COURT OF APPEALS
DECISION
DATED AND RELEASED

November 2, 1995

No. 94-2455-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DERRICK C. EVANS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Sundby, JJ.

EICH, C.J. Derrick Evans appeals from a judgment convicting him of possession of cocaine with intent to deliver and from an order denying his motion for post-conviction relief. The issues are: (1) whether Evans, as an overnight guest in another's home, is entitled to challenge a search of a garage belonging to his host; and (2) whether the trial court erred when it concluded that Evans had not shown a "new factor" justifying modification of his prison sentence.

On December 4, 1993, Evans, Kathleen McIntyre and two acquaintances traveled to Chicago, where they purchased cocaine, and then returned to Madison, where McIntyre lived. Upon arriving in Madison, Evans asked McIntyre if he could spend the night at her house, and she agreed. Evans had an overnight bag, clothes and some toiletries with him. Later that evening, when McIntyre saw Evans weighing and cutting the cocaine in the presence of her teenage son, she told him to "[g]et the stuff out of the house." The son took the cocaine to the garage and hid it inside some stereo speakers, but apparently did not inform Evans where he had taken it. The garage sits approximately 15-20 feet from McIntyre's residence.

Later that day, officers of the Dane County Sheriff's Department arrived at McIntyre's residence with a search warrant for "the premises." During the search the officers found and seized the cocaine. Evans and McIntyre were arrested and charged with several offenses relating to possession of the cocaine.

Before trial, Evans moved to suppress the evidence taken from the garage on grounds that it was seized pursuant to an illegal search. The trial court denied the motion, concluding that: (1) Evans did not have "standing" to challenge a search of the garage;[1] and (2) even if Evans was entitled to challenge the search, the garage was properly included in the warrant's authorization to search the "premises."

Evans elected to plead to one of the charges. Just prior to the plea and sentencing hearing, the prosecutor gave Evans's counsel a memorandum indicating that the State had obtained the statement of an informant which contradicted the testimony given by McIntyre at Evans's preliminary hearing. According to the informant, McIntyre had played a much greater role in the crimes charged than she had testified. Neither Evans nor the prosecution informed the trial judge of the memo at the plea/sentencing hearing. Evans

[1] We agree with the state that, while the word "standing" is often employed to describe whether someone has a right to object to a search, the real issue in this and similar cases is really not one of "standing" but of "substantive Fourth Amendment doctrine," *e.g.*, "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." ***Rakas v. Illinois***, 439 U.S. 128, 140 (1978). *See also* ***State v. Fillyaw***, 104 Wis.2d 700, 710, 312 N.W.2d 795, 800 (1981).

was convicted of possession of cocaine with intent to deliver and was sentenced to ten years in prison.

Evans then moved to modify his sentence, claiming that the potentially "exculpatory" information in the prosecutor's memorandum constituted a "new factor" warranting modification. The trial court denied the motion and he appeals the denial, as well as the denial of his earlier suppression motion.

I. THE SEARCH

Because a party moving to suppress the fruits of a police search must show that his or her own Fourth Amendment rights were violated by the challenged search or seizure, ***Rakas v. Illinois***, 439 U.S. 128, 131 n.1 (1978), to prevail on his motion Evans must establish that he had a subjective expectation of privacy in the place searched, and that that expectation is "legitimate." ***Katz v. United States***, 389 U.S. 347, 361 (1967). A legitimate expectation of privacy is "`one that society is prepared to recognize as "reasonable".'" ***Rakas v. Illinois***, 439 U.S. 128, 143-44 n.12 (1978) (quoting ***Katz***, 389 U.S. at 361) (Harlan, J., concurring). Whether Evans has made such a showing is a question of law which we review de novo. ***State v. Jackson***, 147 Wis.2d 824, 829, 434 N.W.2d 386, 388 (1989), although we will uphold the trial court's findings of historical fact unless they are clearly erroneous. ***State v. Whitrock***, 161 Wis.2d 960, 973, 468 N.W.2d 696, 701 (1991).

Evans argues that his status as an overnight guest at McIntyre's residence is sufficient to establish a legitimate expectation of privacy in her garage. We disagree.

There is little doubt that an overnight guest has a legitimate expectation of privacy in the host's home, ***Minnesota v. Olson***, 495 U.S. 91, 98 (1990),[2] but that expectation "will not always extend to the entire premises."

[2] In ***Olson***, the Court held that the defendant could challenge the seizure of physical evidence found in an apartment in which he was spending the night despite the fact that he did not have a key to the apartment and had occupied it only when his host was

United States v. Osorio, 949 F.2d 38, 41 (2d Cir. 1991). The legitimacy, or the reasonableness, of the expectation is tested by consideration of several factors, including whether the defendant: (1) had a property interest in the premises; (2) was legitimately on the premises; (3) had dominion and control and the right to exclude others; (4) took precautions customarily taken by those seeking privacy; and (5) put the property to some private use. ***State v. Whitrock***, 161 Wis.2d 960, 974, 468 N.W.2d 696, 702 (1991); *see also* ***Olson***, 495 U.S. at 97. Also to be considered is whether the claim of privacy is consistent with historical notions of privacy. ***Id***. The factors are representative, not exclusive. ***Id***.

