IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellant*,

v.

TIFFANY LYNN ONUSKO, *Appellee*.

No. 1 CA-CR 16-0586
FILED 8-3-2017

Appeal from the Superior Court in Maricopa County
No. CR2013-002343-002
The Honorable Jose S. Padilla, Judge

REVERSED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Judge Margaret H. Downie and Judge Maria Elena Cruz joined.

M c M U R D I E, Presiding Judge:

¶1 The State of Arizona appeals the superior court's order granting Tiffany Lynn Onusko's Motion to Suppress. For the reasons that follow, we reverse and remand.

FACTS AND PROCEDURAL BACKGROUND

¶2 In July 2012, Phoenix Police Officer Womack responded to a trespass call at an apartment complex in Phoenix. Upon arrival, Womack approached Mr. and Mrs. Oshana, who claimed to be the landlords for the apartment. Womack confirmed the Oshanas were the rightful owners of the apartment. The Oshanas told Womack the apartment was supposed to be empty, but someone was still inside the apartment. Womack, together with the Oshanas, approached the apartment and knocked while announcing his presence. After receiving no response, Womack unlatched the chain to the front door, entered the apartment, and found Onusko and her partner in the bedroom.

¶3 Officer Albrand conducted a record check and learned that Onusko had an outstanding parole warrant. Onusko was arrested and placed in the back of a patrol car. Onusko then asked Womack if she could retrieve something from the apartment bedroom. Womack agreed to Onusko's request, and escorted her back to the apartment, where she retrieved what appeared to be an envelope containing money from a pair of shorts next to the mattress. Onusko was then taken back outside, handcuffed, and placed in the patrol vehicle.

¶4 Womack returned to the apartment again because the Oshanas asked him to locate their keys for the apartment. Womack searched the apartment and heard a jingle from the same pair of shorts from which Onusko retrieved the envelope. After reaching inside the pocket for what he believed to be keys, Womack simultaneously pulled out a small baggie of what was later discovered to be methamphetamine.

¶5 Onusko was charged with one count of possession or use of methamphetamine, a Class 4 felony; one count of possession of drug paraphernalia, a Class 6 felony; and one count of criminal trespass in the first degree, a Class 6 felony.

¶6 Onusko filed a Motion to Suppress, arguing the bag of methamphetamine was illegally seized, and the superior court held an evidentiary hearing on the motion. The superior court granted Onusko's Motion to Suppress, finding Onusko had an expectation of privacy in the shorts and no exception applied. The State timely appealed the superior court's order granting the Motion to Suppress, and moved to dismiss the drug related counts without prejudice pending this appeal. A jury trial was held in April 2017 and Onusko was found guilty of criminal trespass. We have jurisdiction to consider this appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033(A)(1).[1]

DISCUSSION

¶7 We review a superior court's ruling on a motion to suppress evidence for an abuse of discretion, but review constitutional and legal issues *de novo*. *State v. Moody*, 208 Ariz. 424, 445, ¶ 62 (2004). A superior court's ruling on a motion to suppress evidence will not be set aside absent a clear abuse of discretion, *State v. Sharp*, 193 Ariz. 414, 419, ¶ 12 (1999), and is viewed in the light most favorable to upholding the court's ruling. *State v. Estrada*, 209 Ariz. 287, 288, ¶ 2 (App. 2004). We defer to the trial court's factual determinations, unless clearly erroneous, but the ultimate determination of whether the suppression of the evidence is warranted, is a conclusion of law we review *de novo*. *State v. Box*, 205 Ariz. 492, 495, ¶ 7 (App. 2003). "We restrict our view to consideration of the facts the [superior] court heard at the suppression hearing." *State v. Blackmore*, 186 Ariz. 630, 631 (1996).

¶8 The Fourth Amendment guarantees the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures. U.S. Const. amend. IV; *State v. Wilson*, 237 Ariz. 296, 298, ¶ 7 (2015). A protected Fourth Amendment interest requires an individual's legitimate expectation of privacy in the invaded place. *Rakas v. Illinois*, 439 U.S. 128, 141 (1978); *State v. Peoples*, 240 Ariz. 244, 247, ¶ 8 (2016).

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[1] We cite to the current version of applicable statutes and rules when no revision material to this case has occurred.

Whether a legitimate expectation of privacy exists is two-fold: (1) whether the individual, by his or her conduct, has exhibited an actual subjective expectation of privacy in the place that was the subject of the search; and (2) whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967); *State v. Estrella*, 230 Ariz. 401, 403, ¶ 7 (App. 2012).

A. Onusko's Possessory Interest in the Apartment.

¶9 The State argues Onusko was trespassing, and therefore had no expectation of privacy in the apartment or the shorts themselves.[2] The superior court did not find the issue of whether Onusko was a trespasser to be determinative, and instead focused on whether Onusko had a legitimate expectation of privacy in the shorts.[3] However, the focus on the shorts was misguided. Because the shorts were located inside the apartment Onusko was living in, the inquiry related to her expectation of privacy should be focused on the apartment in which the shorts were located, and not the shorts themselves. *See State v. Caldwell*, 20 Ariz. App. 331, 334 (App. 1973) (search of a home "may include all property necessarily a part of the

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[2] Even though Onusko has been convicted of criminal trespass, because our review is limited to the facts at the time of the suppression hearing, we do not consider her conviction. *See Blackmore*, 186 Ariz. at 631.

