COURT OF APPEALS DECISION DATED AND FILED

December 20, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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No. 00-3506-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT D. MOSS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Reversed and cause remanded with directions*.

Before Dykman, Roggensack and Deininger, JJ.

¶1 DEININGER, J. Robert Moss appeals a judgment convicting him of possession of cocaine with intent to deliver it. He claims the trial court erred in denying his motion to suppress evidence which police seized from a residence he was occupying at the time of his arrest. Specifically, Moss contends that, contrary

to the trial court's conclusion, he had a legitimate expectation of privacy in the premises and thus was entitled to challenge the reasonableness of the search and seizure. We agree, and accordingly we reverse Moss's conviction and remand for a determination of whether police violated Moss's rights under the Fourth Amendment when they entered the residence and seized the evidence.

BACKGROUND

¶2 The State charged Moss with possessing cocaine with intent to deliver it, and he moved to suppress evidence police obtained at the time of his arrest. Because the State challenged Moss's "standing" to claim a Fourth Amendment violation, the trial court and the parties agreed to take testimony first on Moss's relationship to the premises in question, which was the lower unit of a duplex. Moss testified that the tenant of the residential unit was Gwendolyn Cole, whom he identified as "like my girlfriend" and stated that they were "sleeping partners." He claimed that he had stayed overnight at Cole's residence "every night" of the month of his arrest and that he had intended to do so on the night of his arrest. On cross-examination, Moss admitted that he paid no rent or utilities for the premises, and that he was not "on the lease."

¶3 The State introduced a written statement Moss had given to a detective following his arrest. In it, Moss admitted that "for the past month he has been selling cocaine base" from Cole's residence. Moss also said that "[h]e gives Cole free crack cocaine base to use her house for selling cocaine and also sleeps with Cole…. He stated, 'we're sleeping partners.'" The State also introduced Cole's written statement, in which she stated that Moss "has stayed at [her] residence in the past[,] however he does not reside [there] and he keeps no personal effects at the house."

¶4 In its bench decision, the court found Moss's testimony not credible, concluding that his earlier statement to the detective was "more accurate." Thus, the court did not accept Moss's claim that he intended to stay at Cole's residence on the night of his arrest. The court stated that "[t]he fact that someone stays overnight there at the residence in the past does not give that person standing." Accordingly, the court rejected Moss's claim to have been an "overnight guest" entitled to raise a Fourth Amendment challenge under ***Minnesota v. Olson***, 495 U.S. 91 (1990). It further concluded that, based on the written statements of Moss and Cole, Moss "does not have standing to challenge the entry," and it denied the motion to suppress. Given the court's conclusion that Moss could not claim a Fourth Amendment violation, the court heard no testimony and made no findings regarding the circumstances of the officers' warrantless entry into Cole's residence and their seizure of evidence.

¶5 Following the denial of his motion to suppress, Moss pled guilty to the charged offense and the court sentenced him to a term of imprisonment. He appeals the judgment of conviction, claiming the court erred in denying his motion.[1]

ANALYSIS

¶6 Unless they are clearly erroneous, we will uphold a trial court's factual findings when it rules on a motion to suppress evidence on Fourth Amendment grounds. ***State v. Trecroci***, 2001 WI App 126, ¶23, 246 Wis. 2d 261,

[1] *See* WIS. STAT. § 971.31(10) (1999-2000) ("An order denying a motion to suppress evidence … may be reviewed upon appeal from a judgment of conviction notwithstanding the fact that such judgment was entered upon a plea of guilty."). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

630 N.W.2d 555. Whether, under the facts as found, a defendant may raise a Fourth Amendment challenge to the seizure of evidence, however, is a question of law which we review de novo. ***Id***. While sometimes framed in terms of "standing," the issue before us is whether "the disputed seizure infringed on an interest ... which the Fourth Amendment and art. I, sec. 11 [of the Wisconsin Constitution] were designed to protect." ***State v. Harris***, 206 Wis. 2d 243, 251, 557 N.W.2d 245 (1996). The issue is thus a matter of substantive Fourth Amendment law. ***State v. Dixon***, 177 Wis. 2d 461, 467, 501 N.W.2d 442 (1993).

¶7 We have previously described the necessary two-part inquiry as follows:

> [W]e analyze the question under the general approach for determining whether a person has a reasonable expectation of privacy in an area where evidence is gathered. Whether a person has a reasonable expectation of privacy depends on (1) whether the individual has exhibited an actual, subjective expectation of privacy in the area inspected and in the item seized, and (2) whether society is willing to recognize such an expectation of privacy as reasonable.

State v. Thompson, 222 Wis. 2d 179, 185-86, 585 N.W.2d 905 (Ct. App. 1998) (citations omitted). The State does not argue that Moss failed to exhibit an actual or subjective expectation of privacy in Cole's residence. The dispute in this case is thus over whether Moss's expectation of privacy was a reasonable one, and Moss, as the one claiming Fourth Amendment protection, has the burden to show that it was. ***Id***. at 185.

