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Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-18-1196

Nancy Catherine Powers

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-19-2058)

COLE, Judge.

Nancy Catherine Powers pleaded guilty to unlawful possession of methamphetamine with the intent to distribute, a violation of § 13A-12-211(c)(6), Ala. Code 1975. The Mobile Circuit Court sentenced

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Powers to three years' imprisonment but suspended that sentence and placed her on two years' probation. Before she pleaded guilty, Powers preserved and reserved for appellate review the following issue: Does a warrant to search a house for certain items also allow law-enforcement officers to search the belongings of a person who is present at the house during the execution of that warrant when that person does not own or occupy the house and is not otherwise identified in the search warrant.

In her brief on appeal, Powers argues that the trial court should have granted her motion to suppress the drug evidence found in her purse because, she says, a premises search warrant does not permit law-enforcement officers to search a person's personal belongings when that person is not reasonably associated with the premises, absent some additional "probable cause to exceed the parameters of the search warrant." (Powers's brief, p. 10.) The State, on the other hand, argues that "the search of [Powers's] purse was pursuant to a validly-issued warrant to search the premises for methamphetamine and anything related to the sale of methamphetamine" and that Powers's "purse was clearly a container on the premises that could conceal an item of the kind

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described in the [search] warrant."¹ (State's brief, p. 8.) The dispute between Powers and the State presents this Court with an issue of first impression that has not been uniformly and authoritatively decided by the courts that have addressed it.

Facts and Procedural History

On November 16, 2018, Officer Shaun Wood of the Mobile Police Department secured a warrant to search Joshua Moyers's house and to seize

"illegal drugs, to wit: methamphetamine, phone bills, cell phone, documents, ledgers, currency, prerecorded U.S. currency, photographs, lock boxes and safes and contents

¹The State also argues on appeal that Powers lacks standing to challenge the search warrant. But, in making that argument, the State concedes that it "did not assert below that Powers lacks standing to object to the search." (State's brief, p. 5.) "[B]ecause the [S]tate did not raise the issue of standing at trial, [that issue] is waived." Drake v. State, 668 So. 2d 877, 879 (Ala. Crim. App. 1995). See also Washington v. State, 922 So. 2d 145, 163 (Ala. Crim. App. 2005) ("Initially, we point out that the State argues, for the first time on appeal, that Washington lacked standing to challenge the search of the Jetta. However, the State did not present this argument to the trial court; the prosecutor did not argue a lack of standing at the suppression hearing or at any other time during the trial. Therefore, the State's argument is deemed to be waived."). Thus, we assume that Powers has standing to challenge the search and answer only the question whether the search was proper.

thereof, paraphernalia, weapons that may be used to facilitate in illegal drug transactions, articles of property tending to establish the identity of persons in control of premises, vehicles, storage areas, and containers being searched to include utility receipts, addressed envelopes, and keys."

(C. 19.) According to Officer Wood, the probable cause supporting the search of Moyers's home was that a confidential informant had purchased methamphetamine from Moyers at Moyers's house.

On the morning of November 26, 2018, Officer Wood and other law-enforcement officers executed the search warrant for Moyers's house. When they entered the house, Powers was the first person they encountered. She was asleep on a couch in the first room inside the front door. Powers's black purse was sitting next to her on the side table by the couch. No one else was in the room with Powers when police officers entered the house. The officers found Moyers and two other individuals in other areas of the house, each asleep in a separate bedroom. The officers then read Powers her Miranda² rights, and, after she waived those rights, they asked her if there was anything illegal belonging to her in the

²Miranda v. Arizona, 384 U.S. 436 (1966).

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house. Powers said that there was not. The officers then asked Powers if the black purse belonged to her, and she said that it did. (C. 43.) The officers then searched the purse, finding in it a digital scale, over \$800, and a clear plastic bag containing what they believed to be methamphetamine. (C. 43.) Powers admitted that the substance in her purse was methamphetamine and explained that she had the digital scale to weigh the methamphetamine. Powers was arrested for unlawful possession of methamphetamine with the intent to distribute and possession of drug paraphernalia. She was later indicted for those offenses.

Powers filed a pretrial motion to suppress the evidence obtained from the search of her purse and her resulting statements, arguing that "the search and seizure of [Powers's] purse was in violation of the Fourth Amendment ... in that certain acts on the part of the investigating officers constituted an unreasonable search and seizure." (C. 15.) Specifically, Powers claimed that "[n]o person is specifically named in the search warrant as a person to be specifically searched" and that "[a] search

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warrant for premises does not permit searches of persons who are not reasonably associated with the premises." (C. 16.)

