

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 09-0284
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
) (Not for Publication -
RAYMOND MORENO,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-166851-001 DT

The Honorable John R. Ditsworth, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 Raymond Moreno appeals his conviction and sentence for burglary on the ground the trial court abused its discretion in

denying his motion to suppress evidence of the stolen property initially discovered during a protective sweep of the apartment in which he was staying.

¶12 In reviewing a trial court's ruling on a motion to suppress, we ordinarily restrict our review to consideration of the facts the trial court heard at the suppression hearing. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996). In this case, the trial court heard evidence pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), in the same proceeding immediately before hearing evidence on the suppression issue. The neighbor who called 9-1-1 to report the burglary and a relative of Moreno who had asked him to stay at the apartment to safeguard it while she was away both testified during the *Dessureault* portion of the hearing, but in ruling on the motion to suppress, the trial court did not expressly rely on their testimony.

¶13 Although it is not necessary to resolve the issues before us, for clarity's sake and because the parties at least implicitly relied in part on this background testimony in arguing the suppression motion, we view it as having been introduced during a single, consolidated hearing on the pre-trial motions, including the motion to suppress. We review the facts in the light most favorable to sustaining the trial

court's ruling. *State v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655, 668 (1996).

¶14 The evidence at the hearing, viewed in the light most favorable to sustaining the ruling, was as follows. A resident of a Phoenix apartment complex called 9-1-1 at about 6:30 a.m. on October 15, 2007 to report seeing a man she identified as Moreno walk down the stairs outside her window and enter his apartment, wearing black gloves and carrying a pillowcase containing what she suspected was property stolen from the apartment next to hers. She testified that she had noticed that the window of the next-door apartment had been broken for several days. Moreno's cousin's wife testified that she had asked Moreno to stay at her apartment while she was away.

¶15 An officer responded to the 9-1-1 call within three minutes. He testified that he knocked on the door of the apartment the neighbor had reported the suspected burglar had entered, and announced, "Phoenix police, open the door." He testified that it took "at least a minute or two if not longer" for Moreno to open the door. Moreno told the officer that "he had just woken up," but he appeared alert to the officer, who suspected that he was not telling the truth. The officer also believed that Moreno was lying when he told him he had not been out of the apartment all morning, based on the neighbor's positive identification of him as the person she had witnessed

walking down the stairs with the pillowcase. When the officer asked Moreno if anyone else was in the apartment, Moreno said his cousin was in the apartment. It took another minute or two for Moreno's cousin to exit the apartment, and he appeared "groggy."

¶16 The officer testified that he was concerned about his safety at that point. He testified his main concern was:

Using the totality of the circumstances, my experience, training and experience being involved with burglars and criminal activity, there could be weapons involved, could be other individuals involved.

I am in an unknown location. The possible suspect or suspects enter an apartment. I don't know if there's any more individuals hiding inside so I conducted a protective sweep.

He testified that he saw the pillowcase inside a bedroom closet, which he had opened to see if any individuals were hiding in the closet. Once he determined that there were no other people inside the apartment, he left.

¶17 The officer testified that Moreno said "in casual conversation later . . . that he may have been either in between homes or just staying there for the night or something like that. I don't recall him saying whether he lived there permanently or not." The officer testified that when he asked Moreno if he could search the apartment, Moreno told him, "No, it was his cousin's apartment." Asked if Moreno "ever

assert[ed] any personal interest in the apartment," the officer responded, "Not to my recollection."

¶18 Moreno argued that the officer had no reason to fear for his safety outside the apartment in the absence of any indication that the burglar had been carrying a weapon or that other persons remained inside the apartment, and thus, the protective sweep was not legally justifiable. The State argued that Moreno had no standing to challenge the protective sweep because he had told the officer that it was not his apartment, and even if he had standing, the officer believed that Moreno was being deceptive, and accordingly, had reason to believe that a protective sweep of the apartment was necessary for officer safety. The State also argued that even if the protective sweep was not justified, police would have inevitably discovered the pillowcase with the stolen items based on other evidence.

¶19 The trial court ruled that Moreno lacked standing to challenge the protective sweep because he had "informed the officer that this was not his apartment," specifically telling the officer that "'his' cousin had the apartment." The trial court further found that the sweep was constitutionally permissible because "the officers reasonably believed that they needed to make a protective sweep of the apartment for their own safety." Finally, the trial court found that the "sweep of areas likely to contain a person led to the in plain view

discovery of the pillowcase in a back bedroom closet. That discovery led to the request for a search warrant which when granted led to the seizure of the stolen items." The trial court accordingly denied the motion to suppress.

¶10 Defendant timely appealed, and we have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(1) (2010).

