

FILED

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring:

Yasser Abdelhaq argued that his conviction for first-degree murder should be reversed and that the indictment should be dismissed because an investigating police officer was a member of the grand jury that indicted him. The majority opinion concluded that, under our recent decision in *State v. Barnhart*, 211 W. Va. 155, 563 S.E.2d 820 (2002), the conviction had to be reversed and the indictment dismissed without prejudice. While I believe it is a close call as to the preservation of this issue for appeal purposes, I concur in the majority's disposition of that issue.

I am compelled to write separately because the majority opinion failed to address another assignment of error. That assignment of error involved the denial of Mr. Abdelhaq's pretrial motion to suppress evidence seized at the hotel room where the murder took place. It was imperative that the majority opinion address this issue as this matter will undoubtedly resurface during the retrial of this matter. *See State v. Ladd*, 210 W. Va. 413, 431, 557 S.E.2d 820, 838 (2001) ("Due to the possibility of retrial upon remand, we find it necessary to address some of the other assignments of error alleged by the defendant in order to provide guidance to the trial court upon remand."); *State v. Stacy*, 181 W. Va. 736, 743, 384 S.E.2d 347, 354 (1989) ("We reverse based on the defendant's primary assignment of error

regarding the insufficiency of jury instructions given at trial. We address the next assignment of error in order to give guidance to the trial court upon retrial.”); *State v. Adkins*, 170 W. Va. 46, 48, 289 S.E.2d 720, 722 (1982) (“We find it necessary to reverse the judgment of the Circuit Court of Lincoln County on the basis of one of the errors assigned and address other errors assigned on this appeal that may recur at any possible retrial of the defendant.”). As I will demonstrate below, the evidence seized from the hotel room was lawfully seized.

Possession and Control of the Hotel Room

Mr. Abdelhaq argued in his brief that items seized from the hotel room in which he was staying should not have been introduced into evidence because he did not consent to the entry or search thereof by the police. We have recognized that, “[a]s a general rule, a warrantless search of an individual’s home is constitutionally prohibited.” *State v. Flippo*, ___ W. Va. ___, ___ n.7, 575 S.E.2d 170, 177 n.7 (2002) (citing *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290, 298-99 (1978); *State v. Peacher*, 167 W. Va. 540, 562, 280 S.E.2d 559, 574-75 (1981)). Our cases have also pointed out that “[t]his prohibition has been extended to a rented room occupied as a temporary residence by a person.” *Flippo*, ___ W. Va. at ___ n.7, 575 S.E.2d at 177 n.7 (citing *Stoner v. California*, 376 U.S. 483, 490, 84 S. Ct. 889, 893, 11 L. Ed. 2d 856, 861 (1964)); *State v. Buzzard*, 194 W. Va. 544, 549, 461 S.E.2d 50, 55 (1995)). Consequently, during the time of Mr. Abdelhaq’s lawful stay at the hotel room, he had a constitutionally recognized expectation of privacy that required a search

warrant for entry by the police.¹

Mr. Abdelhaq also contends that the circuit court was wrong in ruling that the “emergency exception” to the warrant requirement permitted the police to enter and search the room. This Court adopted the emergency exception doctrine in *State v. Cecil*, 173 W. Va. 27, 311 S.E.2d 144 (1983). In *Cecil*, we held that the emergency exception doctrine permitted

a limited, warrantless search or entry of an area by police officers where (1) there is an immediate need for their assistance in the protection of human life, (2) the search or entry by the officers is motivated by an emergency, rather than by an intent to arrest or secure evidence, and (3) there is a reasonable connection between the emergency and the area in question.

Cecil, 173 W. Va. at 32, 311 S.E.2d at 149 (citation omitted). Assuming that the emergency exception doctrine was not applicable or that the police exceeded the scope of the search permitted by the emergency exception doctrine, I believe another exception to the warrant requirement allowed the search and seizure.

¹The State argued in its brief that the hotel room Mr. Abdelhaq stayed at was rented by the victim. Consequently, Mr. Abdelhaq did not have a constitutionally recognized expectation of privacy. I disagree. Courts that have addressed the issue have uniformly held that an overnight guest in a hotel room rented by another has a reasonable expectation of privacy protected by the Fourth Amendment of the United States Constitution. See *United States v. Gordon*, 168 F.3d 1222, 1226 (10th Cir. 1999) (finding that either registered occupant of hotel room or overnight guest of registered occupant has standing to object to search); *United States v. Wilson*, 36 F.3d 1298, 1303 (5th Cir. 1994) (recognizing that overnight guest of hotel resident had standing to object to search of hotel room); *Johnson v. Nagle*, 58 F. Supp. 2d 1303, 1379 (N.D. Ala. 1999) (same); *People v. Olson*, 556 N.E.2d 273, 277 (Ill. App. Ct. 1990) (same); *People v. Ali*, 517 N.Y.S.2d 216, 218 (1987) (same).

The decisions of this Court have recognized that consent is one of the exceptions to the warrant requirement. This Court has stated that

“[t]he general rule is that the voluntary consent of a person who owns or controls premises to a search of such premises is sufficient to authorize such search without a search warrant, and that a search of such premises, without a warrant, when consented to, does not violate the constitutional prohibition against unreasonable searches and seizures.” Syl. pt. 8, *State v. Plantz*, 155 W. Va. 24, 180 S.E.2d 614 (1971), *overruled in part on other grounds by State ex rel. White v. Mohn*, 168 W. Va. 211, 283 S.E.2d 914 (1981).