On August 27, 2019, the trial court held a pretrial hearing on Powers's motion. Officer Wood was the only person who testified. At the hearing, Officer Wood said that, although Powers was not mentioned in the search warrant, he "knew about her" because the confidential informant had mentioned her "in the past," "that she usually has meth," and that she does not "stay [at Moyers's house] full time." (R. 5.) Officer Wood explained that law-enforcement officers had "never made a control[led] buy on her" and that he did not know that Powers was going to be in the house when they executed the search warrant. (R. 5, 7.) When asked what led him to believe that Powers had anything illegal in her possession, Officer Wood responded: "I mean, besides being nervous, I mean, and her mentioning that was her purse, she told me that she didn't have nothing on her or with her." (R. 6.)

After the hearing, the trial court denied Powers's motion to suppress. Powers then pleaded guilty and reserved the right to appeal the trial court's decision to deny her motion to suppress. During the guilty-

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plea colloquy, the State explained that it expected the evidence to show that Powers "was found to be in possession of approximately [17] grams of suspected methamphetamine that was separated into three clear plastic bags." (R. 19-20.) The court then sentenced Powers. (R. 21-22.) This appeal follows.

Discussion

Powers argues that, although law-enforcement officers had a warrant to search Moyers's house, because she did not either own or occupy Moyers's house and because she was not named or otherwise identified in the search warrant, she had an expectation of privacy in her purse and that law enforcement could not search her purse unless they had "separate and independent probable cause at the time of the search." (Powers's brief, p. 21.) In short, Powers argues that a warrant to search the premises of another person does not also authorize the search of the belongings of a person who is not an occupant of those premises unless they are identified in the warrant or unless there is some additional probable cause to conduct a search of that person's belongings.

The State, on the other hand, argues that "the search of [Powers's] purse was pursuant to a validly-issued warrant to search the premises for methamphetamine and anything related to the sale of methamphetamine," explaining that this Court has held that "'any container situated within residential premises which is the subject of a validly-issued warrant may be searched if it is reasonable to believe that the container could conceal an item of the kind portrayed in the warrant.' Dees v. State, 575 So. 2d 1225, 1228 (Ala. Crim. App. 1990) (quoting United States v. Gray, 814 F.2d 49, 51 (1st Cir. 1987))." (State's brief, pp. 5, 8.) In short, the State contends that a validly issued warrant to search a house for certain items permits law-enforcement officers to search every container in that house that could possibly conceal those items, regardless of whether the container they want to search belongs to a person who does not own or occupy that house or belongs to a person who is not identified in the search warrant.

The Fourth Amendment to the United States Constitution ensures that people have the right "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" and guarantees

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that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Alabama Constitution provides the same protections. See Article I, § 5, Ala. Const. of 1901 (Off. Recomp.). Absent some exigent circumstance, both the Fourth Amendment and Alabama law require law-enforcement officers to obtain a search warrant to enter someone's house to search it. See § 15-5-3, Ala. Code 1975 ("A search warrant can only be issued on probable cause, supported by an affidavit naming or describing the person and particularly describing the property and the place to be searched."); see also Rule 3.9(a), Ala. R. Crim. P.

Here, Officer Wood certainly complied with the Fourth Amendment and Alabama law when he secured a warrant to search Moyers's house for "illegal drugs" and items related to the sale of illegal drugs. But when Officer Wood and other law-enforcement officers went into Moyers's house to execute that warrant, they encountered Powers, who they knew frequented Moyers's house but apparently did not expect to be present at Moyers's house when they executed that warrant. Despite not expecting

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Powers to be in Moyers's house during the execution of the search warrant, Officer Wood saw Powers's purse (which was nearby where she was sleeping), confirmed with Powers that it was her purse, and searched Powers's purse.

