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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. WAYNE CHIN, Appellant.	2 CA-CR 2007-0398 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054730

Honorable Richard S. Fields, Judge

AFFIRMED AS MODIFIED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin
Tucson
Attorneys for Appellant

E S P I N O S A, Presiding Judge.

¶1 Appellant Wayne Chin was convicted after a jury trial of conspiracy to commit possession or transportation of marijuana for sale. The trial court sentenced him to a 3.5-year prison term. On appeal, he contends the trial court erred by denying his motion to suppress evidence seized from a home in which he had been staying as a guest. He also contends the jury did not make the required finding on the amount of marijuana involved; therefore, the charge must be reduced to a class four felony, and he is entitled to be resentenced.

¶2 Pursuant to a search warrant, police officers searched the home of Daniel Alatorre Castro for drugs and contraband. They found numerous bales of marijuana, $20,000 in cash, drug paraphernalia, and two guns. Chin, Alatorre, Sandra James, and Arturo Castillo-Chavarria were arrested. Chin and James were charged with conspiracy to possess and/or transport marijuana for sale, possession of marijuana for sale with a weight of more than four pounds, two counts of possession of a deadly weapon during the commission of a felony drug offense, and possession of drug paraphernalia. Alatorre pled guilty to possession of marijuana for sale and testified for the state at Chin's trial. He testified about the large amount of marijuana that was brought to the house and the numerous sales he, Chin, and James had been involved in for the month or so before they were arrested. The only charge of which Chin was found guilty was the conspiracy charge.

¶3 Chin first contends the trial court abused its discretion by denying his motion to suppress the evidence seized from Alatorre's home. Chin had argued that when the officers initially entered the home, they had done so without a warrant and that this was unconstitutional, therefore rendering invalid the subsequent search pursuant to the warrant.

The state maintained, as it does on appeal, that Chin lacked standing to challenge the warrantless search as well as the subsequent search pursuant to the warrant. After an evidentiary hearing, the court denied the motion, finding Chin had no reasonable expectation of privacy in Alatorre's home and that Chin therefore lacked standing to challenge the search of the house.

¶4 We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion, based only on the evidence that was presented at the suppression hearing, which we view in the light most favorable to sustaining the ruling of that court. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 3, 185 P.3d 135, 137 (App. 2008). We review the court's legal conclusions de novo. *Id.*; *see also State v. Smith*, 197 Ariz. 333, ¶ 2, 4 P.3d 388, 390 (App. 1999). The issue of whether a party has standing to challenge a search is a mixed question of law and fact; we review the legal question de novo. *See United States v. Sarkisian*, 197 F.3d 966, 986 (9th Cir. 1999); *see also United States v. Cooper*, 203 F.3d 1279, 1284 (11th Cir. 2000). But we do not address the question whether Chin has standing to challenge the search of Alatorre's home under traditional standing principles. *See Rakas v. Illinois*, 439 U.S. 128, 139 (1978). Rather, we review the propriety of the trial court's ruling to determine whether Chin had a reasonable expectation of privacy. *Id.*; *see also State v. Martinez*, ___ Ariz. ___, n.7, 212 P.3d 75, 81 n.7 (App. 2009).

¶5 Chin contends, as he did in the trial court, that he had a long-term business and social relationship with Alatorre and that he was welcome to stay at the home anytime he wished. Chin argues that a person's standing to challenge a warrant is based on whether the

person has a reasonable expectation of privacy that is not contingent on property rights to a certain location. Relying, as he did below, on *Katz v. United States*, 389 U.S. 347 (1967), and *Minnesota v. Olson*, 495 U.S. 91 (1990), he contends the court erred in finding he lacked a reasonable expectation of privacy, distinguishing *Minnesota v. Carter*, 525 U.S. 83 (1998), which he contends the court and the prosecutor incorrectly found directly on point. Chin contends that he was not only a business associate of Alatorre's but a social guest like the defendant in *Olson*, who was found to have standing to challenge the warrantless search of his girlfriend's home, where he had slept the entire night.

