[Cite as *State v. Alexander*, 2010-Ohio-3598.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93300

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARLES ALEXANDER

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516274

BEFORE: McMonagle, P.J., Blackmon, J., and Sweeney, J.

RELEASED AND JOURNALIZED: August 5, 2010

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CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Charles Alexander, appeals from the trial court's judgment after a bench trial finding him guilty of tampering with evidence. He contends that the trial court erred in denying his motion to suppress because, as an overnight visitor, he had standing to challenge the warrantless search. He also contends that his conviction for tampering with evidence was not supported by sufficient evidence and was against the

manifest weight of the evidence. And finally, he argues that the evidence was insufficient to support his conviction on the forfeiture specification and, therefore, the trial court erred in ordering him to forfeit $1,782 in cash found on his person when he was arrested. We reverse and remand.

I

{¶ 2} Alexander was charged in a three-count indictment on one count each of drug possession in violation of R.C. 2925.11(A), possession of criminal tools in violation of R.C. 2923.24(A), and tampering with evidence in violation of R.C. 2921.12(A)(1). Each count carried two forfeiture specifications; one for forfeiture of $1,782 cash and the other for forfeiture of an electronic scale.

{¶ 3} At the hearing on Alexander's motion to suppress, Cleveland Metropolitan Housing Authority (CMHA) police officer Ronald Hopkins testified that at approximately 9:30 p.m. on August 27, 2008, he and his partner responded to a complaint from a security guard in a CMHA apartment building of drug activity in one of the apartments. Hopkins said that he and his partner observed the apartment for approximately ten minutes and did not see anyone enter or leave. They then knocked on the door and announced themselves.

{¶ 4} According to Hopkins, Eliza Alexander, the defendant's mother and leaseholder, answered the door. When the officers advised her that they were there to investigate a complaint of drug activity, Eliza advised the

officers that they needed a warrant to enter her apartment. Hopkins testified that he told her they did not need a warrant.

{¶ 5} Hopkins testified that he saw Alexander and a woman through the partially open door "running" into the bedroom of the efficiency-sized apartment; Alexander was trying to hide a "black object" on the side of his body. Upon seeing the "black object," for "officer safety," Hopkins pushed Eliza out of the way, pushed the door open, pulled his gun, and went into the bedroom, where he saw Alexander crouched down by the bed, pushing an object under the mattress. After securing Alexander and the woman, Hopkins lifted up the mattress and found a small black scale, which subsequently tested positive for cocaine residue. Hopkins testified that he then patted down Alexander and found $1,782 in cash in his front pants pocket, which he seized.

{¶ 6} Both Eliza and Alexander testified at the hearing on the motion to suppress. Eliza testified that Alexander planned to spend the night at her apartment on the day in question. She testified that she opened the door after the officers knocked and the officers asked if they could come in. She immediately said, "No," and stepped into the hall, closing the door behind her. She asked who had called with the complaint and the officers said they could not tell her. When she told the officers to go to that person's apartment,

Officer Hopkins told her she was under arrest for obstructing justice and handcuffed her, and then both officers entered her apartment.

{¶ 7} Alexander testified that his mother answered the door after the knock and went out into the hallway. Alexander said his girlfriend then called him into the bedroom and handed him a scale. At that moment, the officers entered the bedroom and pointed a gun at him; he dropped the scale and fell to the floor.

{¶ 8} The trial court found that there were no exigent circumstances justifying the warrantless entry and that the officers had themselves created the circumstances that led to the warrantless search and seizure. Nevertheless, the trial court denied Alexander's motion to suppress on the basis that he had no standing to challenge the search of his mother's apartment. The trial court found that there was no credible testimony indicating that Alexander stayed at his mother's apartment on a regular basis, so the court concluded that he did not have a reasonable expectation of privacy in her apartment and therefore no standing.

{¶ 9} At trial, both Eliza and Alexander additionally testified that Alexander had planned to spend the night at Eliza's apartment so he could take her shopping for a flat-screen TV the next day. Alexander testified that he planned to use the $1,782 cash found in his pocket to pay for the TV. Further, he testified that the money was part of $9,841 illegally seized from

him by the Cleveland Police Department and returned to him by the city of Cleveland on August 1, 2008 pursuant to a court order. A copy of the check was admitted into evidence.

{¶ 10} The trial court subsequently found Alexander not guilty of drug possession and possession of criminal tools, but guilty of tampering with evidence, ordered forfeiture, and sentenced him to two years community control sanctions.

II

{¶ 11} In his first assignment of error, Alexander contends that the trial court erred in overruling the motion to suppress because, as an overnight guest, he had standing to challenge the legality of the warrantless search. We agree.

