COURT OF APPEALS DECISION DATED AND FILED

January 11, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 04-0441-CR

Cir. Ct. No. 02CF005769

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC GARCIA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge.[1] *Affirmed*.

Before Fine, Curley and Kessler, JJ.

---

[1] This case was originally assigned to the Honorable Michael B. Brennan, who presided over the two-day evidentiary hearing and issued the twenty-one-page decision denying Garcia's suppression motion. Due to routine judicial rotation, the case was reassigned to the Honorable Timothy G. Dugan, who presided over Garcia's guilty plea and sentencing hearings.

¶1 FINE, J. Eric Garcia appeals from a judgment entered on his guilty plea to possession of 500 grams or fewer of tetrahydrocannabinols with the intent to deliver, as a party to a crime, and possession of 5 grams or fewer of cocaine, with the intent to deliver. *See* WIS. STAT. §§ 961.41(1m)(h)1., (cm)1.; 939.05. He claims that the trial court erred when it denied his motion to suppress. We affirm.

I.

¶2 The facts are undisputed. Garcia lived in the second-floor apartment of a duplex in Milwaukee. In October of 2002, police went to the duplex to investigate drug-dealing complaints. When they arrived, the main outside door was three-fourths open. They walked through the open door and into a common hallway. After talking to the first-floor tenant, they went to the end of the hallway, where they could smell burning marijuana. They then went through an open doorway at that end of the hallway and up the stairs. At the top of the stairs, they saw through an open door a man, who was later identified as Garcia, and a woman sitting at a table, and what the officers suspected was marijuana on a counter. The police entered and searched the apartment and found marijuana, cocaine base, cocaine powder, two scales, and $1,052 in cash.

¶3 Garcia contended that the warrantless entry into the duplex violated his rights under the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution. The trial court held an evidentiary hearing. Jeffrey Sullivan, a Milwaukee detective who was one of the officers at the duplex, testified that once they entered the common hallway he knocked on a door immediately to his right and the first-floor tenant, Lisa Schultz, answered. According to Sullivan, Schultz told him that she did not "mind" if the

officers were in the hallway. She also told him that someone was selling drugs from the second-floor apartment.

¶4 As we have seen, the officers then went upstairs. Sullivan told the trial court that when the man and the woman simultaneously saw both him and an officer with him who was in uniform, they entered the apartment and seized the marijuana they had seen from outside the apartment because they were afraid that if they did not do so Garcia and the woman would try to destroy it. The police then searched Garcia's apartment and found the cocaine, scales, and money.

¶5 Garcia also testified at the hearing. He told the trial court that he leased the apartment, and that he had six keys for the duplex—one key for the basement, one key for the main outside door, two keys for a door at the bottom of the stairway, and two keys for the door to his apartment. The outside door had a doorbell for Garcia's apartment and locked automatically when shut. Garcia claimed that he kept the door at the bottom of the stairway closed and locked "most of the time." He did not testify as to the habits of the other tenant. He also testified that in his view his apartment started at the door at the bottom of the stairway. On cross-examination, however, Garcia testified that his apartment started at the top of the stairway.

¶6 Robert Mapel, the owner of the duplex, testified that the duplex had three apartments—basement, first floor, and second floor. Schultz, the first-floor tenant, had keys for the outside door and her apartment door, but not for the door at the bottom of the stairway leading to the second floor. Mapel testified that the stairway was part of the second-floor apartment, and that he told Garcia that he could use a landing at the top of the stairs for storage.

¶7 Schultz testified that she had a key for the outside door and a key for her apartment door. She told the court that the outside door and the door at the bottom of the stairway were "normally locked," but that the outside door was left open "on occasion." Although Schultz conceded that the police came to her door that day, she denied that she talked to them about drug activity in the second-floor apartment.

¶8 The trial court denied Garcia's motion in a written decision, concluding that the police lawfully entered Garcia's apartment. It also concluded that the marijuana and cocaine were lawfully seized under the plain-view exception to the warrant requirement, *see* ***State v. Guy***, 172 Wis. 2d 86, 101, 492 N.W.2d 311, 317 (1992), and Garcia does not challenge this ruling on appeal.

II.

¶9 When reviewing a trial court's ruling on a motion to suppress evidence, we will uphold a trial court's factual findings unless they are clearly erroneous. ***State v. Eskridge***, 2002 WI App 158, ¶9, 256 Wis. 2d 314, 320–321, 647 N.W.2d 434, 437. Whether a search is reasonable under the Fourth Amendment, however, is a question of law that we review *de novo*. ***Id.***, 2002 WI App 158, ¶9, 256 Wis. 2d at 321, 647 N.W.2d at 437.