Syl. pt. 1, *State v. Buzzard*, 194 W. Va. 544, 461 S.E.2d 50 (1995)).

Mr. Abdelhaq did not give the police permission to enter the hotel room in which he had stayed. At the time of the police entry, the check-out time had passed. Indeed, before the police arrived at the hotel, employees of the hotel attempted to gain access to the room with a pass key, but the door was barricaded. Other efforts to gain access to the room failed, including attempts to call the room by the hotel management. It was only after the hotel management was unable to gain entry into the room that police officers were summoned. When the police arrived at the hotel, they were given permission by hotel management to enter the room. The police proceeded to cut the chain to the door and enter the room. There they found the body of the victim.

The critical points from the above abbreviated facts are that (1) Mr. Abdelhaq was in the hotel room after check-out time and (2) hotel management gave the police

permission to enter the room. Under this set of facts, the general rule is that

when the term of a guest's occupancy of a room expires, the guest loses his exclusive right to privacy in the room. The manager of a motel [or hotel] then has the right to enter the room and may consent to search of the room and the seizure of the items there found.

United States v. Parizo, 514 F.2d 52, 54 (2d Cir. 1975). See also *United States v. Kitchens*, 114 F.3d 29, 31 (4th Cir. 1999) (“Generally, a guest does not have a reasonable expectation of privacy in his hotel room after his rental period has terminated.”); *United States v. Huffhines*, 967 F.2d 314, 318 (9th Cir. 1992) (“A guest in a motel has no reasonable expectation of privacy in a room after the rental period has expired.”); *United States v. Rahme*, 813 F.2d 31, 34 (2d Cir. 1987) (“[W]hen a hotel guest’s rental period has expired or been lawfully terminated, the guest does not have a legitimate expectation of privacy in the hotel room or in any articles therein of which the hotel lawfully takes possession . . . once the guest’s access to the room is no longer his ‘exclusive right,’ he has no legitimate expectation of privacy in the room even though he himself still has access.”); *State v. Weekley*, 27 P.3d 325, 331 (Ariz. Ct. App. 2001) (“Upon the expiration of the rental period; a hotel guest no longer has a right to use the room and loses any privacy interest associated with it.”); *Norwood v. State*, 670 N.E.2d 32, 35 (Ind. Ct. App. 1996) (“Hotel guests enjoy the same constitutional protection against unreasonable search and seizure as do occupants of private residences. However, the expectation of privacy ends when the rental period expires and ‘Fourth Amendment protection of a motel or hotel room ends at the conclusion of the rental period.’” (quoting *Myers v. State*, 454 N.E.2d 861 (Ind. 1983))); *Commonwealth v. Brass*, 674 N.E.2d 1326, 1327-28 (Mass.

App. Ct. 1997) (“[T]he generally accepted rule [is] that a person who stays over in a hotel or motel room ‘after his rental period has terminated’ has lost any reasonable expectation of privacy in the room that he may once have had.” (quoting *Commonwealth v. Paszko*, 461 N.E.2d 222, 235 (Mass. 1984)) (internal quotations and citation omitted)); *State v. Mitchell*, 20 S.W.3s 546, 561 (Mo. Ct. App. 2000) (“We conclude that, in the absence of payment for continued rental of the room, or of permission to stay in the room more than the time reasonably considered a ‘late check-out,’ Defendant lost his privacy interest in the room when the motel took back possession of the room to clean it.”);

State v. Taggart, 512 P.2d 1359, 1364 (Or. Ct. App. 1973) (“Whatever subjective expectation of privacy defendant may have had was not objectively reasonable under these circumstances. The search of defendant’s motel room . . . was lawful, based on the consent of the motel management.”).² “Moreover, even if the party giving consent does not have actual authority to consent, ‘apparent authority’ may be sufficient, if the circumstances would lead a reasonable officer to conclude that the person providing consent had the requisite authority to do so.” *Bryant v. Commonwealth*, 573 S.E.2d 332, 335 (Va. Ct. App. 2002) (citations omitted); *State v. Loya*, 18 P.3d 1116, 1119 (Utah Ct. App. 2001) (“A hotel guest’s expectation of privacy . . . is not unlimited, but normally ends upon the termination of the rental period.”);

²The recognized exception to the loss of privacy expectation in a rented room, after check-out time, is when “the motel has accepted late payment and/or tolerated overtime stays in the past.” *State v. Davis*, 937 P.2d 1110, 1113 (Wash.App. 1997) (citations omitted). In the instant case, there was no evidence introduced to trigger application of this exception.

In view of the great weight of authorities addressing the issue, it is clear that after the check-out time expired, Mr. Abdelhaq lost all expectation of his constitutionally protected privacy in the hotel room. Thus, hotel management had the right to consent to the police entering and searching the room. Consequently, entry into the room and seizure of evidence by the police was lawful.

Therefore, I concur in the majority's decision in this case. I am authorized to state that Justice Maynard joins me in this concurring opinion.