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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1726

State of Minnesota,
Respondent,

vs.

Todd Ryan Baumgart,
Appellant.

Filed November 25, 2008
Affirmed
Halbrooks, Judge

Clay County District Court
File No. TX-07-1620

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Brian J. Melton, Clay County Attorney, Stephanie J. Borgen, Assistant County Attorney, 807 11th Street North, P.O. Box 280, Moorhead, MN 56561 (for respondent)

Blair W. Nelson, Blair W. Nelson, Ltd., 205 7th Street Northwest #3, Bemidji, MN 56601 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Harten, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D   O P I N I O N

HALBROOKS, Judge

Following his conviction of driving while impaired, appellant challenges the district court's denial of his motion to suppress the evidence obtained from a warrantless search of his residence. Because we conclude that appellant's brother validly consented to the search, we affirm.

FACTS

At approximately 3:01 a.m. on March 11, 2007, R.R. saw a pickup truck collide with a street-light pole. The pickup left the scene before R.R. could make contact with its driver. R.R. then contacted law enforcement, and the dispatcher advised him to follow the pickup. R.R. followed the pickup to a residence, where the driver pulled into a garage and shut the garage door. R.R. saw one person exit the garage and enter the house, but could not see what the person looked like.

When law enforcement arrived, R.R. identified the house that the person had entered and the garage where the pickup was parked. Officer Scott Kostohryz knocked on the door of the house, but no one responded. The house was dark.

Officer Cory Borkenhagen arrived at the residence, approached the garage, and looked through the garage windows. Because he smelled an odor that was consistent with explosives used to deploy air bags, Officer Borkenhagen entered the garage and observed that both of the pickup's airbags had been deployed and that the pickup had sustained "fairly heavy" damage to its front.

Officer Kostohryz directed the dispatch center to check the city utility records for the address to determine who lived there. Appellant's mother and brother were listed as property owners/occupants. Officer Kostohryz contacted appellant's brother by the telephone number that was listed and informed him of the accident. The brother told the officer that he and appellant lived at the residence, but appellant was the only person staying there that night. The brother confirmed that appellant owned a pickup matching the officer's description. Appellant's brother arrived at the residence about ten minutes later, unlocked the door, and let the officers into the house.

The brother went into the bedroom where appellant was sleeping and woke him. Without objection from appellant or his brother, Officer Kostohryz followed the brother into appellant's bedroom and asked appellant if he had injuries from the collision that required medical attention. While speaking with appellant, Officer Kostohryz observed indicia of intoxication and arrested him.

Appellant testified that because his brother moved out of the house approximately one week earlier, he was the only person living at the residence on March 11, 2007. Appellant stated that he and his brother had been living in the house together for at least eight months before that. Appellant also testified that his mother owned the property.

The district court concluded that the evidence of intoxication was admissible based on two exceptions to the warrant requirement of the Fourth Amendment—the exigent-circumstances-created-by-emergency exception and its conclusion that appellant's brother consented to the search. As a result, the district court denied appellant's motion to suppress evidence and dismiss.

This appeal follows.

D E C I S I O N

Appellant asserts that his conviction should be reversed because the officer's warrantless search that extended to his bedroom was unconstitutional, therefore resulting in suppression of the evidence of his intoxication. The Fourth Amendment to the United States Constitution and article I, section 10, of the Minnesota Constitution guarantee individuals the right to be secure against unreasonable searches and seizures. "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380 (1980) (quotation omitted). But a warrantless entry or search of premises is valid "when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained." *Georgia v. Randolph*, 126 S. Ct. 1515, 1518 (2006); *see also State v. Hummel*, 483 N.W.2d 68, 73 (Minn. 1992) ("Valid consent may be given by a third party who possesses common authority over the premises.") (citing *United States v. Matlock*, 415 U.S. 164, 170, 94 S. Ct. 988, 992 (1974)). A potential objector to a search who is "nearby but not invited to take part in the threshold colloquy, loses out." *Randolph*, 126 S. Ct. at 1527.

The United States Supreme Court has stated that common authority

> rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the

> others have assumed the risk that one of their number might permit the common area to be searched.

Matlock, 415 U.S. at 171 n.7, 94 S. Ct. at 993 n.7.

Before addressing whether appellant's brother had apparent authority to consent to the search of appellant's residence, we address whether appellant's brother claimed to have actual authority to consent. *See State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003) (concluding that "apparent authority exists only if the authority claimed by the third party would, if true, be sufficient to satisfy the legal test for actual authority"). Actual authority to consent to a warrantless search requires mutual use of the property. *State v. Buschkopf*, 373 N.W.2d 756, 767 (Minn. 1985), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 150, 110 S. Ct. 2301, 2315 (1990). If appellant's brother did not claim mutual use of appellant's residence, apparent authority to consent to the search cannot exist. *See Licari*, 659 N.W.2d at 253–54 (storage-facility landlord who did not claim to have mutual use of storage unit could not consent to warrantless search); *State v. Frank*, 650 N.W.2d 213, 219 (Minn. App. 2002) (stating that an officer's reasonable mistake of fact will support a finding of apparent authority, but that "even a reasonable mistake of law will not support a finding of apparent authority"). Here, appellant's brother claimed to have mutual use of the residence when he told Officer Kostohryz that he lived at the residence with appellant. We therefore turn to the question of whether appellant's brother had apparent authority to consent to the search.

The Minnesota Supreme Court has adopted the objective standard set forth in *Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793 (1990), for determining whether

apparent authority exists. *Licari*, 659 N.W.2d at 253. The test is whether "the facts available to the officer at the moment [would] warrant a [person] of reasonable caution in the belief that the consenting party had authority over the premises." *Id.* (quoting *Rodriguez*, 497 U.S. at 188, 110 S. Ct. at 2801; *see also State v. Thompson*, 578 N.W.2d 734, 740 (Minn. 1998). "Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably." *Rodriguez*, 497 U.S. at 186, 110 S. Ct. at 2800. Here, appellant's brother was listed with the utility company as an owner/occupant of the residence, told Officer Kostohryz that he lived at the residence, voluntarily met the officer at the house, had a key and unlocked the door of the residence, and led law enforcement directly to appellant's bedroom. In light of these facts, it was reasonable for Officer Kostohryz to believe that appellant's brother had authority to consent to the warrantless entry and search of the residence. We therefore conclude that appellant's brother validly consented to the entry and search of appellant's residence.

Because we affirm the district court on the ground that the search of appellant's residence was excused by consent, we do not reach the issue of whether the emergency-aid exception applies.

Affirmed.