Evans testified that while at McIntyre's residence, he was not restricted to any particular area of the house or yard, although he did not have a key and was never alone in the house in McIntyre's absence. He stated that while he was aware there was a garage on the property, he had never been in it and could not state how it could be entered.[3] Evans took no privacy precautions with respect to the garage, nor did he put it to any use of his own (or anyone else's).

The trial court could find nothing in the record to establish that Evans had a reasonable expectation of privacy in the garage, nor can we.

Evans argues, however, that two cases, ***State v. Curbello-Rodriguez***, 119 Wis.2d 414, 351 N.W.2d 758 (Ct. App. 1984), and ***United States v. Dunn***, 480 U.S. 294 (1987), require suppression of the evidence. Again, we disagree.

In ***Curbello-Rodriguez***, we held that the defendant's status as an overnight guest entitled him to challenge physical evidence seized in a search of his host's home. Unlike the situation here, however--where the evidence was

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present. The Court reasoned that an overnight guest "seeks shelter in another's home precisely because it provides him with privacy," and to acknowledge this expectation as legitimate "merely recognizes the everyday expectations of privacy that we all share." ***Minnesota v. Olson***, 495 U.S. 91, 98, 99 (1990).

[3] When asked how the garage was entered, Evans replied "I never went into the garage. I mean, if there's a door, if there's a garage door that comes up, you know."

seized from a separate building which Evans knew little about and had never entered or put to any private use--the evidence in ***Curbello-Rodriguez*** was seized from the same apartment in which the defendant had been an overnight guest and to which he had enjoyed full access. ***Curbello-Rodriguez***, 119 Wis.2d at 422, 424-25, 351 N.W.2d at 762. ***Dunn*** is equally inapposite, for the Court was there considering whether a barn could be considered part of the curtilage; the decision did not touch upon the issue Evans raised on this appeal--his "standing" to challenge the search.

Our conclusion that Evans has not established a constitutionally protected interest in McIntyre's garage ends our inquiry into Evans's Fourth Amendment claims.[4]

II. NEW FACTOR

Evans next argues that the trial court erred in ruling that the informant's memorandum suggesting that McIntyre had played a more significant role in the drug transaction(s) than her earlier testimony indicated[5] did not constitute a new factor warranting modification of his sentence.[6]

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[4] Even if Evans could properly challenge the search, his claim that the warrant was unconstitutionally overbroad would fail for he has not included the warrant in the record on appeal. Our review is, obviously, limited to those portions of the record the parties have brought before us. ***In re Ryde***, 76 Wis.2d 558, 563, 251 N.W.2d 791, 793 (1977). The defendant appealing a criminal conviction carries the duty to incorporate material evidence into the appellate record, and failure to do so is grounds for rejection of his or her claims. ***State v. Smith***, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972).

[5] According to the memo summarizing the statement of an informant who claimed to have been present at the Chicago drug purchase and the events surrounding the arrest in Madison: (1) McIntyre contributed approximately $20,000 to the drug transaction in Chicago, not $2,800 as she had previously testified; (2) McIntyre was involved in weighing and cutting the cocaine at her residence; and (3) also present for these activities was another individual who had stored cocaine at her own home for McIntyre in the past.

[6] The state argues that Evans has waived the issue by not raising it in the trial court. The record indicates, however, that counsel and the court discussed the contents of the memorandum at some length at the post-conviction hearing, and we think that is

A new factor is information that is "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). Whether a new factor exists presents a question of law which we review de novo. ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989).

The memorandum does not constitute a new factor. Evans's counsel was informed of the potentially exculpatory evidence in the document prior to the sentencing hearing. Referring to the memorandum, Evans's counsel stated that "it was revealed *the day before the plea and sentencing* that the [State's] informant witness did have evidence which could have been exculpatory."[7] (Emphasis added.)

The memorandum was not "unknowingly overlooked" by the parties. *See* ***State v. Toliver***, 187 Wis.2d 346, 362, 523 N.W.2d 113, 119 (Ct. App. 1994). It was known to counsel in advance of the sentencing hearing, and it is counsel's obligation to present "all information relevant to sentencing" to the trial judge. ***Rosado***, 70 Wis.2d at 288, 234 N.W.2d at 73. We see no error in the denial of Evans's motion to modify his sentence on the basis of a new factor.[8]

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sufficient.

[7] The memorandum itself was dated March 3, 1993, the same date as the plea and sentencing hearing. Counsel for Evans stated, however, that the State had obtained the evidence and revealed its contents to defense counsel on the previous day.

[8] In order to warrant modification of a sentence, "the new factor must operate to frustrate the sentencing court's original intent when imposing sentence." ***State v. Toliver***, 187 Wis.2d 346, 362, 523 N.W.2d 113, 119 (Ct. App. 1994). In ***State v. Toliver***, we held that where the trial court expressed no desire for parity between the sentences of co-defendants, ordering sentences of disparate lengths "did not frustrate the sentencing court's original intent when it imposed [appellant's] sentence" and did not constitute a new factor. ***Id.*** Because the trial court in this case did not rely on the relative culpability of Evans and the other participants in determining his sentence, even if the informant's memorandum had not been available to him prior to sentencing, his "new-factor" argument would fail.

By the Court.—Judgment affirmed.

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