IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 17, 2008 Session

STATE OF TENNESSEE v. WILLIAM GLENN TALLEY

Direct Appeal from the Criminal Court for Davidson County
No. 2006-A-559 Monte Watkins, Judge

No. M2007-01905-CCA-R9-CD - Filed July 1, 2009

The appellant, William Glenn Talley, was charged in the Davidson County Criminal Court with two counts of sexual exploitation of a minor and four counts of possessing a controlled substance with intent to sell or deliver. He filed pretrial motions to suppress the evidence linking him to the crimes and his statement to police, and the trial court denied the motions. From the trial court's order, the appellant brings this interlocutory appeal, arguing that the evidence and his statement were obtained in violation of his right to be free from unreasonable searches and seizures as provided by the Fourth Amendment of the United States Constitution and article I, section 7 of the Tennessee Constitution. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

David L. Raybin (at trial and on appeal) and Ed Yarbrough (at trial), Nashville, Tennessee, for the appellant, William Glenn Talley.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Deborah Housel, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The record reflects that in August 2005, the appellant lived in a condominium building on Thirty-First Avenue North in Nashville. The building's front door was always locked, and residents gained entry to the building by entering an access code into a keypad outside the main door. On August 16, 2005, detectives went to the building after receiving a tip that the appellant was selling

drugs from his condominium. When the detectives arrived and found the building's front door locked, they called their department to obtain the access code, which was on file. While waiting for the code, a man exited the building and let the detectives inside. The detectives went to the appellant's condominium on the second floor and knocked on the door. The appellant was not home, but Kimberly Knight answered the door. She told the officers she had been living in the condominium with the appellant for about three weeks, and she gave the officers permission to come inside. In plain view, the detectives saw a glass crack pipe and a knife with a white residue on it. They secured the scene and obtained a search warrant for the condominium and the appellant's place of business. Searches revealed controlled substances and child pornography at both locations. The appellant was arrested, and he stated that he was addicted to cocaine and that he exchanged pills with his friends for money. Subsequently, the appellant filed motions to suppress the evidence and his statement. In pertinent part, he claimed in the motions that the evidence and the statement resulted from an unlawful search because the detectives gained warrantless, unreasonable entry to the private condominium building.

At the hearing on the motions, Charles B. Reasor testified that he owned a condominium on the third floor and that the appellant owned a unit on the second floor. Twenty-one condominiums were in the building, and each owner owned their individual condominium and one twenty-first (1/21) of all the building's common areas such as the hallways, stairs, and the outside yard. Reasor stated that a person gained access into the building from the keypad at the locked front door. A guest could push the "pound sign" on the keypad to find a condominium owner's name. Once the guest found the owner's name, the guest could call the owner's condominium telephone. The owner could give the guest the access code to get into the front door or the owner could come to the front door and let the guest into the building.

Reasor testified that the fire department, the police department, the United Postal Service, FedEx, vendors, the cleaning service, and "people who need[ed] to have access" had the access code. He described the code as a "general number" but acknowledged that it was considered an "emergency code." He stated that absent an emergency, the police were not allowed to come into the building. He stated that once a person entered the front door, it would take one to two minutes for the person to get to the appellant's second-floor condominium.

On cross-examination, Reasor testified that once an owner's guest gained entry to the building, the guest had free access to the building's hallways. He acknowledged that he had seen deliverymen in the hallways and that there was a reduced expectation of privacy in the hallways. He also acknowledged that if he had thought someone was selling drugs from a condominium, he would have contacted the police and would have expected them to come into the building to investigate. He stated that he was unaware of any problems in the appellant's condominium until the police "raided" it. He acknowledged that if the police came to the building in response to an emergency or in order to investigate, the police could call dispatch to obtain the access code. He said it was his understanding the code had "just been registered with the police department, just like it has with the postal service, and it's [to be used] at their discretion." He acknowledged that there were no "no trespassing" signs posted around the building and that an owner or a guest had the authority to let

the detectives into the building. On redirect examination, Reasor testified that the building's homeowners association may have provided the police department with the access code "as a matter of courtesy." On recross-examination, Reasor testified that he would not let police officers into the building without a warrant.

Metropolitan Nashville Police Detective Joseph Simonik testified that on August 16, 2005, he went to the appellant's condominium building in response to an anonymous complaint that had been called in to "244-dope-line." According to the caller, the appellant was selling pills from his residence and place of business. Detective Simonik decided to do a "knock and talk" at the appellant's condominium and went to the building with Detectives Fox, Osborne, Stokes, and Gonzales. When they arrived, they encountered the building's locked front door. Detective Simonik called dispatch to obtain the door's access code. While waiting for the code, a man came out of the building, said hello to the officers, and opened the door for them. Detective Simonik said the man was in his late twenties or thirties, was dressed casually, and was possibly a resident. The officers went inside and went up to the appellant's condominium. Detectives Simonik, Fox, and Osborne went to the appellant's unit while Detectives Stokes and Gonzales waited down the hall.

