

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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, STATS.

No. 98-1973-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEROY BRYANT,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Affirmed.*

SNYDER, P.J. Leroy Bryant contends that the trial court improperly denied his motion to suppress evidence which resulted in judgments convicting him of resisting an officer, repeater, contrary to §§ 946.41(1), 939.51(3)(a) and 939.62(1)(a), STATS.; disorderly conduct, repeater, contrary to §§ 947.01, 939.51(3)(a) and 939.62(1)(a), STATS.; and possession of drug paraphernalia, repeater, contrary to §§ 961.573(1), 961.50 and 939.62(1)(a),

STATS. Bryant argues that the trial court erred in holding that he lacked standing to assert a constitutional right to privacy and freedom from search and seizure as a guest in his mother's home. We disagree and affirm.

The facts are undisputed. Bryant, his wife Iris and their four children traveled from their home in Kalamazoo, Michigan, to Racine to attend a May 31, 1997 wedding. The Bryant family arrived at the home of Bryant's mother, Margaret, at approximately 10:30 p.m. on May 30, 1997. After a brief visit, Iris left Bryant and two of the four children at Margaret's home; she then left with the other two children. Bryant was in the home approximately twenty minutes when police officers arrived at the front door and asked Margaret if Bryant was at the home. The police entered the home with a K-9 unit and took Bryant into custody. Bryant's motion to suppress certain incriminating evidence that was seized from him at the time he was taken into custody was denied by the trial court, and Bryant appeals.

The question of whether a party has standing to challenge the constitutionality of a search and seizure based upon a given set of facts is a question of law, and we need not defer to the trial court's determination of that issue. See *State v. Fillyaw*, 104 Wis.2d 700, 711, 312 N.W.2d 795, 801 (1981). Fourth Amendment rights are personal rights which may not be asserted by another. See *id.* at 710, 312 N.W.2d at 800 (citing *Rakas v. Illinois*, 439 U.S. 128 (1981)). "The inquiry as to whether these personal rights were violated 'requires a determination of whether the disputed search and seizure has infringed on an interest of the defendant which the Fourth Amendment was designed to protect.'" *Id.* (quoting *Rakas*, 439 U.S. at 140). The relevant question is whether the defendant had a legitimate expectation of privacy in the invaded place. See *id.*

(“[A]n illegal search only violates the rights of those who have ‘a legitimate expectation of privacy in the invaded place.’”).

In order to claim his constitutional protections against an unreasonable search and seizure, Bryant must show that he seeks to preserve something as private and that his “subjective expectation of privacy is ‘one that society is prepared to recognize as reasonable.’” *Fillyaw*, 104 Wis.2d at 715, 312 N.W.2d at 803 (quoted source omitted). Bryant argues that his subjective expectation of privacy in his mother’s home was reasonable.

Bryant contends that because he was an overnight guest at his mother’s home, he is entitled to assert his Fourth Amendment protections as recognized in *State v. Whitrock*, 161 Wis.2d 960, 468 N.W.2d 696 (1991) (holding that an overnight guest at a home shares in the privacy expectation of the home’s owner). However, as occurred with the defendant in *Whitrock*, Bryant fails to establish that he was an overnight guest at Margaret’s home.

Margaret and Iris testified at the suppression hearing. Margaret testified that Bryant did not live at her house, that she had not seen him for a period of months, that he arrived at her home at approximately 10:30 p.m. and that Bryant was in the house about twenty minutes before the police officers arrived at her door. Iris testified that she and Bryant resided in Kalamazoo, Michigan, on May 30, 1997, that they were in Racine to attend a wedding on May 31, 1997, and that when they arrived at Margaret’s home “all of us got out of the van, went in the house, [to] visit.” Bryant did not testify at the suppression hearing, and neither Margaret nor Iris testified that Bryant was an overnight guest at Margaret’s home.

Bryant has the burden of establishing that his Fourth Amendment rights were violated by the challenged search or seizure occurring in another

person's home by a preponderance of the evidence. *See Whitrock*, 161 Wis.2d at 972, 468 N.W.2d at 701. While both Margaret and Iris testified that Bryant was a guest at Margaret's home at the time of the search, their testimony establishes only that he was a welcomed visitor rather than an overnight guest. Because Bryant has failed to meet his burden of establishing that he was an overnight guest at Margaret's home at the time of the police entry, the expanded, subjective expectation of privacy he asserts under *Whitrock* was not triggered.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