{¶ 12} An individual challenging the legality of a search or seizure bears the proving of proving standing. *Rakas v. Illinois* (1978), 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387; *State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372, 683 N.E.2d 1096; *State v. Williams*, 73 Ohio St.3d 153, 166, 1995-Ohio-275, 652 N.E.2d 721. The burden is met by establishing that the person had a legitimate expectation of privacy in the area searched. Id.; *Dennis*, supra. A legitimate expectation of privacy is one that society is prepared to recognize as reasonable. *Rakas* at 143. Status as an overnight guest is sufficient to show that the person had an expectation of privacy in the home that society is

prepared to recognize as reasonable. *Minnesota v. Olson* (1990), 495 U.S. 91, 96-97, 110 S.Ct. 1684, 109 L.Ed.2d 85. In other words, an overnight guest has standing to challenge the legality of a search. *Dennis*, citing *Olson.*

{¶ 13} In this case, the evidence was uncontroverted that Alexander was an overnight guest at his mother's apartment on the night in question. Eliza testified at the suppression hearing that Alexander visited her every day, had many of his meals there, and planned to spend that night at her apartment. Although not relevant for purposes of deciding the motion to suppress, both she and Alexander explained at trial that he was staying over so they could go shopping the next day for a new TV.

{¶ 14} The trial court did not address Alexander's status as an overnight guest when deciding the motion to suppress; it simply concluded there was not enough evidence to demonstrate that he *regularly* stayed at the apartment. Although that may be true, the evidence that he was staying there on the day in question was undisputed. Accordingly, the trial court erred in ruling that he did not have standing to challenge the warrantless entry. As Alexander had standing, and the trial court ruled that there were no exigent circumstances justifying the warrantless entry, the motion to suppress should have been granted. Accordingly, the matter is remanded for a new trial.

{¶ 15} Appellant's first assignment of error is sustained.

{¶ 16} In his second and third assignments of error, Alexander contends that his conviction for tampering with evidence was not supported by sufficient evidence and against the manifest weight of the evidence. Our resolution of the first assignment of error renders these assigned errors moot because the matter is remanded for a new trial.

{¶ 17} In his fourth assignment of error, Alexander argues that even assuming the evidence was sufficient to support a conviction for tampering with evidence, it was insufficient to support the trial court's order for forfeiture of the $1,782 cash found on his person. We agree.

{¶ 18} R.C. 2981.02 specifies three kinds of property that may be forfeited to the State: (1) contraband involved in an offense, (2) proceeds derived from or acquired through the commission of an offense, or (3) an instrumentality that is used in or intended to be used in the commission or facilitation of a felony.

{¶ 19} "Contraband" is defined as property that is illegal for a person to acquire or possess under a statute, ordinance, or rule, or that a trier of fact determines to be illegal to possess by reason of the property's involvement in an offense. R.C. 2901.01(A)(13). "Proceeds" in matters involving unlawful goods means any property derived directly or indirectly from an offense. R.C. 2981.01(B)(11)(a). An "instrumentality" is property that is otherwise lawful to possess but is used or intended to be used in an offense. R.C.

2981.02(A)(3). In determining whether property was used or intended to be used in the commission of an offense, the trier of fact should consider (1) whether the offense could not have been committed or attempted but for the presence of the instrumentality; (2) whether the primary purpose in using the instrumentality was to commit or attempt to commit the offense; and (3) the extent to which the instrumentality furthered the commission of the offense. R.C. 2981.02(B)(1), (2), and (3).

{¶ 20} The State must prove by a preponderance of the evidence that the property is subject to forfeiture. R.C. 2981.04(B). It argues that the money found on Alexander was likely involved in a criminal offense because he admitted that scales are used for weighing drugs, and that he had not paid taxes for five years and did not have a job. Further, there was cocaine residue found on the scale he was attempting to hide under the mattress. The State contends that this evidence demonstrates that the money was contraband subject to forfeiture because it demonstrated that "it was more probable than not that the cash was involved in the commission of a criminal offense."

{¶ 21} But Alexander was convicted of tampering with evidence, i.e., attempting to hide the scale, and the money was obviously unrelated to that offense. Further, in finding Alexander not guilty of count two, possessing criminal tools, the trial judge specifically found that the State did not prove

that the scale belonged to Alexander nor that the money constituted criminal tools. In other words, the trial court found that Alexander did not possess the money with an intent to use it for a criminal purpose,[1] and implicitly accepted the uncontroverted evidence that the money had been recently paid to Alexander by the city of Cleveland pursuant to a court order, and was intended to be used the next morning to purchase a television set.

{¶ 22} Because the money was not contraband, proceeds, or an instrumentality used or intended to be used in the commission of an offense, the trial court erred in ordering forfeiture of the $1,782 found on Alexander's person. We order the trial court to vacate the order of forfeiture and return the money to its rightful owner.

Reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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[1]R.C. 2923.24, prohibiting possessing criminal tools, states that "no person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
JAMES J. SWEENEY, J., CONCUR