STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1961

State of Minnesota,
Respondent,

vs.

Joshua Micheal Bursch,
Appellant.

Filed December 18, 2017
Affirmed
Hooten, Judge

Polk County District Court
File No. 60-CR-13-1873

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

John D. Ellenbecker, St. Cloud, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.

S Y L L A B U S

An individual who is not on probation but knowingly resides with a probationer has a diminished expectation of privacy in common areas of the residence shared with the probationer. A legitimate probation-based search of such shared areas does not violate Fourth Amendment rights even if the search is done over the objection of the individual who is not on probation.

O P I N I O N

HOOTEN, Judge

In an appeal from his felony convictions of felon in possession of a firearm and receiving stolen property, appellant claims that the district court erred in failing to suppress evidence recovered during a search by probation officers and other law enforcement—over his objection and without a warrant—of a residence he shared with two felons whom he knew were on probation. Because the record does not support appellant's claim that, as a non-probationer, his Fourth Amendment rights were violated during the search, we affirm.

FACTS

Appellant Joshua Micheal Bursch shared a residence in Polk County with his brother and Jacob Syverson, both of whom were on felony probation and had signed probation agreements that provided their consent to warrantless searches of their residence by probation officers. While Bursch was a felon, he was not on probation during the time period relevant to this appeal.

Investigator Nathan Nelson of the Crookston Police Department received a call from a concerned citizen who believed that persons living at the residence were in possession of stolen goods. The matter was later referred to Deputy Matthew Hitchen of the Polk County Sheriff's Office, who was able to confirm that Bursch, his brother, and Syverson were living at the residence. Upon learning that Bursch's brother and Syverson were both on probation, Hitchen contacted the probation officer for Bursch's brother regarding the citizen's tip. The probation officer and Hitchen agreed that, in light of the information

from the concerned citizen, a warrantless probation search of the residence should be conducted.

The next day, Nelson, Hitchen, Investigator Nathan Rasch, two other police officers, and two probation officers went to Bursch's residence to conduct the probation search. Outside the residence, they encountered Bursch who was getting into his vehicle to leave. Bursch initially declined to let them into the residence, but relented after Hitchen indicated that, if necessary, they would knock down the door to perform the search. Bursch acknowledged that he was aware that his brother and Syverson were on probation and therefore were subject to searches. Before entering the residence, Rasch asked Bursch if there were any firearms inside. Bursch responded that he had firearms in his bedroom.

Upon entering the residence, Bursch led law enforcement to a bedroom that was shared by his brother and Syverson. In the hallway on the way to the brother's bedroom, Hitchen passed by the open door to Bursch's bedroom, through which he saw firearms. Bursch attempted to close the door to his bedroom, explaining that he did not want them entering. However, Hitchen advised him that he needed to perform a protective sweep to make sure that no one was hiding in the bedroom. Bursch relented after Hitchen explained to him that they would not be "searching" the bedroom, but merely making sure that there was no one hiding in it. Hitchen entered the bedroom and observed several firearms.

Upon discovering the firearms, the law enforcement officers, who were aware that Bursch was a felon and was not allowed to possess firearms, arrested Bursch. As a result of the search of the residence, several firearms and stolen goods were found. Law enforcement also found drug paraphernalia while performing a warrantless search of a

pickup truck and a Jeep on the property. Later, during an interview with Rasch, Bursch admitted to owning the firearms found in his bedroom.

After an omnibus hearing, the district court found that the evidence seized from the vehicles and appellant's statements to law enforcement about the drug paraphernalia were inadmissible. However, the district court denied Bursch's motion to suppress the evidence found in the residence and his statements regarding that evidence.

The parties then agreed to submit the case to the district court as a stipulated-facts trial under Minnesota Rule of Criminal Procedure 26.01, subdivision 4, thereby reserving the dispositive pretrial suppression issue for appeal. The district court found Bursch guilty of receiving stolen property pursuant to Minn. Stat. § 609.53, subd. 1 (2012), and being a felon in possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(2) (Supp. 2013). This appeal followed.