Detective Simonik testified that although the detectives were not wearing police uniforms, they were wearing "raid jackets" marked with a police patch and a badge and were clearly identified as police officers. Detective Simonik knocked on the door, and Kimberly Knight opened it. The detective told her they were looking for the appellant, and Knight told them he was not there. Detective Simonik asked Knight if they could come inside and speak with her, and she said yes. Knight told Detective Simonik she had been living in the condominium for about three weeks; Detective Simonik later discovered she had clothes in the condominium and a key to the residence. In the living room, the officers saw a glass smoking pipe and a knife with a white residue on it. Knight asked if she could telephone the appellant, and she called him with her cellular telephone. Detective Simonik spoke with the appellant on the phone and explained to him why the detectives were there. Detective Simonik asked the appellant if he could come to the condominium, and the appellant said yes. When the appellant arrived, Detective Simonik asked to search the home. The appellant seemed nervous and refused to consent to the search. Detective Simonik had the scene "frozen" and left to get a search warrant. He obtained the warrant, returned to the condominium, and executed the warrant. During the search, officers found drugs, drug paraphernalia, pornographic images of children, and three pornographic compact discs.

Detective Simonik testified that Knight told him the appellant had drugs and a gun at his place of business. Officers obtained another search warrant and searched the business. There, they found more drugs, a gun, and a large number of pornographic images of children. The appellant was arrested and told Detective Simonik he had been using cocaine since September. He also told the detective that he exchanged the drugs with his friends for money but that he did not consider this to be "selling" drugs.

On cross-examination, Detective Simonik acknowledged that without a warrant, police had to have consent to enter a home. He stated that although he had described the tipster as

"anonymous" on direct examination, he spoke with the caller and got the caller's name. However, he did not "check out" the caller. He acknowledged that he waited five days after the tip to go to the appellant's condominium and that going to the condominium was not an emergency. He stated that after searching the appellant's home and business, he learned the appellant had a pharmacy license. He acknowledged that he did not use the speaker at the building's front door to call the appellant's condominium because he did not want to "tip off" anyone in the condominium that the police were there.

In a written order, the trial court noted that in order for a person, other than a resident, to gain entry to the condominium building, the person had to have express authorization to enter. The court determined that the area between the door of the building and the appellant's condominium door was "within the curtilage of his home, and is protected from warrantless entry by the Fourth Amendment." Therefore, the court concluded that the detectives should have obtained consent to enter the building because exigent circumstances did not exist to justify a warrantless entry. The trial court ruled that because the unidentified male who held open the door for the detectives could have been a resident, a guest, or a trespasser, the detectives did not obtain lawful consent to enter the building. Nevertheless, the trial court denied the appellant's motions because it determined that the detectives gained lawful entry to the appellant's condominium when Kimberly Knight, who lived in the condominium with the appellant, gave consent for the detectives to come inside. Through an interlocutory appeal to this court, the appellant challenges the denial of the motions.

II. Analysis

The appellant contends that the trial court correctly concluded the detectives' entry of the private condominium building was unlawful because it violated the appellant's reasonable expectation of privacy and, therefore, violated his constitutional right to be free from unreasonable searches and seizures. However, he argues that the trial court incorrectly concluded Knight's consent for the detectives to enter the condominium cured the taint because "like a set of dominoes, the searches of the [condominium], business and the custodial interrogation all fall pursuant to the 'fruit of the poisonous tree' doctrine [when] the initial intrusion into Mr. Talley's condominium was unlawful." The State contends that the detectives' entry to the building was lawful because the homeowner's association consented to the entry by providing the police department with the access code in order for police to investigate complaints. The State also contends that the detectives' entry was lawful because a man "with apparent authority" permitted it. In response, the appellant argues that according to Charles Reasor's testimony, the police were to use the access code only for an emergency, not merely an investigation. He also argues that the only time the police could lawfully use the access code for investigative purposes was if one of the condominium owners summoned them. Finally, he contends that the unidentified man could not consent to the entry because the State failed to show the man had any right to use or occupy the building.

In reviewing a trial court's determinations regarding a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18,

23 (Tenn. 1996). Thus, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." Id. Nevertheless, appellate courts will review the trial court's application of law to the facts purely de novo. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). Furthermore, the State, as the prevailing party, is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." Odom, 928 S.W.2d at 23.

