STATE OF MINNESOTA
IN COURT OF APPEALS
A09-479

State of Minnesota,
Respondent,

vs.

Steven Minh Tran,
Appellant.

Filed January 19, 2010
Reversed
Stauber, Judge

Hennepin County District Court
File No. 27CR07025570

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

John L. Lucas, Attorney at Law, Minneapolis, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Stauber, Judge; and Crippen, 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

STAUBER, Judge

On appeal from his conviction of controlled substance crime, appellant argues that the district court erred in denying his suppression motion because police did not have a valid basis for entering his apartment without a warrant. Because the district court's conclusion that the warrantless entry was necessary for officer safety is not supported by the record, we reverse.

FACTS

On April 19, 2007, police officers Todd Bohrer and Mary Ann Konietzko responded to an anonymous complaint of marijuana odor emanating from a unit in an apartment complex in Bloomington. Upon entering the second-floor hallway of the complex, the officers smelled the odor of burnt marijuana and noticed that the odor was strongest near the apartment identified by the complainant. The officers decided to knock on the door of the apartment, but before they could do so, an individual exited the apartment. As the officers talked with the individual, appellant Steven Tran came out of the apartment to talk with the officers. Appellant told the officers that he was the sole tenant of the apartment, and both he and his guest denied smoking marijuana. Officer Konietzko asked if they could enter the apartment, but appellant refused the officers access without a warrant. According to Officer Konietzko, appellant appeared to be nervous and tried to divert their attention from his apartment by moving from the doorway of the apartment to the wall on the opposite side of the hallway facing the apartment door. Appellant's behavior raised the officers' suspicions that he was hiding

something. While the officers continued to talk to appellant, the door to his apartment remained partially opened.

Moments later, Officer Bohrer allegedly noticed movement through the opening in the apartment doorway that passed beyond his line of sight. Officer Bohrer asked appellant if there were other people inside the apartment, but he did not respond. Officer Bohrer proceeded to push the door further open to investigate the movement he had observed, and noticed what appeared to be a small baggie of marijuana next to a plate containing tobacco-like material on the floor of the apartment. Two additional guests were also present in the apartment.

Officer Bohrer removed the baggie of marijuana from the apartment and asked appellant for identification. Appellant reentered the apartment, momentarily went to an area of the apartment that was beyond Officer Bohrer's line of sight, then came back toward the entryway to retrieve his driver's license from a black bag near the door. Appellant's actions raised the officers' suspicions, and Officer Bohrer reentered the apartment to ask one of appellant's guests what appellant had done while he was retrieving his identification. The guest entered the area where appellant had gone and showed the officers a large zip-lock bag of marijuana that had been covered by a blanket. The officers then performed a sweep of the apartment, which led to the discovery of a large duffel bag filled with clear plastic bags of marijuana. A warrant was later obtained, and after searching the entire apartment, police found approximately 90 pounds of marijuana. Appellant was arrested and charged with aiding and abetting first-, second- and third-degree controlled substance crimes.

Prior to trial, appellant moved to suppress the marijuana found in his apartment, claiming that Officer Bohrer violated his Fourth Amendment rights by pushing open the door to his apartment without a warrant. Following a hearing, the district court denied the motion on the ground that the intrusion into appellant's apartment was necessary to protect the safety of the officers. After a trial on stipulated facts, appellant was found guilty of second- and third-degree controlled substance crime, and not guilty of the first-degree charge. Appellant received a stayed sentence of 48 months. This appeal followed.

D E C I S I O N

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). This court accepts the district court's underlying factual determinations unless they are clearly erroneous. *State v. Lemieux*, 726 N.W.2d 783, 787 (Minn. 2007). "Clearly erroneous means manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Novack v. Nw. Airlines, Inc.*, 525 N.W.2d 592, 597 (Minn. App. 1995) (quotation omitted).

I. Reasonable expectation of privacy

As an initial matter, the parties disagree as to whether appellant had a reasonable expectation of privacy in his apartment because the door was already partially ajar when Officer Bohrer pushed it further open. The United States and Minnesota Constitutions protect the "right of the people to be secure in their persons, houses, papers, and effects

against unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. However, the Fourth Amendment's protections "are not triggered unless an individual has a legitimate expectation of privacy in the invaded space." *State v. Perkins*, 588 N.W.2d 491, 492 (Minn. 1999). A two-step test is used to determine whether a reasonable expectation of privacy exists. *In re Welfare of B.R.K.*, 658 N.W.2d 565, 571 (Minn. 2003). First, the court looks at whether the person "exhibited an actual subjective expectation of privacy" in the area searched. *Id.* Second, the court looks at "whether that expectation is reasonable." *Id.* The person asserting Fourth Amendment rights has the burden of demonstrating a reasonable expectation of privacy. *State v. Gail*, 713 N.W.2d 851, 860 (Minn. 2006) (burden of proving "subjective expectation of privacy"); *State v. Jordan*, 742 N.W.2d 149, 156 (Minn. 2007) (burden of proving "reasonable expectation of privacy").