ISSUES

I. Did Bursch forfeit his argument that the district court erred by denying his motion to suppress because of inadequate briefing on appeal?

II. Did the district court err by failing to suppress the evidence found during the search of Bursch's residence and Bursch's statements to law enforcement about that evidence?

ANALYSIS

I. Forfeiture

Bursch raises a novel question under Minnesota law: if officers conduct a probation search, how are the Fourth Amendment rights of a non-consenting, non-probationer third

party affected? The state argues that Bursch forfeited his right to address this issue by not properly supporting it in his brief.[1] Arguments are forfeited if they are presented in a summary and conclusory form, do not cite to applicable law, and fail to analyze the law when claiming that errors of law occurred. *In re Conduct of Karasov*, 805 N.W.2d 255, 271 n.12 (Minn. 2011); *see also State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (stating that arguments are forfeited if the "brief contains no argument or citation to legal authority in support of the allegations"); *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is [forfeited] and will not be considered on appeal unless prejudicial error is obvious on mere inspection." (quotation omitted)).

The state argues that Bursch does not adequately brief the issue because he only cites to a single case—*Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515 (2006)—which he asserts is analogous to his case, even though it deals with consent searches, not probation searches. Because there are no Minnesota cases specifically discussing this issue, and Bursch is not able to cite to any state or federal caselaw that directly supports his position, we conclude that Bursch's brief, although sparse in legal support, sufficiently analyzes general Fourth Amendment principles for us to address the issue.

[1] The state in its brief, and the caselaw we cite, refer to this argument as waiver instead of forfeiture. However, the Minnesota Supreme Court recently clarified that a right is forfeited when not timely asserted, and that it is waived when voluntarily given up by a party. *State v. Beaulieu*, 859 N.W.2d 275, 278 n.3, 284 (Minn. 2015). The real question is whether Bursch forfeited the issue, not whether he waived it.

II. Fourth Amendment Challenge

When the facts are undisputed, appellant courts review de novo pretrial orders on motions to suppress. *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008). Since the parties do not dispute the district court's findings of fact from the omnibus hearing, we apply de novo review.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The touchstone of the Fourth Amendment is reasonableness." *United States v. Knights*, 534 U.S. 112, 118, 122 S. Ct. 587, 591 (2001). We determine whether a search is reasonable by balancing "the degree to which it intrudes upon an individual's privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests." *Id.*, 534 U.S. at 119, 122 S. Ct. at 591.

Typically, a search is reasonable only when conducted on the basis of probable cause and with a warrant. *Id.*, 534 U.S. at 121, 122 S. Ct. at 592–93. Even if police have probable cause, a search conducted without a warrant is "presumptively unreasonable under the Fourth Amendment." *State v. Anderson*, 733 N.W.2d 128, 136 (Minn. 2007) (citing *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380 (1980)). However, there are circumstances where the Fourth Amendment's reasonableness standard does not require police to obtain a warrant. *See Knights*, 534 U.S. at 121, 122 S. Ct. at 592. And, there are circumstances where a lower standard than probable cause satisfies the Fourth Amendment. *Id.* The search of a probationer's residence qualifies for both exceptions. The United States Supreme Court has held that a "warrantless search of [a probationer],

supported by reasonable suspicion and authorized by a condition of probation, [is] reasonable within the meaning of the Fourth Amendment." *Id.*, 534 U.S. at 122, 122 S. Ct. at 593; *see also Anderson*, 733 N.W.2d at 139–40 (adopting the reasoning of *Knights* and explaining that probation with search conditions significantly diminishes probationer's reasonable expectation of privacy).

Probationers have a significantly diminished expectation of privacy because probation "is a form of criminal sanction" and "probationers do not enjoy the absolute liberty to which every citizen is entitled." *Knights*, 534 U.S. at 119, 122 S. Ct. at 591 (quotation omitted). And, the government has a legitimate interest in monitoring probationers to facilitate reintegration into the community and monitor compliance with probation conditions, coupled with a justified concern that a probationer "will be more likely to engage in criminal conduct than an ordinary member of the community." *Id.*, 534 U.S. at 121, 122 S. Ct. at 592.

