks; and the lower tenant had informed dispatch there was significant traffic going into and out of those doors, "suggesting that third parties did have free access to the stairway." That McNeal himself did not testify is inconsequential, so long as the evidence presented meets his burden of demonstrating he exhibited an actual, subjective expectation of privacy in the area. *See* ***State v. Orta***, 2003 WI App 93, ¶13, 264 Wis. 2d 765, 663 N.W.2d 358. Here, McNeal's landlord testified he had informed McNeal the rear exterior doors and inside entryway were exclusively for his upper unit, with no access to the entryway by the lower unit tenant unless McNeal permitted it by leaving the door to his basement access unlocked, which the landlord stated he had never seen McNeal do. The landlord further testified the rear entry was clearly marked with the word "UP" posted on the outside of the building near the storm door and doorbell, and that both the storm door and inside wooden door each had locks,

which McNeal had the sole ability to secure. Additionally, the detective testified the lower unit tenant had informed him months after the search that she did not have access to the rear entryway. And while the State notes that the locks on the entryway doors were not deadbolt locks, we point out that there were *two* doors with locks, not just one as in ***Trecroci***. Additionally, that various individuals may have come and gone from McNeal's residence does not suggest this entryway was open to uninvited guests. The evidence supports McNeal's assertion that he had a subjective expectation of privacy in the rear entryway and stairs.

¶11 Because we conclude McNeal has demonstrated he had a subjective expectation of privacy, we next consider whether society is willing to recognize that expectation as reasonable. ***Trecroci***, 246 Wis. 2d 261, ¶36. This is an objective test. ***Id.*** The Wisconsin Supreme Court has identified the following relevant factors a court must consider:

> (1) whether the defendant had a property interest in the premises; (2) whether he was legitimately (lawfully) on the premises; (3) whether he had complete dominion and control and the right to exclude others; (4) whether he took precautions customarily taken by those seeking privacy; (5) whether he put the property to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy.

Id. (citing ***State v. Rewolinski***, 159 Wis. 2d 1, 17-18, 464 N.W.2d 401 (1990)).

¶12 The State does not dispute McNeal met his burden on the first three factors, but argues McNeal failed to satisfy the last three. We disagree.

¶13 Regarding the fourth factor, the State argues that because McNeal did not lock the outside storm door or completely close the inner door, "there is no evidence that McNeal took any precaution customarily taken by those seeking privacy in an entryway." While it is undisputed the doors were unlocked and the

wooden inside door was open several inches, as we noted in ***Guard***, "[a]n opening of four or five inches between an interior solid door and an exterior barred security door hardly creates an open invitation of 'unfettered access' to the general public." ***Guard***, 338 Wis. 2d 385, ¶19 (quoting ***Trecroci***, 246 Wis. 2d 261, ¶35). The State provides no legal authority for the premise that just because a resident does not lock or even completely close the door to his or her residence that he or she loses his or her Fourth Amendment rights. Moreover, in ***Guard*** we completely rejected a similar argument. *See* ***id.***, ¶19. The State also points out that both doors contained unobstructed windows, enabling persons to see into the entryway. While windows in a door would enable a person on the outside to see into the entryway, this provides no invitation for anyone to open the doors and walk into that area without permission; it could easily mean McNeal desires the ability to clearly see, from the inside, who is at his door before he opens it.

¶14 As to the fifth factor, the State argues "there is no evidence that McNeal put the interior vestibule or stairway to some private use or that anything was ever kept in the vestibule or on the stairway." The nature of the entryway is that it is just that—an entryway into the rest of McNeal's residence, like a vestibule or foyer in a home. It is a means of ingress and egress to and from the areas of deeper sanctuary within McNeal's home. We would not expect McNeal to "keep things" in that area, so as to make the ingress and egress less effective or more dangerous. The landlord testified he informed McNeal the area was his exclusively; that means McNeal had the right to put or not put anything there as he wanted. Due to the particular nature of this area, leaving the area open for unobstructed ingress and egress was in fact putting that area to McNeal's private use.

¶15 Finally, regarding the sixth factor, the State asserts that "any claim of privacy is inconsistent with historical notions of privacy because passageways that offer an implied permission to enter negate any legitimate expectation of privacy in these areas." The State's argument of course assumes this passageway in fact "offer[ed] an implied permission to enter," which, as we have already explained, it did not. In addition to the reasons previously noted, we point out that the word "UP" was posted on the outside of the duplex near the storm door and doorbell. The most obvious conclusion one would make from such an arrangement is that to gain legitimate entry beyond the exterior doors one must ring the doorbell and await the tenant's arrival at the door and permission to enter.

¶16 For the foregoing reasons, we conclude McNeal has demonstrated he had a reasonable expectation of privacy in the entryway and stairwell leading further into the sanctuary of his home. Accordingly, the officers' warrantless entry was unlawful.

¶17 The State next argues that we should conclude the officers' actions were reasonable because they were based on two mistakes of fact: (1) the lower tenant had given the police permission for them to enter and (2) the rear exterior doors looked like they entered into a common area. The evidence simply does not support the State's position. On the first point, the evidence was that the caller merely provided information that the rear door was the door that provided access to the upper level residence, not that police had permission to enter. On the second point, the testimony of the entering officer was that he observed doors inside the entryway, which he thought might lead to the lower level residence and thus create a common area in the entryway, *after* he already had entered through the exterior doors.

¶18 The State further contends even if the officers' entry beyond the rear exterior doors was unlawful, we nonetheless should not exclude the evidence discovered thereafter. The State asserts the officers made a simple mistake in believing they were entering a common area of the duplex based on the lower tenant's information and their observations. As we have already discussed, however, the information dispatch provided to the officers regarding the caller provided no basis for the officers to believe they had permission to enter through the exterior doors, and the officers did not see additional doors inside the entryway, suggesting a common area, until *after* they unlawfully had entered through the exterior doors. *See supra*, ¶17.

¶19 Lastly, in arguing the exclusionary rule should not apply, the State argues, "The exigency would have come about regardless of whether the officers made contact with McNeal through the main interior door of the upper unit or through the exterior door at the rear entrance of the duplex"; "[i]n other words, the exigency was inevitable." No, it was not. The State's argument assumes the doorbell would have worked and McNeal would have heard it and responded to the exterior doors (or responded to alternative knocking at the exterior doors) to greet the officers. Had McNeal simply not responded to the door and not provided any indication of an awareness of a police presence, there would have been no exigent situation. *See* ***State v. Hughes***, 2000 WI 24, ¶27, 233 Wis. 2d 280, 607 N.W. 2d 621. Further, the State insists we should not apply the exclusionary rule here because the evidence was not procured "by the exploitation of purposeful and flagrant misconduct." We note, however, that "[t]he primary purpose of the exclusionary rule is to deter future unlawful police conduct." ***State v. Felix***, 2012 WI 36, ¶30, 339 Wis. 2d 670, 811 N.W.2d 775 (citations omitted). Exclusion in

this case fits precisely within the purpose of the exclusionary rule, to let police know that in similar situations, they should secure a warrant.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).