To start, it is well settled that law-enforcement officers do not have carte blanche to search every person they encounter during the execution of a validly issued search warrant, especially when they do not expect that person to be at the place being searched and when they do not identify that person in the search warrant. "'Alabama courts, following the dictates of Ybarra[v. Illinois, 444 U.S. 85 (1979)], have held that a warrant to search designated premises will not authorize the search of every individual who happens to be on the premises. Travis v. State, 381 So. 2d 97, 101 (Ala. Cr. App. 1979), cert. denied, 381 So. 2d 102 (Ala. 1980).' " Brooks v. State, 593 So. 2d 97, 99 (Ala. Crim. App. 1991) (quoting Helms v. State, 549 So. 2d 598, 600-01 (Ala. Crim. App. 1989)) (emphasis added). In fact, most legal precedent acknowledges that "the search of persons not named or described in the warrant, but found on premises or who come onto premises being searched, is not made lawful simply by

their presence"; rather, "the law requires that there be probable cause to believe that such persons are themselves participants in criminal activity." Smith v. State, 292 Ala. 120, 121, 289 So. 2d 816, 817 (1974). So, as Powers correctly points out, a validly issued search warrant does not permit law enforcement to search the "person" of individuals who are merely present at the place being searched, absent some independent probable cause or exigent circumstance.³

But the law-enforcement officers in this case did not search Powers's person; rather, they executed a validly issued search warrant, encountered someone who they do not identify in the warrant, and searched her possessions. From what we can tell, Alabama appellate courts have never been asked to resolve this question. And although

³This, of course, does not mean that law-enforcement officers cannot detain those people during the execution of the search warrant. See Bragg v. State, 536 So. 2d 965, 968-69 (Ala. Crim. App. 1988) (recognizing that "police officers executing a valid search warrant do have the authority to detain persons found on the premises subject to the warrant"). Nor does it mean that law-enforcement officers cannot conduct a pat-down search of those people under Terry v. Ohio, 392 U.S. 1 (1968). Rather, this simply means that a person's presence alone at a place being searched pursuant to a validly issued search warrant does not justify a search of that person under the Fourth Amendment.

several of the United States Circuit Courts of Appeals have been asked to resolve this question, those courts are divided on how they do so. That division has resulted in the formation of two different tests:

(1) The "proximity test/physical-possession test," which is used by the United States Courts of Appeals for the Seventh Circuit and the District of Columbia Circuit, see United States v. Teller, 397 F.2d 494 (7th Cir. 1968); United States v. Branch, 545 F.2d 177 (D.C. Cir. 1976); and

(2) The "relationship test," which is used by the United States Courts of Appeal for the First Circuit and Fifth Circuit, see United States v. Micheli, 487 F.2d 429 (1st Cir. 1973); and United States v. Giwa, 831 F.2d 538 (5th Cir. 1987).

Although the United States Court of Appeals for the Tenth Circuit has not decided which of these two tests it would apply,⁴ it has examined the two tests and discussed the pros and cons of each test:

"The first approach is a 'physical possession' analysis. Under this inquiry, the reviewing court focuses on the physical location of the container and whether the individual wore the container at the time it was searched in order to determine

⁴The Tenth Circuit Court of Appeals was presented with the opportunity to choose between the two tests, but it concluded that, in the particular case before it, under either test, suppression of the evidence was proper; thus, it did not express an opinion as to which test it believed to be more appropriate. See United States v. Vogl, 7 F. App'x 810, 815-16 (10th Cir. 2001) (not selected for publication in the Federal Reporter).

whether the container was an extension of the person or part of the premises. See United States v. Johnson, 475 F.2d 977, 979 (D.C. Cir. 1973). For example, in United States v. Teller, the Seventh Circuit held the search of a purse was within the scope of the premises search warrant where the woman had placed her purse on a bed and left the room during the search. 397 F.2d 494, 497-98 (7th Cir.), cert. denied, 393 U.S. 937, 89 S. Ct. 299, 21 L. Ed. 2d 273 (1968). The court concluded a purse that is temporarily put down cannot be considered an 'extension of her person,' and its search did not constitute a search of the person. Id. It logically follows that a purse within the individual's physical possession is considered an appendage of the body and, therefore, a search of the person. See Johnson, 475 F.2d at 979 (noting the purse was not worn by defendant 'and thus did not constitute an extension of her person so as to make the search one of her person'); but see United States v. Branch, 545 F.2d 177, 182 (D.C. Cir. 1976) (ruling the search of a bag worn by the defendant upon entering the premises was not permissible where the owner was unknown to police, entered the premises during the course of the premises search, and was not given an opportunity to leave).

