

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 27, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

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No. 95-0966-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONALD ROY PETERSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Marinette County: CHARLES D. HEATH, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Ronald Peterson appeals a judgment of conviction for cocaine possession as a second offense entered upon his negotiated *Alford*¹ plea. Peterson claims that the trial court wrongly denied his motion to suppress the evidence seized during the execution of a search warrant at his home. Peterson argues that the search warrant was wrongly issued because it was based upon evidence illegally seized from his housemate's

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

car and the search was beyond the scope of the warrant. We reject his arguments and affirm the judgment.

On March 19, 1994, Ronald Peterson's housemate, Patrick Hartman, was stopped for a traffic violation. He was arrested and the vehicle, registered to Peterson, was searched. The search produced a one-gram bindle of cocaine, a razor blade and short straws. A search of police records revealed that Peterson had been convicted of selling "MDA", a dangerous drug, and possession of "LSD", both felonies, in 1971 in Marinette County. Hartman was arrested and a search warrant issued to search Hartman's residence.

The suppression hearing disclosed that Hartman and Peterson rented a two story single family home that was undergoing remodeling. The purpose of the remodeling was to divide the home into two separate apartments. However, the officer who executed the warrant testified that at the time of the search, the remodeling was far from complete. The home had only one useable entryway; the second floor had to be accessed through the downstairs living room. It had only one bathroom and kitchen on the first floor. An upstairs kitchen and bathroom had been roughed in, but no plumbing was installed. In executing the warrant, the officers basically searched the entire residence. The residence was unoccupied at the time, but from papers and personal effects, the officers determined that Hartman inhabited the upstairs bedroom and Peterson used the downstairs bedroom.

Downstairs, the officers discovered a large quantity of cocaine and Peterson's wallet, with identification, in a living room coffee table. Also found in the coffee table were smaller weighed and labeled bags of cocaine. Also recovered in the living room and kitchen areas were a scale, crack pipe, baggies, straws, guns and razor blades, all with white powdery residue.

Peterson testified that the upstairs plumbing was connected at the time the search was executed. He testified that the upstairs bathroom and kitchen were plumbed and useable. He further testified that Hartman was subleasing the upstairs apartment, which had its own entrance. Although the porch leading to it had been torn down, Hartman used a cement block or a ladder as a step to reach his door. On redirect, the officer testified that on the day of the search, jacks placed in the doorway prevented access through the separate entrance.

Peterson also testified that Hartman had keys and could go through Peterson's door if he wanted. Peterson testified that at the time the warrant was executed, he had been in Oconomowoc for at least ten days and during those ten days Hartman "had access to the complete house." After Peterson's arrest, he gave officers a statement denying knowledge of the cocaine, but stating that he was in the process of remodeling the house and that Hartman lived in the house with him.

The trial court determined that Hartman had access to the entire house and concluded the search was valid. The trial court based its determination on Peterson's testimony that during the ten days he was in Oconomowoc, Hartman had access to the entire house. The court found it incredible that Hartman used a separate entrance: "[T]he Court doesn't believe that Mr. Hartman was required in the wintertime to stand on top of that block and try and unlock that door and push two hydraulic jacks out of the way." The court believed the officers' testimony that at the time of the search, the upstairs plumbing was not connected. The court found that although each had a separate bedroom, both Hartman and Peterson used the entire house. Based on these findings and because the warrant authorized the search of the two-story home, it denied Peterson's suppression motion.

Peterson argues that the cocaine previously seized in an illegal search of the car may not be used to justify probable cause for the subsequent warrant issued for the search of the house.² Peterson's premise is erroneous. This court held that the seizure of the cocaine from the car was valid. See *State v. Hartman*, Nos. 94-2865-CR, 94-2866-CR, slip op. at 4 (Wis. Ct. App. Apr. 25, 1995). Because the seizure of the cocaine resulted from a valid search, it could be used as a basis to support probable cause for the issuance of a warrant.

Next, Peterson argues that because the warrant authorized only a search of Hartman's residence, the execution of the warrant exceeded its lawful scope because it extended beyond Hartman's area in the house into Peterson's area. Because the parties shared common areas, the search did not exceed the

² Our review of the probable cause determination to support the issuance of the warrant is limited to the suppression hearing transcript because the record contains no search warrant or supporting affidavit. See *State v. Heft*, 178 Wis.2d 823, 825, 505 N.W.2d 437, 438 (Ct. App. 1993), *aff'd*, 185 Wis.2d 288, 517 N.W.2d 494 (1994).

scope of the warrant. Whether the facts support a Fourth Amendment claim is an issue of constitutional law we review independently on appeal. *State v. Guzman*, 166 Wis.2d 577, 586, 480 N.W.2d 446, 448 (1992). However, underlying findings of fact will not be set aside unless they are clearly erroneous, giving due deference to the trial court's assessment of weight and credibility. *State v. Dixon*, 177 Wis.2d 461, 466-67, 501 N.W.2d 442, 445 (1993); § 805.17(2), STATS.

The burden is upon the one claiming the Fourth Amendment violation to show that the search was illegal. *State v. West*, 185 Wis.2d 68, 89, 517 N.W.2d 482, 489 (1994). "What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected if the person's expectation is justifiable." *State v. McGovern*, 77 Wis.2d 203, 214, 252 N.W.2d 365, 370 (1977). A home is entitled to special dignity and sanctity. *Id.*

A defendant's Fourth Amendment rights are violated when the challenged conduct unlawfully invaded his legitimate expectation of privacy. *West*, 185 Wis.2d at 85, 517 N.W.2d at 487. Although a tenant may demonstrate a reasonable expectation of privacy in premises he shares with another, that reasonable privacy expectation is limited. "It is well-established that one who shares common authority over premises or effects with another has 'assumed the risk' that the other may allow outsiders to come onto the premises or to examine the property." *Id.* at 93, 517 N.W.2d at 491. "It follows that one who possesses common authority over premises or effects with another may give valid consent to the authorities to search those premises or effects, even though the other person does not consent." *Id.*

The search here was authorized not by consent, nor the administrative code as in *West*, but by a warrant to investigate Peterson's co-tenant's residence. Just as the consent of a co-tenant may validate the search of shared premises, *id.*, a search warrant executed for premises of the co-tenant may justify the search of shared premises. On the record before us, the trial court's findings of fact that Hartman's authority and control extended to areas used also by Peterson cannot be assailed. It is the trial court's function, not the appellate court's, to assess weight and credibility. Section 805.17(2), STATS. The trial court believed the officer's testimony that plumbing had not been connected upstairs. Not only did Hartman and Peterson share a common entrance, kitchen and bathroom, but in Peterson's own words, Hartman "had

access to the complete home" while Peterson was away in Oconomowoc at the time of the search.

There is no dispute that the warrant itself described the house and authorized a search of the entire premises. By relinquishing complete access to the entire house to his co-tenant, Hartman, Peterson also relinquished a corresponding degree of privacy expectation. *See West*, 185 Wis.2d at 93, 517 N.W.2d at 491. Because of the shared authority over the entire home, it was reasonable for the officers to search the entire premises while executing the warrant. The trial court correctly denied Peterson's suppression motion.

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.