DISCUSSION

¶11 In reviewing a ruling on a motion to suppress, we give deference to the trial court's factual findings but review the trial court's legal conclusions de novo. See *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996). We find that the trial court erred in its initial finding that Moreno had no standing to challenge the search. A defendant has standing to challenge the legality of a search under the Fourth Amendment when he has a reasonable expectation of privacy in the area searched. See *State v. Martinez*, 221 Ariz. 383, 389 n.7, ¶ 21, 212 P.3d 75, 81 n.7 (App. 2009) (citing *Rakas v. Illinois*, 439 U.S. 128 (1978)). An overnight guest of an apartment has a reasonable expectation of privacy in the residence, and accordingly, has standing to challenge the legality of a search of the apartment. See *State v.*

Gissendaner, 177 Ariz. 81, 84, 865 P.2d 125, 128 (App. 1993) (citing *Minnesota v. Olson*, 495 U.S. 91 (1990)).

¶12 The State concedes that the evidence before the trial court demonstrated that Moreno lived at the apartment, or was at least an overnight guest at the apartment. The State also concedes that, as a result, Moreno had a legitimate expectation of privacy in the apartment sufficient to grant him standing to challenge the protective sweep.

¶13 The State argues, however, that Moreno "abandoned any expectation of privacy when he told police they could not search the apartment because it was his cousin's." We find no merit in this argument. Property is considered abandoned when a person has voluntarily discarded it, left it behind, or otherwise relinquished his interest in it. *State v. Walker*, 119 Ariz. 121, 126, 579 P.2d 1091, 1096 (1978). We determine whether a person intended to abandon property by considering whether the person's "words or actions would cause a reasonable person in the searching officer's position to believe that the property was abandoned." *State v. Huerta*, 223 Ariz. 424, 426, ¶ 5, 224 P.3d 240, 242 (App. 2010). This is not a case such as *State v. Huffman*, 169 Ariz. 465, 820 P.2d 329 (App. 1991), on which the trial court relied, in which the defendant effectively abandoned any expectation of privacy in a motel room by denying that the room key found during a traffic stop was his. See *id.* at 467,

820 P.2d at 331. In this case, rather, we find that all a reasonable officer could infer from Moreno's response to his request to search the apartment was that Moreno did not feel free to authorize a search of the apartment because it was not his apartment, but his cousin's. We cannot agree that this statement under these circumstances constituted an abandonment of Moreno's privacy interests in the apartment. See *id.* We accordingly find that the trial court erred in its initial finding that Moreno had no standing to challenge the search.

¶14 We find no abuse of discretion, however, in the trial court's finding that the officer had sufficient legal justification for conducting a warrantless protective sweep of the apartment. "A warrantless search is unlawful under the Fourth Amendment and article II, § 8 of the Arizona constitution unless one of the specific and well-established exceptions to the warrant requirement has been met." *Mazen v. Seidel*, 189 Ariz. 195, 197, 940 P.2d 923, 925 (1997). The exigent circumstances exception to the requirement for a warrant includes protective sweeps. *Id.* Police officers may conduct a warrantless protective sweep of a residence incident to an in-home arrest if they possess reasonable suspicion "based on specific and articulable facts" to believe that the residence "harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 333-34 (1990). "[S]uch

a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found." *Id.* at 335. The officers need not be inside the residence affecting an arrest at the time, if they are outside the residence and have reason to suspect they are in immediate danger from someone still inside the residence. *State v. Kosman*, 181 Ariz. 487, 491-92, 892 P.2d 207, 211-12 (App. 1995) (agreeing with federal case law expanding scope of *Buie* to extend to arrest outside residence, but ultimately affirming trial court's ruling that police had not offered legal justification for a protective sweep of an apartment sixty-four feet from the arrest scene).

¶15 In this case, the officer testified that he believed that Moreno was lying when he said he had just woken up, based on his own assessment of Moreno's appearance and alertness, and lying again when he said he had not left the apartment, based on the witness's identification of Moreno as the individual "she saw walking down the stairs with the [pillow]case." The officer thus was not certain that Moreno had not been lying when he said no people remained behind in the apartment, exposing him to possible danger as he stood outside the apartment conducting his investigation. He also testified that based on his experience as a police officer, and the fact that this was a burglary, he

was concerned about the possibility that someone with weapons remained behind in the apartment. We find that the trial court's ruling that the officer had reasonable grounds to conduct a protective sweep of the apartment under these circumstances was supported by the evidence and not an abuse of discretion. Because we find that the protective sweep was constitutionally permissible, we need not consider the other issues the parties raise.

CONCLUSION

¶16 For the foregoing reasons, we affirm Moreno's conviction and sentence.

/s/

PHILIP HALL, Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Presiding Judge

/s/

PATRICIA K. NORRIS, Judge