[3] The State contends the superior court erred by failing to make a finding as to whether Onusko was trespassing and therefore "jumped over the threshold question," which is determinative. We disagree. Whether a person is legitimately on the property is no longer the controlling inquiry for Fourth Amendment standing or whether a person maintains an expectation of privacy. This once controlling inquiry was based on arcane presuppositions in property and tort law that the United States Supreme Court thought ill-advised to import into the purview of the Fourth Amendment, and instead set forth the test in *Katz*. The "legitimately on the premises" standard remains a relevant factor in determining whether an expectation of privacy is legitimate, but is not determinative. *See Jones v. United States*, 362 U.S. 257, 265–66 (1960) (those legitimately on the premises have standing to challenge a Fourth Amendment search); *Katz*, 389 U.S. at 361 ("the Fourth Amendment protects people, not places," when a person exhibits an actual expectation of privacy which society is prepared to recognize as reasonable); *Rakas,* 439 U.S. at 129 (further narrowing the Fourth Amendment and abandoning the *Jones* rule of "legitimately on the premises").

premises"). Onusko had no greater or lesser expectation of privacy in the shorts than she did in the apartment. *But see Peoples*, 240 Ariz. at 248, ¶ 11 (courts have "recognized a uniquely broad expectation of privacy in cell phones" that renders certain exceptions to the warrant requirement inapplicable); *State v. Ontiveros-Loya*, 237 Ariz. 472, 477, ¶ 16 (App. 2015) (the "search incident to arrest" exception to the warrant requirement does not apply to cell phones).

¶10 The record, based on the facts presented at the suppression hearing, reflects Onusko was subleasing the apartment from a friend—the original tenant—and had obtained a key before moving her personal belongings into the apartment the night prior to the arrest. Onusko testified there was no written lease between her and the landlord, or the original tenant and the landlord, and she had no documentation to evidence her sublease other than her own sworn testimony. However, the State presented no controverting evidence that would otherwise indicate Onusko was not subleasing the apartment.

¶11 While Womack testified the Oshanas told him the apartment was supposed to be empty, this statement cannot be offered to prove whether Onusko was trespassing in the apartment. Neither of the Oshanas testified at the evidentiary hearing, and therefore the out-of-court statement regarding Onusko's possessory interest in the apartment cannot be offered to prove the truth of that possessory interest. *See* Ariz. R. Evid. 801(c).[4] Additionally, Womack did not recall asking Onusko why she was in the apartment, nor did he remember whether Onusko stated she was living there.

¶12 Therefore, based on the evidence presented at the hearing, Onusko had a possessory interest in the apartment as a sublessee, and an objectively reasonable expectation of privacy in the apartment. *Katz*, 389 U.S. at 361 (1967); *see also State v. Adams*, 197 Ariz. 569, 572, ¶ 17 (App. 2000) (a legitimate expectation of privacy hinges on whether the individual, by his or her conduct, exhibited an actual subjective expectation of privacy and the expectation is objectively reasonable). This is corroborated by her testimony that she had $600 in cash readily available for rent. Because Onusko maintained an expectation of privacy within the apartment, and society recognizes this expectation as legitimate, Onusko may avail herself of the protections afforded by the Fourth Amendment. *See Chapman v.*

[4] The rules of evidence applicable in criminal proceedings apply in evidentiary hearings. Ariz. R. Crim. P. 32.8(b).

United States, 365 U.S. 610, 616−17 (1961) (landlord does not have authority to permit a search of his tenant's leasehold); *United States v. Chaidez*, 919 F.2d 1193, 1201 (7th Cir. 1990) (the same principle holds true for a tenant and his subtenant); *see also United States v. Matlock*, 415 U.S. 164, 171, n.7 (1974) (the use of and access to the property are the touchstones of authority).

¶13 Considering the facts as presented at the suppression hearing, Womack's warrantless search of the apartment constituted a Fourth Amendment violation.

B. Good-Faith Exception to the Exclusionary Rule.

¶14 The superior court found no exceptions to the warrant requirement applicable. The State argues the good-faith exception to the exclusionary rule applies, and therefore the superior court erred by granting the Motion to Suppress. We agree.

¶15 The Fourth Amendment to the United States Constitution protects individuals against "unreasonable searches and seizures," and any evidence collected in violation of this provision is generally inadmissible in a subsequent criminal trial. *Mapp v. Ohio*, 367 U.S. 643, 654−55 (1961); *State v. Valenzuela*, 239 Ariz. 299, 302, ¶ 10 (2016). A warrantless search is *per se* unreasonable under the Fourth Amendment unless one of a few well-established exceptions applies. *Arizona v. Gant*, 556 U.S. 332, 338 (2009); *Mazen v. Seidel*, 189 Ariz. 195, 197 (1997).