A. Reasonable Expectation of Privacy in the Condominium Building

The Fourth Amendment to the United States Constitution provides that every person has the right to be free from unreasonable searches and seizures. Article I, section 7 of the Tennessee Constitution similarly provides "[t]hat the people shall be secure . . . from unreasonable searches and seizures." The Tennessee Supreme Court has previously noted that, generally, "'article I, section 7 is identical in intent and purpose with the Fourth Amendment.'" State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997) (citation omitted). However, the court also noted that, in some cases, the Tennessee Constitution may afford greater protection. Id. When determining whether an unreasonable government intrusion has occurred, the first question is whether the defendant had a reasonable expectation of privacy. See Katz v. United States, 389 U.S. 347, 360, 88 S. Ct. 507, 516 (1967) (Harlan, J. concurring). In order to answer this question, we must determine "(1) whether the individual had an actual, subjective expectation of privacy and (2) whether society is willing to view the individual's subjective expectation of privacy as reasonable and justifiable under the circumstances." State v. Munn, 56 S.W.3d 486, 494 (Tenn. 2001) (citing Smith v. Maryland, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580 (1979)).

In support of his argument that a person has a reasonable expectation of privacy in the common areas of a locked apartment building, the appellant relies heavily on United States v. Carriger, 541 F.2d 545 (6th Cir. 1976). In Carriger, the Sixth Circuit Court of Appeals considered "whether a tenant in an apartment building has a reasonable expectation of privacy in the common areas of the building not open to the general public." 541 F.2d at 549. The court concluded that "when, as here, an officer enters a locked building, without authority or invitation, the evidence gained as a result of his presence in the common areas of the building must be suppressed." Id. at 552. As the court explained, "A tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not expect trespassers." Id. at 551. Citing Carriger, some state courts also have held that a reasonable expectation of privacy exists in the hallways of a multiple-unit apartment building. People v. Trull, 380 N.E.2d 1169, 1173 (Ill. App. Ct. 4th Dist. 1978); People v. Killebrew, 256 N.W.2d 581, 583 (Mich. Ct. App. 1977); see also State v. Di Bartolo, 276 So. 2d 291, 294 (La. 1973).

Just a year later, however, the Eighth Circuit specifically disagreed with Carriger in United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977), stating that the "locks on the doors to the entrances of the apartment complex were to provide security to the occupants, not privacy in common hallways." The appellate court held that "[a]n expectation of privacy necessarily implies an expectation that one will be free of any intrusion, not merely unwarranted intrusions." Id.

Because the hallways of the defendants' locked apartment building were available for use by the residents, their guests, the landlord and the landlord's agents, and any other person "having legitimate reasons to be on the premises," the court concluded that the defendants did not have a reasonable expectation of privacy in the building's hallways. Id. Various other federal and state jurisdictions also have found that privacy interests do not exist in the locked common areas of multi-unit apartment buildings. See United States v. Nohara, 3 F.3d 1239, 1241-42 (9th Cir. 1993); United States v. Concepcion, 942 F.2d 1170, 1171-72 (7th Cir. 1991); United States v. Holland, 755 F.2d 253 (2d Cir. 1985); State v. Davis, 711 N.W.2d 841, 845 (Minn. Ct. App. 2006); Commonwealth v. Reed, 851 A.2d 958, 962 (Pa. Super. Ct. 2004); Commonwealth v. Dora, 781 N.E.2d 62, 67 (Mass. App. Ct. 2003); People v. Lyles, 772 N.E.2d 962, 966 (Ill. App. Ct. 1st Dist. 2002).

In our view, access by third parties alone does not necessarily negate a reasonable expectation of privacy in a locked apartment building's common areas. See Cornelius v. State, 2004 Minn. App. LEXIS 149 (Minn. Ct. App. Feb. 10, 2004); State v. Trecroci, 630 N.W.2d 555, 566 (Wis. Ct. App. 2001); see also Killebrew, 256 N.W.2d at 583 (stating that, generally, tenants in an apartment building have a reasonable expectation of privacy in hallways that are shared by occupants and guests). On the other hand, we also disagree with the Sixth Circuit's bright line rule that a tenant has a reasonable expectation of privacy in the common areas of a locked apartment building. The Sixth Circuit's reasoning in Carriger, that a tenant expects other tenants and invited guests to enter a building's common areas but does not expect trespassers, is flawed because a person's being a trespasser is irrelevant if tenants do not have a reasonable expectation of privacy in those areas. See Eisler, 567 F.2d at 816.