¶10 On appeal, Garcia does not dispute the trial court's factual findings. Rather, he disputes the trial court's ultimate ruling that the officers' warrantless entry was constitutional. Garcia's constitutional challenge targets three points of entry: (1) the common hallway; (2) the stairway; and (3) his apartment. We address each area in turn.

A. Common Hallway.

¶11 First, Garcia contends that he had a reasonable expectation of privacy in the common hallway, and accordingly, the officers could not enter without a warrant. Although the trial court's written decision did not address specifically whether Garcia had a reasonable expectation of privacy in the common hallway, it made significant findings of fact relevant to the issue. *See* ***State v. Rhodes***, 149 Wis. 2d 722, 724, 439 N.W.2d 630, 632 (Ct. App. 1989) ("[W]here the facts relevant to the standing issue are not in dispute, we may examine the totality of the circumstances to determine whether [the defendant] had a legitimate expectation of privacy."); ***State v. Trecroci***, 2001 WI App 126, ¶26, 246 Wis. 2d 261, 276–277, 630 N.W.2d 555, 563 (trial court's ultimate conclusion encompasses necessary intermediate determinations).

¶12 Here, whether the police illegally entered the common hallway turns on whether Garcia may assert a privacy claim under the Fourth Amendment.

> The United States Supreme Court has refocused inquiry under the Fourth Amendment from traditional concepts of standing to challenge a search and seizure to an analysis of whether the disputed search and seizure has infringed on an interest of the accused which the Fourth Amendment was designed to protect. Standing is now a matter of substantive Fourth Amendment law, framed in terms of reasonable or legitimate expectation of privacy.

State v. Dixon, 177 Wis. 2d 461, 467, 501 N.W.2d 442, 445 (1993).[2]

---

[2] Generally, we interpret article I, section 11 of the Wisconsin Constitution in a manner that conforms to the interpretation of the Fourth Amendment to the United States Constitution. *See* ***State v. Guzman***, 166 Wis. 2d 577, 586–587, 480 N.W.2d 446, 448 (1992).

¶13 Whether a person has a reasonable expectation of privacy depends on: (1) whether the individual has an actual, subjective expectation of privacy in the area inspected, and (2) whether society is willing to recognize such an expectation of privacy as reasonable. ***Trecroci***, 2001 WI App 126, ¶35, 246 Wis. 2d at 281, 630 N.W.2d at 565. A defendant has the burden of establishing a reasonable expectation of privacy by a preponderance of the evidence. ***Ibid.*** We need not address both prongs if the defendant fails to make a sufficient showing on either. *See* ***State v. Orta***, 2003 WI App 93, ¶14, 264 Wis. 2d 765, 774, 663 N.W.2d 358, 362–363.

¶14 Here, the trial court believed Sullivan's testimony that the main outside door to the duplex was "'three-quarters open.'" It thus concluded that Garcia's privacy interest in the common hallway was "at least temporarily vitiated by the open door." It also found, based on testimony from the evidentiary hearing, that:

> • Schultz told Sullivan that the hallway was a common area that led to both apartments.
>
> • Schultz had two keys—one for the main outside door, and one for her apartment.
>
> • The owner of the building testified that there were three units in the duplex—basement, first floor, and second floor. Each of the units had access to the building through the back door.

These findings support the conclusion that Garcia did not have a subjective expectation of privacy in the common hallway; the main outside door was open, and third parties, including other tenants, had access to the hallway. *Cf.* ***Trecroci***, 2001 WI App 126, ¶35, 246 Wis. 2d at 282, 630 N.W.2d at 565 (subjective expectation of privacy in stairway where doorway had deadbolt lock and no evidence third parties had "unfettered access"). These findings also support the

trial court's conclusion that Garcia did not have an objective expectation of privacy in the common hallway—he did not have the right to keep others out. *See **id.***, 2001 WI App 126, ¶36, 246 Wis. 2d at 282, 630 N.W.2d at 565–566; ***Eskridge***, 2002 WI App 158, ¶17, 256 Wis. 2d at 326, 647 N.W.2d at 440.

B. Stairway.

¶15 Second, Garcia claims that the warrantless entry was illegal because he had a reasonable expectation of privacy in the stairway leading to his apartment. Again, we disagree.