"Critics suggest this approach is both too broad and too narrow. The rule provides blanket protection to those seeking to hide incriminating evidence because those individuals could avoid detection from lawful searches 'through the simple act of stuffing it in one's purse or pockets.' See United States v. Young, 909 F.2d 442, 445 (11th Cir. 1990), cert. denied, 502 U.S. 825, 112 S. Ct. 90, 116 L. Ed. 2d 62 (1991). Similarly, the approach is too constrictive because 'it would leave vulnerable many personal effects, such as wallets, purses, cases, or overcoats, which are often set down upon chairs or counters, hung on racks, or checked for convenient storage.' [United States v. Micheli, 487 F.2d [429] at 431 [(1st Cir. 1973)].

"The second approach to determine whether the individual's container may be searched pursuant to a premises search warrant focuses on the officers' knowledge or understanding of the person's 'relationship' to the premises searched at the time the officers executed the search warrant. See United States v. Giwa, 831 F.2d 538, 544 (5th Cir. 1987). In United States v. Micheli, the First Circuit rejected the 'physical possession' test in favor of examining the relationship between the person and the place being searched. Id. at 431-32. Using this principle, the court concluded the usual occupant or owner of a premises being searched loses her privacy interest in the belongings located there; however, a 'mere visitor' retains her legitimate expectation of privacy regardless of whether the visitor is currently holding or has temporarily put down her belongings. Id. at 432. Thus, the court upheld the search of the defendant's briefcase found under a desk because, as the co-owner of the business premises subject to the search warrant, he was not a mere visitor. Id. As a co-owner the defendant bore

" 'a special relation to the place, which meant that it could reasonably be expected that some of his personal belongings would be there. Thus, the showing of probable cause and necessity which was required prior to the initial intrusion into his office reasonably comprehended within its scope those personal articles, such as his briefcase, which might be lying about the office. The search of the briefcase, under these circumstances, was properly carried out within the scope of the warrant.'

"Id.

"In United States v. Giwa, the Fifth Circuit focused its inquiry on the officers' perception of the defendant's

relationship to the place being searched. 831 F.2d at 544-45. Under this analysis the officers' search of the flight bag was upheld because the defendant was an overnight visitor, he answered the door clad only in pants and a bathrobe, and was alone in the residence. Id. at 545. According to the court, these facts suggested defendant had 'more than just a temporary presence in the apartment,' and 'the agents could reasonably believe his flight bag contained evidence' of the kind portrayed in the warrant. Id. at 544-45.

"Critics suggest the 'relationship' inquiry promotes inefficiency and uncertainty because it requires law enforcement officers to know the status of the individual and who owns the container. See Micheli, 487 F.2d at 434 (Campbell, J., concurring). Such an approach obligates a court to inquire into the officer's subjective knowledge at the time of the search. See id. Additionally, because 'the nature and quantum of "relationship" cannot readily be defined, officers and courts may be bedeviled with uncertainty in a field where certainty is especially desirable.' Id."

United States v. Vogl, 7 F. App'x 810, 815-16 (10th Cir. 2001) (footnote omitted) (not selected for publication in the Federal Reporter).

In United States v. Young, 909 F.2d 442 (11th Cir. 1990), the Eleventh Circuit Court of Appeals expressed agreement, albeit in dicta, with applying the "relationship test" to situations like the one presented here:

"[W]e disagree with the district court's implicit conclusion that any search of a purse, or similar personal effects, in the

physical possession of a person necessarily violates the Fourth Amendment where a valid search warrant covers only 'the premises.' We agree instead with the position taken by the First Circuit Court of Appeals in United States v. Micheli, 487 F.2d 429 (1st Cir. 1973), and United States v. Gray, 814 F.2d 49, 51 (1st Cir. 1987). In Micheli, while noting that no bright line rule exists, the First Circuit held that in determining whether a search of personal effects violates the scope of a 'premises' warrant, one must consider the relationship between the object, the person and the place being searched. Id. at 431. Using this formula the First Circuit reasoned that the usual occupant of a building being searched would lose a privacy interest in his belongings located there; however, a transient visitor would retain his expectation of privacy, whether or not his belongings are being held by him or have been temporarily put down. Thus, the court held that a briefcase belonging to an employee could be searched pursuant to a premises warrant, whether found in his possession or under his desk. Id. at 431-2. The First Circuit again adhered to this test in Gray, upholding the search of a visitor's jacket pursuant to a premises warrant covering a residence where a drug deal had just taken place. 814 F.2d at 51.