The state contends that no subjective expectation of privacy exists when a door is left partially open because "open doorways are public places where officers may adjust, open, move, or reach through limited obstructions."[1] We disagree. A party may exhibit a subjective expectation of privacy by keeping the entrance door to a dwelling closed. *See, e.g., State v. Carter*, 569 N.W.2d 169, 174 (Minn. 1997) (concluding that a person

[1] The state cites several cases for the proposition that no reasonable expectation of privacy exists if a door is left partially open. However, none of the cases support that proposition. Instead, the cases state that police may conduct a warrantless arrest inside a home if the intended arrestee is visible through an open entry door. *See United State v. Santana*, 427 U.S. 38, 42, 96 S. Ct. 2406, 2409 (1976); *State v. Howard*, 373 N.W.2d 596-598–99 (Minn. 1985); *State v. Patricelli*, 324 N.W.2d 351, 352–53 (Minn. 1982). Here, the officers were not attempting to execute an arrest, and the evidence was not in plain view through the opening in the door.

demonstrated a subjective expectation of privacy by remaining inside an apartment with doors shut and blinds drawn), *overruled on other grounds by Minnesota v. Carter*, 525 U.S. 83, 119 S. Ct. 469 (1998); *State v. Sletten*, 664 N.W.2d 870, 876 (Minn. App. 2003) (stating that a party had a subjective expectation of privacy when he was in a hotel room with the door closed and locked), *review denied* (Minn. Sept. 24, 2003). But whether the door remained closed is only one factor to consider in deciding whether a subjective expectation of privacy exists. Among other things, courts also consider whether the party attempted to exclude police from the dwelling. *See Sletten*, 664 N.W.2d at 876 (stating that a person may exhibit a subjective expectation of privacy by attempting to exclude the police or others from the area).

Here, appellant attempted to preserve his privacy by (1) clearly and unequivocally informing the officers that they were not permitted to enter the apartment without a warrant; (2) shielding the apartment from the officers by keeping the door partially closed; and (3) attempting to divert their attention from the apartment by moving to the opposite side of the hallway. Based on these actions, we conclude that appellant clearly exhibited a subjective expectation of privacy.

In order to invoke the protections of the Fourth Amendment, appellant must also demonstrate that his expectation of privacy is one that "society is prepared to recognize as reasonable." *State v. McBride*, 666 N.W.2d 351, 360 (Minn. 2003) (quotation omitted). In other words, the expectation must be objectively reasonable. This prong is satisfied because courts have long recognized that an individual has a reasonable expectation of privacy in his dwelling. *See, e.g., State v. Anderson*, 720 N.W.2d 854, 861

(Minn. App. 2006), *aff'd* 733 N.W.2d 128 (Minn. 2007). Accordingly, appellant is entitled to challenge the intrusion into his apartment.

II. Constitutionality of search

Appellant claims that Officer Bohrer violated his constitutional rights by further opening the apartment door without his consent, without a warrant, and in the absence of exigent circumstances. "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). "Certain exceptions apply to the warrant requirement, however, and the ultimate touchstone of the Fourth Amendment is reasonableness." *State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009) (quotation omitted). The state bears the burden of demonstrating that the entry was justified by an established exception to the warrant requirement. *State v. Anderson*, 388 N.W.2d 784, 787 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986).

A. Plain view

At oral argument, the state asserted that the plain-view exception to the warrant requirement applies because Officer Bohrer may have been able to see the marijuana inside the apartment without opening the door. In making this argument, the state emphasized Officer Bohrer's testimony that his observation of the marijuana and the opening of the door occurred "simultaneously."

Under the plain view exception, law enforcement may "seize an item in plain view if (1) police were lawfully in a position from which they viewed the object, (2) the object's incriminating character was immediately apparent, and (3) the officers had a

lawful right of access to the object." *State v. Zimmer*, 642 N.W.2d 753, 755–56 (Minn. App. 2002) (quotation omitted), *review denied* (Minn. June 26, 2002).

Here, the district court found that Officer Bohrer did not observe the marijuana until *after* he opened the door. This conclusion is supported by the evidence. Despite Officer Bohrer's speculation that he might have been able to see the marijuana through the opening left by appellant, he also admitted that he did not notice the marijuana until after he further opened the door. Because the district court's finding is not clearly erroneous, Officer Bohrer's observation of the marijuana cannot be justified under the plain view exception.