¶16 The trial court correctly analyzed whether Garcia had a reasonable expectation of privacy in the stairway under the two-part test in ***Trecroci***. With regard to Garcia's subjective expectation of privacy, it found that:

> • Garcia's testimony that his apartment "'did not begin until the top of the stairs,'" was evidence that Garcia did not believe that his apartment included the stairway.
>
> • The testimony that Garcia kept the door to the stairway open, "allowing for third parties to access the stairwell," was "more consistent and reasonable than [] Garcia's self-serving testimony to the contrary."
>
> • Garcia did not use the ledge next to the stairway for storage.

Based on these findings, which Garcia does not contend are clearly erroneous, the trial court concluded that Garcia did not exhibit an "actual, subjective expectation of privacy in the stairway leading to the apartment." We agree. As with the common hallway, the door at the bottom of the stairs was open, and third parties not only had access to the stairway but Garcia did nothing to keep them out. The trial court found: "While [] Garcia could have closed the 'middle' door, locked it, and used the stairway storage area, effectively rendering the stairway part of his

apartment, he did not." As with our analysis of the common-hallway issue, this also resolves the "objective" expectation-of-privacy issue. *Cf. **Trecroci***, 2001 WI App 126, ¶35, 246 Wis. 2d at 282, 630 N.W.2d at 565 (measures taken to ensure privacy).

C. Apartment.

¶17 Finally, Garcia contends that the police illegally entered his apartment without a warrant. "A warrantless search of a home is presumptively unreasonable under the Fourth Amendment." ***State v. Richter***, 2000 WI 58, ¶28, 235 Wis. 2d 524, 540, 612 N.W.2d 29, 36. An exception to the warrant requirement arises when the State can demonstrate "both probable cause and exigent circumstances that overcome the individual's right to be free from government interference." ***State v. Hughes***, 2000 WI 24, ¶17, 233 Wis. 2d 280, 290, 607 N.W.2d 621, 626. Thus,

> [t]o determine whether the entry was lawful, we must answer two questions: first, did the officers have probable cause to believe that [the defendant's] apartment contained evidence of a crime, and second, did exigent circumstances exist at the time of the entry to establish an exception to the warrant requirement?

Id., 2000 WI 24, ¶18, 233 Wis. 2d at 290, 607 N.W.2d at 626–627. Garcia did not dispute before the trial court, and does not dispute on appeal, that the police had probable cause to believe that there was evidence of illegal drug activity in his apartment. We thus turn to whether there were exigent circumstances for their entry.

¶18 In determining whether there were exigent circumstances, we look to see what a reasonable police officer would reasonably believe under the

circumstances. *See* ***Richter***, 2000 WI 58, ¶30, 235 Wis. 2d at 541, 612 N.W.2d at 37. This is an objective test. ***Ibid.***

> There are four well-recognized categories of exigent circumstances that have been held to authorize a law enforcement officer's warrantless entry into a home: 1) hot pursuit of a suspect, 2) a threat to the safety of a suspect or others, 3) a risk that evidence will be destroyed, and 4) a likelihood that the suspect will flee.

Id., 2000 WI 58, ¶29, 235 Wis. 2d at 540–541, 612 N.W.2d at 37. In this case, the trial court found that there was a risk that the marijuana would be destroyed. We agree. Garcia and the woman saw Sullivan and the officer in uniform through the open door through which the officers also saw the marijuana. This triggered the officers' objective belief that there was a substantial risk that the marijuana would be destroyed. *See* ***Hughes***, 2000 WI 24, ¶26, 233 Wis. 2d at 293, 607 N.W.2d at 628 ("[D]rugs are highly destructible. ... It is not unreasonable to assume that a drug possessor who knows the police are outside waiting for a warrant would use the delay to get rid of the evidence.").

¶19 Garcia argues, however, that the police "created" the exigent circumstances "by proceeding up the stairs." *See* ***State v. Smith***, 131 Wis. 2d 220, 234, 388 N.W.2d 601, 607 (1986) ("police cannot themselves create the exigency" to avoid the warrant requirement). We disagree. The officers did not know that the door to Garcia's apartment would be open when they reached the top of the stairs, and they did not know that the marijuana would be in plain view. According to Sullivan's testimony at the suppression hearing, they wanted to talk to the apartment's residents about the drug-dealing complaints. Given the trial court's findings in connection with the open doors to the common hallway and to the stairway leading to the second floor, and based on what the trial court determined Schultz told Sullivan, the officers had a right to use the common areas

to approach the apartment in order to see if the residents would either talk to them or admit them to the apartment.

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.