"We find this approach more reasonable than the physical proximity approach used by the district court. Indeed, a mere physical proximity rule would facilitate the insulation of incriminating evidence from lawful searches through the simple act of stuffing it in one's purse or pockets. We do not wish to condone such a blanket rule."

909 F.2d at 444-45 (footnotes omitted; emphasis added).

After examining the physical-possession test and the relationship test and weighing the pros and cons of each, we hold that "mere physical

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possession should not be the sole criterion [that] should be used to determine whether a personal item may be searched pursuant to a premises warrant." Giwa, 831 F.2d at 544. Rather, in our view, the relationship test seems to be the better approach because it "best balances citizens' reasonable expectations of privacy with law enforcement needs." Perino v. Slaughter, No. Civ. 07-144 LH/WDS, Jan. 27, 2007 (D.N.M. 2009) (not reported in Federal Supplement). Indeed, the relationship test better protects citizens' rights and reasonable expectations of privacy in their belongings because, unlike with the physical-possession test, they do not need to maintain control of their belongings (i.e., purse, wallet, jacket, etc.) when they visit a person's house to also maintain their Fourth Amendment rights if law-enforcement officers happen to execute a search warrant while they are there. A person's Fourth Amendment rights should not turn on whether they continuously maintain control over their possessions. As the First Circuit Court of Appeals explained in Micheli:

"The Fourth Amendment's basic interest in protecting privacy, Warden v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967), and avoiding unreasonable governmental intrusions, Mancusi v. Deforte, 392 U.S. 364, 88 S. Ct. 2120, 20 L. Ed. 2d 1154 (1968), is hardly furthered by making its

applicability hinge upon whether the individual happens to be holding or wearing his personal belongings after he chances into a place where a search is underway. The rudest of governmental intrusions into someone's private domain may occur by way of a search of a personal belonging which had been entrusted to a nearby hook or shelf. The practical result of such a rule may be to encourage the government to obtain search warrants for places frequented by suspicious individuals, such as infamous bars, then lie in wait for those individuals to enter and make themselves comfortable."

Micheli, 487 F.2d at 431. The relationship test also better ensures that law-enforcement officers can effectively enforce criminal laws because it allows them to search the belongings (i.e., purse, wallet, jacket, etc.) of anyone who is present at the place being searched, regardless of whether that person is in physical possession of their belongings, as long as the law-enforcement officers can provide a reason why the relationship between the person, that person's belongings, and the place being searched warrant an intrusion into that person's belongings. So, we now apply the relationship test to the facts in this case.

Here, it is clear that, at the time the law-enforcement officers carried out the search warrant for Moyers's house, they would have perceived Powers as something more than a "transient visitor" to Moyers's house.

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When the officers entered Moyers's house on the morning of November 26, 2018, Powers was by herself in the first room inside the house asleep on the couch, and she had left her black purse sitting next to her on the side table while she slept. (R. 4, 8.) In other words, Powers was, at least, an overnight guest in Moyers's house and was certainly more than a "transient visitor." Indeed, as Officer Wood testified at the suppression hearing, a confidential informant, who had participated in a controlled buy of drugs at Moyers's house, told Officer Wood about Powers -- namely, that Powers "usually has meth" and that she does not "stay [at Moyers's house] full time" (R. 5), indicating that Powers does, at least, "stay" at Moyers's house on occasion. Thus, Officer Wood could have reasonably believed that Powers's purse contained the "illegal drugs" he was searching for as detailed in the search warrant. See, e.g., Giwa, 831 F.2d at 545 ("[W]e do not agree with the district court's finding that Giwa was merely a 'casual visitor' to the apartment. Giwa was an overnight visitor to Aruya's apartment. Additionally, at the time the agents arrived at the apartment, Giwa had been sleeping and answered the door clad only in a bathrobe and slacks, apparel indicating that his was more than just a

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temporary presence in the apartment. Finally, Giwa was discovered alone in a private residence. These facts support the conclusion that Giwa was not a 'mere visitor' or 'passerby' and thus, the agents could reasonably believe his flight bag contained evidence of credit card fraud.").

Conclusion

Because Powers was more than a "transient visitor" at Moyers's house and had a known relationship to the premises, and because Powers's purse was a container that could conceivably conceal the "illegal drugs" that law-enforcement officers were looking for in Moyers's house, Powers's Fourth Amendment rights were not violated when the officers searched her purse. Thus, the trial court did not err when it denied Powers's motion to suppress.

Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum, McCool, and Minor, JJ., concur.