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March 18, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP976-CR State of Wisconsin v. Ories Lee Smith (L.C. # 2017CF1354)

Before Brennan, Brash and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Ories Lee Smith appeals from a judgment of conviction for one count of possession of THC, as a second or subsequent offense, and one count of being a felon in possession of a

firearm, as a habitual criminal.[1] *See* WIS. STAT. §§ 961.41(3g)(e), 941.29(1m)(a), and 939.62(1)(b) (2017-18).[2] Smith argues that the trial court erred when it denied his suppression motion on grounds that Smith lacked standing to challenge the search of the home where he was a guest. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

When Smith was twenty-six years old, he was arrested at his mother's home after officers searched his mother's residence without a search warrant and found a firearm and suspected illegal drugs. Smith moved to suppress that evidence on grounds that the "police did not have proper consent to enter and search the residence." He acknowledged that police contacted his mother, who was not at home, and obtained her consent to search the home, but he asserted that the police unlawfully "began searching the residence before his mother's consent was given."[3]

The trial court scheduled an evidentiary hearing on Smith's motion. On the day of the hearing, the trial court indicated that the threshold question it had to decide was whether Smith had standing to challenge the search. The defense called only one witness: Smith. During his brief testimony, Smith said that he was at his mother's residence when the police arrived. Trial counsel asked Smith a series of questions about the residence and why he was there:

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[1] Although Smith was charged as a habitual criminal for both counts, the trial court explicitly struck that penalty enhancer from Count 1 consistent with the plea agreement. Nonetheless, there is a scrivener's error in the judgment of conviction indicating that Smith was found guilty of Count 1, possession of THC, as a second or subsequent offense and as a habitual criminal. We direct the circuit court to correct this scrivener's error in the judgment of conviction upon remittitur. See State v. Prihoda, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

[2] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[3] The consent of Smith's mother is not challenged on appeal.

Q [I]s that an apartment? Is that a single-family home?

A It's a duplex.

Q And which unit is she in?

A The lower level.

Q She's the renter. Do you normally stay there?

A No. I haven't stayed with my mom in almost like two years.

Q Okay. That night of the—the day of [] January 2nd and the day of [] January 1st, did you stay with your mother, though?

A Yes, because my car was actually—it was about like 12:00 and I decided, like, I wasn't gonna go to … my lady friend's house so I decided to just call my mom and ask her can I stay the night there.

Q So you were an overnight guest with your mother—

A Yes.

Q —on the evening of January 1st?

A Yes, I did.

Q And then January 2nd?

A Yes.

Q That's when the police came to the residence; correct?

A Yes.

Q What time in the morning did they come to the residence?

A Around 10:00; 9:30, 10:00.

Q So you're not a normal resident; you were, at most, a visitor, and that day you were a visitor but an overnight guest; correct?

A Yes.

Q It was in the morning; correct?

A Yes.

After this testimony, trial counsel indicated that he had no further questions, and the State did not cross-examine Smith. The trial court questioned whether Smith had standing to challenge the search of his mother's home, stating:

> He indicates he doesn't stay there. He hasn't lived there in several years. He stayed one night because he had car issues and that it's his mother's residence. I quite frankly, I mean, he was a one night visitor. Does that give him standing? I don't know. [Trial counsel], are you going to be seriously arguing that he has standing here, based on that record?

Trial counsel answered that he did not believe the case law supported his assertion that Smith had standing. The trial court then told Smith:

> Mr. Smith, in order to bring the kind of motion that your attorney's filed on your behalf … you've got to have … standing, which is the legal right to bring the motion.
>
> And you're challenging a search of a residence that you don't own, that you don't live in, that you haven't stayed in in more than two years and you were just there one night because of a car issue. I think it's pretty clear from this record that you do not have standing to challenge the search or bring the motions that you have brought. So I find that you don't have legal standing here and the motions are denied.

Based on that ruling, the trial court heard no additional testimony and did not make findings regarding the circumstances of the officers' warrantless entry into the residence and their seizure of evidence.

Smith ultimately pled guilty to two felonies pursuant to a plea agreement and was sentenced to a total of forty-two months of initial confinement and forty-eight months of extended supervision. This appeal follows.

"To have a claim under the Fourth Amendment, the person challenging the reasonableness of a search or seizure must have standing." ***State v. Fox***, 2008 WI App 136, ¶10, 314 Wis. 2d 84, 758 N.W.2d 790. "A person has standing under the Fourth Amendment when he or she 'has a legitimate expectation of privacy in the invaded place.'" ***Id.*** (quoting ***Minnesota v. Olson***, 495 U.S. 91, 95 (1990)). "The defendant bears the burden of showing, by a preponderance of the evidence, that he or she had a reasonable expectation of privacy." ***State v. Tentoni***, 2015 WI App 77, ¶7, 365 Wis. 2d 211, 871 N.W.2d 285. Specifically, a defendant is required to satisfy a two-prong test. First, under the "subjective" prong, the defendant must show "that he or she had an actual, subjective expectation of privacy in the area searched and item seized." ***Id.*** Second, under the "objective" prong, the defendant must show "that society is willing to recognize the defendant's expectation of privacy as reasonable." ***Id.*** The second prong can be satisfied by demonstrating that the defendant was an overnight guest.[4] *See* ***Trecroci***, 2001 WI App 126, ¶56, 246 Wis. 2d 261, 630 N.W.2d 555 ("[A]n overnight houseguest has a legitimate expectation of privacy in his or her host's home.").