B. Officer safety

Next, the state contends that Officer Bohrer's actions did not violate appellant's Fourth Amendment rights because his intrusion into the apartment was conducted out of concern for officer safety. A warrantless search may be justified by exigent circumstances when the safety of law enforcement officers is threatened. *See United States v. Cunningham*, 133 F.3d 1070, 1072 (8th Cir. 1998) (providing that concerns about officer safety can constitute exigent circumstances justifying a warrantless search); *see also State v. Shriner*, 751 N.W.2d 538, 542 (Minn. 2008) (stating that protection of human life can be an exigent circumstance justifying a warrantless search). In order for officer safety to constitute an exigent circumstance, police must have a "reasonable fear of harm." *United States v. Poe*, 462 F.3d 997, 1000 (8th Cir. 2006).

The district court found that officer safety was a valid basis for pushing the door further open because (1) appellant seemed nervous; (2) the smell of marijuana was

present outside the apartment door; (3) the officers were vulnerable to attack because they were positioned with their backs to the open door; and (4) the officers detected movement within the apartment.

We disagree that officer safety was a valid basis for upholding the search. The evidence in the record indicates that the officers were more curious about what they might find inside the apartment than they were concerned for their safety. Officer Bohrer testified that appellant's nervous behavior and adamant refusal of the officers' request to enter the apartment caused him to believe that "there's something in [the apartment that appellant] doesn't want me to see by just standing in the doorway." Officer Bohrer also admitted that the movement inside the apartment was not "criminal or suspicious," and there is no evidence that the officers observed appellant or his guests in possession of weapons or engaging in any threatening behavior. On this record, the officers did not have an objectively reasonable fear for their safety.

We also note that after appellant clearly and unambiguously refused to allow the officers into the apartment, as he was constitutionally entitled to do, it was unnecessary to open the door because there were alternative means for the officers to alleviate any concerns about their safety. The odor of marijuana and appellant's nervous behavior may have provided the officers with probable cause to believe that criminal activity (smoking of marijuana) had occurred inside the apartment. *See State v. Hodgman*, 257 N.W.2d 313, 314 (Minn. 1977) (stating that officer had probable cause to arrest suspect once he smelled marijuana). Thus, the officers could have simply left the premises and requested a search warrant. If the officers did not want to leave the area, it would have also been

permissible to ask appellant to move away from the door to a place where safety was not an issue. The record reflects that the officers had already re-positioned themselves so that their backs were no longer facing the door.

The state concedes that opening the door was only one of several options available to the officers, but notes that police are generally not required to draw fine distinctions about which alternative course is the least intrusive. *See State v. Balenger*, 667 N.W.2d 133, 140–41 (Minn. App. 2003) (noting that fact that officer safety might be accomplished by less intrusive means does not render search unreasonable), *review denied* (Minn. Oct. 21, 2003). We acknowledge that police officers are generally entitled to some deference in making decisions that could affect their safety. But based on appellant's clear denial of the officer's request to enter the apartment and the limited evidence suggesting that the officers were truly concerned for their safety, the officers' discretion in determining the appropriate investigative technique to apply is outweighed by appellant's interest in maintaining the privacy of his apartment. *See State v. Storvick*, 428 N.W.2d 55, 61 (Minn. 1988) (stating that courts must be "hesitant in finding exigent circumstances for warrantless entries of dwellings" because the expectation of privacy in one's home is the core interest protected by the Fourth Amendment).

C. Destruction of evidence

The state also argues that the warrantless search was permissible due to the possible destruction or removal of the marijuana from the apartment. The state claims that it is likely that appellant or his guests would have destroyed or removed the evidence before a warrant could be obtained because the officers had questioned them about

smoking marijuana and noticed the odor of marijuana in the hallway. The possibility of removal or destruction of evidence is an exigent circumstance permitting a warrantless search or seizure. *Shriner*, 751 N.W.2d at 541. But the denial of appellant's suppression motion was not based on potential removal or destruction of evidence, and neither officer testified that the apartment door was opened for this purpose. Without any evidence in the record to support the state's assertion, we decline to uphold the search on this basis.

Because no exception to the warrant requirement applies to the initial search by Officer Bohrer, the evidence seized by the officers inside the apartment is inadmissible, and appellant's conviction is, therefore, reversed. *See Segura v. United States*, 468 U.S. 796, 804, 104 S. Ct. 3380, 3385 (1984) (stating that "the exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, . . . but also evidence later discovered and found to be derivative of an illegality or fruit of the poisonous tree" (citations and quotation marks omitted)).

Reversed.