Neither the Supreme Court nor Minnesota courts have addressed whether the warrantless search of a probationer's residence, based on reasonable suspicion, violates the Fourth Amendment rights of a non-consenting non-probationer living in the same residence.

A. Entering Bursch's Residence

Bursch does not dispute that his brother and Syverson had diminished expectations of privacy in the residence, nor does he argue that the officers did not have reasonable suspicion to perform a warrantless search of the residence. Rather, he argues that as a non-probationer, he did not have a diminished expectation of privacy just by virtue of living

with the two probationers, and therefore the search violated his Fourth Amendment rights because he explicitly refused to consent to it. We disagree.

Non-probationers who choose to live with probationers "assume the risk that they too will have diminished Fourth Amendment rights in areas shared with the probationer." *State v. Adams*, 788 N.W.2d 619, 623 (N.D. 2010). Bursch was voluntarily living with two probationers. He himself has been on probation in the past and he admitted to Rasch that he knew that his brother and Syverson were subject to probation searches. By living with his brother and Syverson, Bursch voluntarily and knowingly took on the risk that his otherwise private residence might be subjected to probation searches by the state. *See State v. Davis*, 965 P.2d 525, 532 (Utah App. 1998) (explaining that probationer consents to searches of "any areas of the residence over which he had common authority with [the non-probationer]" and that law enforcement was allowed to search those areas if it had reasonable suspicion); *see also People v. Robles*, 3 P.3d 311, 317 (Cal. 2000) (holding that those who live with a probationer have normal expectations of privacy in areas under their exclusive control "so long as there is no basis for [law enforcement] to reasonably believe the probationer has authority over those areas"); *People v. Schmitz*, 288 P.3d 1259, 1267 (Cal. 2012) (reiterating the holding of *Robles*); 5 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 10.10(d), at 556–57 n.138 (5th ed. 2012) (stating that when probationer lives with non-probationer "the search may nonetheless extend to all parts of the premises to which the probationer . . . has common authority").

Relying on *Randolph*, Bursch responds that even though his brother and Syverson may have agreed to warrantless searches of the residence as part of their probation

agreements, he objected to the search of their shared residence. In *Randolph*, one co-tenant consented to a search of a residence while the other co-tenant objected to the search. 547 U.S. at 107, 126 S. Ct. at 1519. The Supreme Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Id.*, 547 U.S. at 120, 126 S. Ct. at 1526. Relying on common social expectations, the *Randolph* Court pointed out that "the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant," noting that the co-tenant's "disputed invitation, *without more*, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all." *Id.*, 547 U.S. at 114, 126 S. Ct. at 1523 (emphasis added). Here, however, there is more.

Someone who chooses to cohabitate with another assumes "the risk that one of their number might permit the common area to be searched." *United States v. Matlock*, 415 U.S. 164, 171 n.7, 94 S. Ct. 988, 993 n.7 (1974). Unlike in *Randolph*, the social expectation here was not that one of Bursch's co-inhabitants *might* agree to a search of their shared residence. Rather, Bursch knew that both of his co-inhabitants *had* already agreed to a search of the residence as part of their respective probation agreements. Bursch cannot simultaneously be aware that his co-inhabitants have agreed, as a required condition of their probation, to consent to a search by their probation officer, and maintain a reasonable belief that he has the same privacy interests in those areas of the residence he shares with the probationers as he has in those under his exclusive control. Accordingly, we hold that

a non-probationer who knowingly lives with a probationer has a diminished expectation of privacy in areas of the residence shared with the probationer.