"When reviewing a trial court's ruling on a motion to suppress evidence on Fourth Amendment grounds, we will uphold the trial court's factual findings unless clearly erroneous." ***State v. Orta***, 2003 WI App 93, ¶10, 264 Wis. 2d 765, 663 N.W.2d 358. The issue of whether the defendant has standing is a question of law. ***Id.***

[4] The State explicitly agrees that if this court were to conclude "that Smith was an overnight guest when the search occurred, it should conclude that his alleged expectation of privacy was reasonable under" ***Minnesota v. Olson***, 495 U.S. 91, 95-100 (1990). (Emphasis omitted.) The State asserts, however, that Smith did not prove that he was an overnight guest who had permission to be in the home. For reasons outlined in this decision, we agree.

The State argues that the trial court's order should be affirmed because Smith failed to prove both prongs of the two-prong test. First, the State argues that Smith failed to show "that he exhibited a subjective expectation of privacy in his mother's house when police searched it." For instance, the State notes, Smith did not offer testimony concerning: (1) "how many other people had access to the house and what their degree of access was"; (2) "the extent to which his mother gave him privacy in her house"; and (3) whether Smith closed the curtains or locked the doors.

Smith's appellate brief and reply brief do not explicitly address those issues or assert that Smith had a subjective expectation of privacy. However, the reply brief implicitly faults the trial court for not examining those issues, stating:

> The State in its Respon[se] Brief undertakes an analysis that the trial court refused to undertake and it goes beyond the question of whether or not Mr. Smith was an overnight guest. It is agreed that Mr. Smith did not present testimony on the questions raised in the State's Response Brief, however, the court did not address the questions raise[d] in the State's Response Brief because it held essential[ly] that there was not a requirement to do so given the established facts of this case. The trial court here said that "I don't even know how much further we need to go on the record that's been made." The court held, contrary to ***Minnesota v. Olson***, that an overnight guest cannot have standing. This holding was contrary to established law.

Smith's argument is not compelling. It was Smith's burden to show by a preponderance of the evidence both prongs of the two-prong test. *See* ***Tentoni***, 365 Wis. 2d 211, ¶7. The transcript demonstrates that the trial court did not preclude Smith from offering testimony concerning his subjective expectation of privacy, and it did not prevent trial counsel from arguing that Smith met his burden. Although the trial court expressed doubt that Smith had met his burden, it invited trial counsel to make the case. Trial counsel chose to concede that "case law does not support" Smith's position. As a result, the trial court did not engage in additional analysis.

Not only did Smith fail to offer testimony demonstrating that he had a subjective expectation of privacy, he also failed to offer sufficient testimony to satisfy the objective prong of the two-part test. Specifically, we agree with the State that Smith's testimony did not prove he was an overnight guest.[5] Smith argues that "[t]he facts elicited at the suppression hearing in this case show that … he had obtained permission to become an overnight guest." However, we have carefully reviewed Smith's testimony, which we have included in this decision. Smith testified that he "decided to just call my mom and ask her can I stay the night there," but he did not explain whether he reached his mother by phone or whether she gave him permission to stay and for how long. Moreover, Smith did not call his mother as a witness. Smith's testimony was insufficient to prove that he had his mother's permission to spend the night at her home and, if so, whether that permission extended to 9:30 or 10:00 a.m., when the police arrived. *See* ***State v. McCray***, 220 Wis. 2d 705, 712-13, 583 N.W.2d 668 (Ct. App. 1998) (A defendant who entered the premises with permission but did not have permission to remain until 10:30 the next morning "cannot claim to have been legitimately on the premises at that time" and therefore lacked standing to challenge the search.).

Smith's reply brief does not directly address the State's arguments concerning the lack of testimony about any communication he had with his mother. Instead, he quotes the trial court's statement that "he was a one night visitor." We are not persuaded that this statement by the trial court constitutes a finding that Smith had his mother's explicit permission to stay overnight and

[5] The State argues that in addition to not proving he was an overnight guest, "Smith has not otherwise shown that he had a reasonable expectation of privacy." (Bolding omitted.) The State analyzes tests from case law that can be applied when a defendant does not allege that he or she is an overnight guest. We decline to discuss that case law because Smith has not presented arguments concerning those tests.

that the permission extended until the time the police arrived at the residence. Because Smith did not meet his burden of proof to establish those facts, he has not satisfied the objective prong of the two-part test.

In summary, Smith did not present sufficient evidence to prove he had standing to challenge the warrantless search of his mother's home. Therefore, we summarily affirm.

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals