Affirmed and Plurality, Concurring and Dissenting Opinions filed August 10, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-01005-CR
NO. 14-15-01006-CR

NATHAN RAY FOREMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause Nos. 1374837 and 1374838

C O N C U R R I N G O P I N I O N

Appellant raises a single issue on appeal – the denial of his motions to suppress video surveillance. The video surveillance was found on the hard drive of a computer that was seized from Dreams Auto Customs Shop, the business wherein the two complainants were assaulted and from which they were kidnapped. Because I would affirm the trial

court's judgment on the basis that appellant failed to meet his burden to establish standing to challenge the seizure, I concur.

In order to challenge a search and seizure under either the United States or Texas Constitutions and article 38.23, a party must first establish standing. *See Kothe v. State*, 152 S.W.3d 54, 59 (Tex. Crim. App. 2004); *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996); *Martinez v. State*, 236 S.W.3d 361, 367 (Tex. App.—Fort Worth 2007, pet. dism'd). Standing is a question of law that we review *de novo* and may be raised by this court *sua sponte*. *Kothe*, 152 S.W.3d at 59-60; *State v. Millard Mall Svcs., Inc.*, 352 S.W.3d 251 (Tex. App.—Houston [14th Dist.] 2011, no pet.).[1] It is the defendant's burden to provide facts that establish standing. *See Villarreal*, 935 S.W.2d at 138; *see also Millard Mall Svcs.*, 352 S.W.3d at 253. Failure to meet that burden and to establish standing may result in the denial of the motion to suppress. *State v. Klima*, 934 S.W.2d 109, 110 (Tex. Crim. App. 1996). That decision will not be disturbed on appeal even in cases in which the record does not reflect that the issue was ever considered by the parties or the trial court. *Id.*

In determining whether appellant has established standing, we consider both the expectation of privacy approach and the property-based approach. *See State v. Bell*, 366 S.W.3d 712, 713 (Tex. Crim. App. 2012) (citing *United States v. Jones*, 565 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012)).[2] "A Fourth Amendment claim may be based on a trespass theory of search (one's own personal "effects" have been trespassed), or a privacy theory of search (one's own expectation of privacy was breached). *Ford v. State*, 477 S.W.3d 321, 328 (Tex. Crim. App. 2015).

---

[1] *See also State v. Sepeda*, 349 S.W.3d 713 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *State v. Simon Prop. Group, Inc.*, 357 S.W.3d 687 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (same). Thus the dissent's point that the State did not challenge standing in the trial court is of no moment.

[2] On remand, the appeals brought by Mark Steven Bell were dismissed in accordance with the parties' agreement. *State v. Bell*, NO. 14-10-00771-CR, 2013 WL 328952, at *1 (Tex. App.—Houston [14th Dist.] Jan. 29, 2013, no pet.).

To establish standing under the latter privacy theory, the defendant must show (1) that he had a subjective expectation of privacy in the place or property searched and (2) that society would recognize that expectation of privacy as being objectively reasonable. *State v. Betts*, 397 S.W.3d 198, 203 (Tex. Crim. App. 2013); *Lown v. State*, 172 S.W.3d 753, 759 (Tex. App.—Houston [14th Dist.] 2005, no pet.). In considering the latter, we examine the totality of the circumstances surrounding the search, including "(1) whether the accused had a property or possessory interest in the place invaded; (2) whether he was legitimately in the place invaded; (3) whether he had complete dominion or control and the right to exclude others; (4) whether, before the intrusion, he took normal precautions customarily taken by those seeking privacy; (5) whether he put the place to some private use; and (6) whether his claim of privacy is consistent with historical notions of privacy." *Id.* (citing *Granados v. State*, 85 S.W.3d 217, 223 (Tex. Crim. App. 2002); *Villarreal*, 935 S.W.2d at 138); *Lown* 172 S.W.3d at 759. This is a non-exhaustive list and no one factor is dispositive. *Betts*, 397 S.W.3d at 203–04; *Lown* 172 S.W.3d at 759. An expectation of privacy in commercial premises is less than a similar expectation in a home. *See New York v. Burger*, 482 U.S. 691, 700, 107 S.Ct. 2636, 2642, 96 L.Ed.2d 601 (1987).

There is scant evidence in the record pertinent to the standing issue. Officer Arnold averred that he "researched the location and found the owner to be Charese Foreman . . . married to Nathan Ray Foreman." The record includes a copy of Nathan and Charese's marriage license. It also includes a copy of a "WITHDRAWAL NOTICE OF ASSUMED NAME" on which Charese Foreman is listed as the sole owner. The motion to suppress refers to the shop as "his business" and similar references were made by counsel during trial.[3] Photographs admitted into evidence show the computer for the audio surveillance system was in an office with two desks. Although there was a lock on the door, it was

[3] The dissent overstates the importance I place upon this fact. Were the business in appellant's name, it would support his claim to an expectation of privacy on the commercial property — but the facts are otherwise. The case cited by the dissent, *Parker v. State*, 182 S.W.3d 923 (Tex. Crim. App. 2006), is clearly distinguishable because the record reflected Parker had permission to drive the car, and was, in fact, driving the car when it was stopped and searched. There is no analogous evidence in this case.

unlocked and no keys were required for entry. The testimony of Officer Douglas Ertons was that the computer was not password protected. Considering these facts, there was no evidence appellant had a subjective expectation of privacy in the computer seized. *See Villarreal,* 935 S.W.2d at 138.

Next, appellant did not show that any expectation of privacy he had was one society would recognize as being objectively reasonable. *See Granados*, 85 S.W.3d at 222–23; *Villarreal,* 935 S.W.2d at 138. The record does not reflect the shop was community property but even assuming appellant's status as the owner's spouse gave him a possessory interest, the totality of the circumstances do not establish his standing to challenge the seizure. There is no evidence that appellant ever used the computer, much less that he had dominion or control over it, or the right to exclude others from its use. There is no evidence as to whether appellant primarily occupied and controlled the office in which the computer was located or had the right to exclude others from it. The computer itself was not password protected. Thus, under the property-based approach, there was also no evidence that appellant's own personal effects were trespassed. *See Ford*, 477 S.W.3d at 328. *See also Williams v. State*, 502 S.W.3d 254, 258-61 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (holding defendant lacked standing to challenge the search of the home under both theories of privacy).

Because appellant did not meet his burden to show that he had standing to complain of the seizure under either privacy theory, I would find the trial court did not err by denying the motion to suppress. *See Betts*, 397 S.W.3d at 203-04 (listing the *Granados* factors); *see also Myrick v. State,* 412 S.W.3d 60 (Tex. App.—Texarkana 2013, no pet.). I therefore respectfully concur in this court's judgment.

/s/ John Donovan
Justice

Panel consists of Justices Christopher, Jamison and Donovan. (Jamison, J., plurality) (J. Christopher dissenting).
Publish — Tex. R. App. P. 47.2(b).