On the other side of the scale, the government's legitimate interest in ensuring compliance with probation conditions supports the reasonableness of this search. If a non-probationer were allowed to object to a search of a probationer's residence just by virtue of living with the probationer, "it would effectively thwart all [probation] searches." *State v. West*, 517 N.W.2d 482, 486 (Wis. 1994).[2] By allowing non-probationers to prevent law enforcement from conducting the search of a probationer's residence, we would be creating a loophole whereby probationers are allowed to evade some of the conditions of their probation simply by making the strategic decision to live with a non-probationer. And this problem is not alleviated by requiring law enforcement to obtain a warrant to enter the residence because search conditions are included in probation agreements precisely to enable law enforcement to search a probationer's residence without any forewarning. This loophole would interfere with the state's ability to properly enforce the terms of probation, as well as impinge upon the state's ability to keep the general public safe from potentially law-breaking probationers. Based upon this record, Bursch knowingly lived with probationers and therefore had a diminished expectation of privacy in areas of the residence

[2] *West* upheld a parole search conducted over the objections of a non-parolee living in same residence. For the purposes of our Fourth Amendment analysis, we treat a parole search and a probation search the same. *See Samson v. California*, 547 U.S. 843, 850–52, 126 S. Ct. 2193, 2198–99 (2006) (noting that although "parolees have fewer expectations of privacy than probationers," parole and probation agreements with search conditions both significantly diminish their subjects' reasonable expectations of privacy); *see also Knights*, 534 U.S. at 119–20, 122 S. Ct. at 591–92 (holding that a search condition in a probation agreement significantly diminishes a probationer's reasonable expectation of privacy).

that he shared with them. We hold that the district court did not err in holding that law enforcement did not violate Bursch's Fourth Amendment rights upon entering the residence over his objection.

B. Entering Bursch's Bedroom

While the entry by law enforcement into the residence did not violate Bursch's Fourth Amendment rights, that does not mean Bursch's Fourth Amendment rights are completely stripped away by living with a probationer. Law enforcement may enter a residence over the objections of a non-probationer co-occupant, but officers are permitted to search only areas that are under the control of the probationer, like a probationer's bedroom, or areas where the probationer exerts shared control, such as a common area shared by all residents. *See Robles*, 3 P.3d at 317 ("[T]hose who live with a probationer maintain normal expectations of privacy over their persons. In addition, they retain valid privacy expectations in residential areas subject to their exclusive access or control, so long as there is no basis for officers to reasonably believe the probationer has authority over those areas."). Law enforcement may not search areas that are under the non-probationer's exclusive control, like the non-probationer's bedroom, just because they live with a probationer. *See id.* ("That persons under the same roof may legitimately harbor differing expectations of privacy is consistent with the principle that one's ability to claim the protection of the Fourth Amendment depends upon the reasonableness of his or her individual expectations."). Law enforcement is only allowed to conduct a search of an area if "the facts available to the officers . . . support a reasonable belief that the probationer has at least common authority over the area searched." *Davis*, 965 P.2d at 533. This approach

accounts for the state's interest in enforcing the terms of probation by not allowing probationers to take advantage of a loophole or shield themselves from probation searches by living with a non-probationer, while at the same time taking into account the non-probationer's Fourth Amendment rights by not allowing law enforcement to have unfettered access to the entire residence upon entry.

Therefore, absent a showing that it was reasonable for law enforcement to believe that the probationers had shared authority of Bursch's bedroom, Bursch had a full expectation of privacy in his bedroom and was within his rights to close the door to it or object to a search of it. Since there is nothing in the record to indicate that law enforcement reasonably believed that Bursch's brother or Syverson exerted any authority over Bursch's bedroom, probation officers and other law enforcement were not allowed to enter it merely because they were conducting a probation search of the residence.

But this does not end our inquiry. The state argues that, even assuming Bursch's higher expectation of privacy in his bedroom, probation officers and other law enforcement could nonetheless enter Bursch's bedroom under the plain-view exception to the Fourth Amendment. We agree. Police officers can seize evidence that is in plain view, so long as they "have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made." *Kentucky v. King*, 563 U.S. 452, 463, 131 S. Ct. 1849, 1858 (2011). Law enforcement entered the residence under the authority of a probation search and proceeded to the hallway. Since the hallway is a common area, the probation officers and other law enforcement were within their authority to be present in the hallway.