¶16 The exclusionary rule, which allows for suppression of evidence obtained in violation of the Fourth Amendment, is a prudential doctrine invoked to deter future violations, and limited in application to situations in which the purpose of prevention—not reparation—is "thought most efficaciously served." *Davis v. United States*, 564 U.S. 229, 236−37 (2011) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)); *Elkins v. United States*, 364 U.S. 206, 217 (1960). "Where suppression fails to yield appreciable deterrence, exclusion is clearly unwarranted." *Davis*, 564 U.S. at 237 (quotation omitted).

¶17 "Exclusion is not a personal constitutional right," and is not "designed to redress [an] injury occasioned by an unconstitutional search;" instead, exclusion is a cost-benefit analysis focusing on the wrongful police misconduct at issue. *Davis*, 564 U.S. at 236–37; *Stone v. Powell*, 428 U.S. 465, 486 (1976). The deterrence benefits of exclusion vary depending on the culpability of the law enforcement conduct and whether law enforcement acted in "deliberate, reckless, or grossly negligent" disregard for the Fourth

Amendment. *Herring v. United States*, 555 U.S. 135, 143−44 (2009). In these deliberate and reckless acts, the deterrent value of exclusion is heightened, and tends to negate and outweigh the resulting costs. *Id*. at 143; *United States v. Leon*, 468 U.S. 897, 909, 926 (1984).

¶18 Therefore, when law enforcement officers "act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves one simple, isolated negligence, the deterrence rationale loses much of its force" and the harsh application of the exclusionary rule is unnecessary. *Davis*, 564 U.S. at 238 (quotation omitted); *see also* A.R.S. § 13–3925(B) (codifying good-faith exception to the exclusionary rule). The State bears the burden of proving the good-faith exception applies. *State v. Crowley*, 202 Ariz. 80, 91, ¶ 32 (App. 2002).

¶19 Womack responded to a trespass call and contacted the Oshanas after confirming their ownership interest in the apartment. After contacting the alleged trespassers, Womack had an objectively reasonable basis to believe Onusko was a trespasser based on the Oshanas' assertion that the apartment was supposed to be vacant, and Onusko's failure to inform Womack about her alleged sublessee status.[5] *See Davis*, 564 U.S. at 238.

¶20 Furthermore, Womack searched the apartment based on the landlords' consent, for the sole purpose of finding the keys to secure the apartment, and not in an attempt to locate any incriminating evidence against Onusko. *See Illinois v. Rodriguez*, 497 U.S. 177, 186–88 (1990) (police may search pursuant to a consent if they reasonably believe that the person consenting has authority to consent); *State v. Lucero*, 143 Ariz. 108, 109–10 (1984) (police could reasonably rely upon indicia of ownership and authority to consent to a search where the party's name consenting to the search was on the rental agreement, and therefore, the search was valid because the officer reasonably and in good faith, though mistakenly, relied on apparent authority of a third party to consent to the search).

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[5] While the Oshanas' statements to Womack regarding Onusko's alleged trespass were not admissible to prove her possessory interest in the apartment, *see supra* ¶ 11, this court can consider those statements when offered to prove Womack's subjective belief about Onusko's possessory interest at the time of the search. *State v. Hernandez*, 170 Ariz. 301, 306 (App. 1991) ("Words offered to prove the effect on the hearer are admissible when they are offered to show their effect on one whose conduct is at issue.").

¶21 Therefore, it was objectively reasonable for Womack, based on the information given to him at the time of the search, to believe the Oshanas were the property owners and Onusko had no possessory interest in the apartment. It was with their consent that the officer entered the apartment and searched the contents therein in order to locate the Oshanas' keys. His conduct does not rise to a level of recklessness or deliberate disregard for the Fourth Amendment to justify the application of the exclusionary rule, and therefore, the superior court erred by finding the good-faith exception to the exclusionary rule did not apply. *See Peoples*, 240 Ariz. at 250, ¶ 26 ("[W]hen law enforcement officers act with an objectively reasonable good-faith belief that their conduct is lawful, deterrence is unnecessary and the exclusionary rule does not apply.") (quotations omitted); *cf. State v. Havatone*, 241 Ariz. 506, 511, ¶ 22 (2017) (good-faith exception is not appropriate when conduct is the result of "recurring or systematic negligence").

¶22 The State argues the abandonment and inevitable discovery exceptions to the exclusionary rule would also apply in this case. However, because we find the good-faith exception applicable, we do not address these arguments. *See State v. Hardwick*, 183 Ariz. 649, 657 (App. 1995) (once the court finds grounds for resolution, it can decline to reach the remaining issues).

CONCLUSION

¶23 Accordingly, we reverse and remand this case to the superior court for further proceedings consistent with this decision.

AMY M. WOOD • Clerk of the Court
FILED: AA