¶6 On the record before us, we cannot say the trial court abused its discretion in finding Chin lacked a reasonable expectation of privacy in Alatorre's home. The evidence presented at the suppression hearing, particularly Alatorre's testimony, supported the finding that their relationship was that of co-drug dealers, much like the defendant in *Carter*. That the two also had a social relationship does not change this fact. And although Chin was welcome to stay at the house, according to Alatorre, that permission was conditioned on Chin's being at the home to help package marijuana. Alatorre testified that, although the two socialized, his relationship with Chin was "all business" and that, when Chin visited the house, it was for the purpose of assisting in the business of marijuana packaging and selling. Alatorre stated Chin never visited the house as simply a social guest. On the day officers entered the house, Chin had only been there for about a half hour, and he was there only to package marijuana, after which he would have left had he not been arrested. According to

Alatorre, Chin had not stayed at the house during the days preceding their arrest and had only done so on occasion, staying for the purpose of packaging marijuana.

¶7 There was no testimony contradicting Alatorre's. Therefore, based on the evidence presented, the trial court did not err in finding Chin lacked standing to challenge the search of Alatorre's home and denying Chin's motion to suppress. Nor are we persuaded the court erred based on broader rights guaranteed by the Arizona Constitution and the decision by Division One of this court in *State v. Gissendaner*, 177 Ariz. 81, 865 P.2d 125 (App. 1993). We agree with the state that *Gissendaner* is distinguishable factually because the defendant in that case had presented evidence of his guest status, including the fact that he had intended to spend the night at the house and had brought clothing with him to do so. 177 Ariz. at 84, 865 P.2d at 128. And as the state points out, whether the defendant was a guest and could have a reasonable expectation of privacy was based on federal authorities, including *Olson*.

¶8 Chin also requests that the conviction be reduced from a class two felony to a class four felony, although he has abandoned his challenge to the sentence because it was already served. He contends that, because the jury never made the finding that the amount of marijuana he had conspired to possess or transport was four pounds or more, his rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), were violated, resulting in fundamental, prejudicial error. As Chin correctly points out, "the weight of marijuana a defendant possesses is not only a factor in determining the proper sentence, but also an element of the offense itself." *State v. Aragón*, 185 Ariz.

132, 134, 912 P.2d 1361, 1363 (App. 1995). But, Chin did not raise this issue until sentencing. The jury had already been excused, and no finding could then be made. Chin thereby waived the right to relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *see also State v. Price*, 217 Ariz. 182, ¶¶ 20-22, 717 P.3d 1223, 1227-28 (2007). Although this was error and the error can be characterized as fundamental, *see Henderson*, 210 Ariz. 561, ¶¶ 23-25, 115 P.3d at 608, it was not prejudicial in light of Alatorre's testimony about the hundreds of pounds of marijuana involved in the business being conducted out of his house and the officer's testimony about how much marijuana had been seized from the house. Likewise, even assuming the issue was preserved by Chin's objection at sentencing, the error is subject to a harmless error review. *See Neder v. United States*, 527 U.S. 1, 15 (1999); *see also State v. Sepahi*, 206 Ariz. 321, n.3, 78 P.3d 732, 735 n.3 (2003). And again, the error was harmless in this case in light of the evidence presented.

¶9 More importantly, the jury found Chin guilty of this count as charged in count one of the indictment. Count one charged the offense as a class two felony. As overt acts, the charge referred to the allegations in the remaining counts; count two charged Chin with possession of four pounds or more of marijuana. Thus, by implication, the jury made the requisite finding. But the sentencing transcript shows the trial court reduced the class two felony to a class three felony, a classification that is based on no less than two and no more than four pounds of marijuana. *See* A.R.S. § 13-3405(B)(5). The sentencing minute entry, however, designates the offense as a class two felony. We are disturbed by the court's

uncertainty on this point and its lack of clarity as to whether it was sentencing Chin to an aggravated term for a class four felony or the presumptive term for a class three felony. *See* A.R.S. § 13-701(C). The term was not properly aggravated. But the court's overall intent, based on the transcript, appears to have been to treat the offense as a class three felony, even though it would have been justified in classifying it as a class two felony.[1] Therefore, the sentencing minute entry, which states the offense is a class two felony, must be modified accordingly. *See State v. Hanson*, 138 Ariz. 296, 304-05, 674 P.2d 850, 858-59 (App. 1983) (oral pronouncement of sentence controls when there is discrepancy with written judgment).

¶10 We affirm the conviction and the sentence imposed as modified to reflect a conviction of a class three felony.

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PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

_____
JOSEPH W. HOWARD, Chief Judge

_____
JOHN PELANDER, Judge

[1]Although the designation of the offense as a class two felony would have been correct, given the contents of the indictment, we will not change the sentence to Chin's detriment in the absence of a cross-appeal by the state. *See State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-75 (1990).