From where he stood in the hallway, Hitchen saw firearms in Bursch's bedroom. That the firearms were in plain view, however, does not alone justify their entry: "first, not only must the item be in plain view; its incriminating character must also be immediately apparent." *Horton v. California*, 496 U.S. 128, 136, 110 S. Ct. 2301, 2308 (1990) (quotation omitted). Before entering the residence, Bursch had admitted that he kept firearms in his bedroom. And Hitchen knew that Bursch was not permitted to lawfully possess firearms. The "incriminating character" of the firearm, therefore, was "immediately apparent" to Hitchen. We conclude that the officers justifiably entered the room under the plain-view exception to the Fourth Amendment's warrant requirement.

The district court determined that law enforcement was allowed to enter Bursch's bedroom to perform a protective sweep. Bursch disagrees, but cites no authority in support of his argument. Two types of protective sweeps are allowed. *State v. Bergerson*, 671 N.W.2d 197, 202 (Minn. App. 2003) (adopting *Maryland v. Buie*, 494 U.S. 325, 110 S. Ct. 1093 (1990)), *review denied* (Minn. Jan. 20, 2004). With the first type, police officers may look in "spaces immediately adjoining the place of arrest, such as closets, from which an attack could be immediately launched," without the need for probable cause or reasonable suspicion. *Id*. (quotation omitted). With the second type, officers may search areas "near, but not immediately adjoining, the place of arrest," but must have reasonable articulable suspicion to justify the sweep. *Id*. Protective sweeps must also be limited to cursory inspections of spaces where someone could be hiding and should not last longer than necessary to make sure that there is no danger in the area. *Id*. If police have probable cause to arrest a defendant prior to a search of his person and formally arrested the defendant

soon after the search, then it does not matter whether the search came before or after the arrest. *See Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S. Ct. 2556, 2564 (1980).[3]

Bursch's admission to having firearms in his room, and the visibility of the firearms from the hallway, each independently gave law enforcement the reasonable articulable suspicion to perform a protective sweep of his bedroom under the second prong of *Bergerson*. It does not matter that the protective sweep came prior to Bursch's arrest because Hitchen already knew that Bursch was not allowed to possess firearms and Hitchen had probable cause to arrest him when they conducted the protective sweep. *See id.* Law enforcement has to be allowed to take actions to protect themselves when entering an unfamiliar environment, and this is especially true when they know that firearms are involved. Hitchen's entrance into Bursch's bedroom was a legitimate protective sweep.

C. Pretext

Bursch also argues in passing that the officers used the fact that his brother and Syverson were on probation as a pretext to search the residence without a search warrant. Bursch barely develops this argument and does not cite to any authority to support it. Courts analyze Fourth Amendment challenges objectively, instead of evaluating "the actual motivations of individual officers." *Knights*, 534 U.S. at 122, 122 S. Ct. at 593 (quotation omitted); *State v. Everett*, 472 N.W.2d 864, 867 (Minn. 1991) (explaining that if there is "an objective legal basis for an arrest or search, the arrest or search is lawful even

[3] Although *Rawlings* discusses a search incident to arrest rather than a protective sweep, we apply the same logic here.

if the officer making the arrest or conducting the search based his or her action on the wrong ground or had an improper motive"). The probation officers and other law enforcement had an objective legal basis for the search because they received the tip from a concerned citizen about criminal activity and knew that Bursch's brother and Syverson were on probation. Bursch's pretext argument fails.

D E C I S I O N

This case raises a novel issue of law in Minnesota, and Bursch does not lose his right to have us decide the issue just because there is limited caselaw that he can rely upon to support his position. Because Bursch knew that his brother and Syverson were subject to probation searches and chose to reside with them anyway, he continued to have a right of privacy in his bedroom, but had a diminished expectation of privacy in the common areas of the residence he shared with them. Accordingly, Bursch's Fourth Amendment rights were not violated when law enforcement entered the residence over his objections. And because Hitchen knew that Bursch was not permitted to possess firearms and observed a firearm in Bursch's bedroom from the hallway, his entry into Bursch's private bedroom and the later seizure of those firearms were justified under the plain-view exception to the Fourth Amendment. Even if Hitchen had not seen any firearms from the hallway, his entry into Bursch's bedroom was a legitimate protective sweep, justified by Bursch's admission to having firearms in his bedroom and the law enforcement officers' knowledge that Bursch was not allowed to possess firearms.

Affirmed.