The determination as to whether a tenant has a reasonable expectation in the common areas of a locked apartment building is a fact-driven issue. In the instant case, Charles Reasor testified that owners could give their guests the access code to get into the building and that various nonresidents such as delivery and cleaning people used the code. See State v. Breuer, 577 N.W.2d 41, 46-47 (Iowa 1998) (noting as one factor in its conclusion that the defendant had a reasonable expectation of privacy in the stairway of his locked apartment building was that guests usually waited at building door after ringing doorbell). Furthermore, twenty-one condominiums were in the building. Compare id. (noting that only two units were in the building). Given the numerous third parties that had unescorted access to the building's common areas, we conclude that the appellant in this case did not have an actual, subjective expectation of privacy in those areas.

Regarding the State's claim that the detectives obtained consent to enter the building from the person who held the door open for them, there is no proof that the person had authority to give consent. As to the State's claim that the detectives lawfully entered the building because the homeowner's association had provided the code to the police department, we find this argument unpersuasive because the detectives did not use the code to enter the building. Nevertheless, because the appellant did not have a reasonable expectation in the building's common areas, we conclude that the trial court erred by ruling the detectives entered the building unlawfully.

B. Fruit of the Poisonous Tree

Given the possibility of further appellate review, we will now determine whether the trial court properly concluded that Kimberly Knight's consent for the detectives to enter the condominium cured the taint of their illegal entry into the building. Again, we disagree with the trial court's conclusion.

In Wong Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 407, 416 (1963), the United States Supreme Court observed that the exclusionary rule bars the admissibility of evidence obtained both directly and derivatively from an unlawful invasion of an individual's privacy or personal security. However, the court declined to hold that "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." 371 U.S. at 487-88, 83 S. Ct. at 417. Instead, the court held that, in determining whether physical or verbal evidence is the fruit of a prior illegality, the "apt question . . . is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" 371 U.S. at 488, 83 S. Ct. at 417. Therefore, consent to search that is preceded by a Fourth Amendment violation may nevertheless validate the search if the consent is voluntary. State v. Simpson, 968 S.W.2d 776, 784 (Tenn. 1998); see Schneckloth v. Bustamonte, 412 U.S. 218, 248-49, 93 S. Ct. 2041, 2059 (1973). Moreover, the consent must be "sufficiently an act of free will to purge the primary taint of the unlawful invasion." Wong Sun, 371 U.S. at 486, 83 S. Ct. at 416-17. "The first prong focuses on coercion, the second on causal connection with the constitutional violation." United States v. Chavez-Villarreal, 3 F.3d 124, 127 (5th Cir. 1993). The trial court found, and the appellant does not dispute, that Knight's consent was voluntary. Therefore, we turn to the causal connection and whether Knight's consent was an exploitation of the prior unlawful entry. See State v. Garcia, 123 S.W.3d 335, 346 (Tenn. 2003).

To determine whether the causal connection between a Fourth Amendment violation and a consent to search has been broken, a court should consider the following three factors set forth by the United States Supreme Court in Brown v. Illinois, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 2261-62 (1975): (1) the temporal proximity of the illegal seizure and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. Although the trial court did not address the issue of attenuation, the question of attenuation is one that this court reviews de novo. State v. Ford, 30 S.W.3d 378, 380 (Tenn. Crim. App. 2000). The State carries the burden of establishing sufficient attenuation. Brown, 422 U.S. at 604, 95 S. Ct. at 2262.

The evidence at the suppression hearing established that after the detectives entered the building, they immediately went upstairs to the appellant's condominium and knocked on the door. According to Charles Reasor's testimony, this would have taken only one to two minutes. Therefore, factor one, the temporal proximity of the illegal seizure and the consent, weighs against attenuation. As to factor two, the presence of intervening circumstances, the detectives knocked on the door and Knight opened it. The detectives asked to speak with the appellant, and Knight told

them the appellant was not there. The detectives then asked to enter the condominium but did not verbally inform Knight that they were detectives investigating a crime. We conclude factor two also weighs against a finding of attenuation. Next, we consider the third factor, the purpose and flagrancy of the official misconduct. Detective Simonik gave contradictory testimony about the identity of the informant, testifying on direct examination that the informant was anonymous but testifying on cross-examination that he got the informant's name. Moreover, although the detectives had not received any information that Knight was involved in the appellant's alleged criminal activities, they asked to enter the condominium even though the appellant was not there. Finally, when asked at the suppression hearing why the detectives did not end the investigation when the detectives learned the appellant was not present, Detective Simonik said, "I wanted to come inside and talk, to see if there was anything in plain view, where I could obtain a search warrant. There happened to be stuff in plain view in order for me to obtain that search warrant." The third factor also weighs against a finding of attenuation. Therefore, had we determined that the officers entered the building unlawfully, the State's failure to show the consent was sufficiently attenuated from the entry into the building would have required suppressing the evidence.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the trial court's denial of the motions to suppress.

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NORMA McGEE OGLE, JUDGE