¶8 The parties agree that the U.S. Supreme Court has provided guidance on the question of when a guest in another's home may claim a

reasonable (or legitimate) expectation of privacy in the premises.[2] *See* ***Minnesota v. Carter***, 525 U.S. 83 (1998); ***Minnesota v. Olson***, 495 U.S. 91 (1990). Each also points to six factors commonly cited in Wisconsin case law as being relevant to a determination of whether, in a given set of circumstances, society is willing to recognize as reasonable a person's subjective expectation of privacy. We have recently listed those factors:

> 1. Whether the person had a property interest in the premises;
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> 2. Whether the person was legitimately on the premises;
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> 3. Whether the person had complete dominion and control and the right to exclude others;
>
> 4. Whether the person took precautions customarily taken by those seeking privacy;
>
> 5. Whether the person put the property to some private use; and
>
> 6. Whether the claim of privacy is consistent with historical notions of privacy.

Trecroci, 2001 WI App 126 at ¶36 (citation omitted).

¶9 Not surprisingly, the parties disagree as to the conclusion we should reach when these holdings and factors are applied to the present facts. The State claims that because Moss was not an "overnight guest" at the time of his arrest, and because his principal use of Cole's residence was as a drug "marketplace," he cannot claim to have had a reasonable expectation of privacy in Cole's residence.

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[2] The cases tend to use the terms "legitimate expectation of privacy" and "reasonable expectation of privacy" interchangeably, with the federal cases preferring the former and the state cases the latter term. We see no difference in meaning between the two, inasmuch as a "legitimate expectation of privacy" is "one that society is prepared to recognize as 'reasonable.'" ***Minnesota v. Olson***, 495 U.S. 91, 95-96 (1990).

Moss, meanwhile, contends that his relationship and connection to the premises, even if he was not an overnight guest on the day of his arrest, is sufficient to give rise to an interest protected by the Fourth Amendment. We agree with Moss.

¶10 We begin by considering the facts and analysis in the two Supreme Court precedents which bear heavily on the question before us. The defendant in ***Olson*** was arrested after police made a warrantless entry into a residence where he had been an overnight guest. ***Olson***, 495 U.S. at 93. The Court stated that it "need go no further than to conclude, as we do, that Olson's status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." ***Id***. at 96-97. The Court explained that an overnight stay in another's home "is a longstanding social custom that serves functions recognized as valuable by society," in that "when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend." ***Id***. at 98-99. The fact that a houseguest generally has little or no authority to admit or exclude others from a host's home did not dissuade the Court from concluding that the guest nonetheless enjoys a legitimate expectation of privacy in the host's home, inasmuch as the host essentially shares "his house and his privacy with his guest." ***Id***. at 99.

¶11 The Court revisited in ***Carter*** the issue of the legitimacy of a person's expectation of privacy in the home of another. The defendants, who lived in another city, made a first-time visit to an apartment for about two-and-one-half hours for the "sole purpose" of packaging cocaine for distribution. ***Carter***, 525 U.S. at 86. The Court explained that, although "an overnight guest in a home may claim the protection of the Fourth Amendment … one who is merely present with the consent of the householder may not." ***Id***. at 90. The Court acknowledged that occupants like the ones in the case before it lie "somewhere in

between" an "overnight guest," who clearly enjoys Fourth Amendment protections in the host's home, and one who is "merely 'legitimately on the premises,'" who does not. ***Id***. at 91. The factors which led the Court to place the ***Carter*** defendants in the latter category were: (1) "the purely commercial nature of the transaction engaged in"; (2) "the relatively short period of time on the premises"; and (3) "the lack of any previous connection between [the defendants] and the householder." ***Id***.

¶12 We recently had occasion to explore the contours of the ***Olson*** and ***Carter*** holdings in ***Trecroci***, 2001 WI App 126.[3] There, the fiancée of a man who rented an attic in which marijuana was being grown, was present in the attic with him when police made a warrantless entry. ***Id***. at ¶7. We noted that the attic was not a residence, that the fiancée was not an overnight guest, and that she was only "temporarily on the premises as an invitee." ***Id***. at ¶57. We also acknowledged that she "comes up short" under the six factors commonly employed in Wisconsin Fourth Amendment "standing" cases, which we have quoted above.

> [The fiancée] had no property interest in the premises, she had no dominion or control over the premises, she had no right to exclude others, and she took no precautions to assure privacy. The only factors in her favor were that she was legitimately on the premises and she was using the property for a private, albeit commercial, purpose.

Id.

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[3] We decided ***State v. Trecroci***, 2001 WI App 126, 246 Wis. 2d 261, 630 N.W.2d 555 on May 2, 2001, well after the trial court denied Moss's suppression motion, and after the parties had completed their briefing of this appeal. Counsel for the parties have, however, addressed ***Trecroci's*** application to the facts of this case in post-briefing correspondence with the court. *See* WIS. STAT. RULE 809.19(10).

¶13 Nonetheless, we rejected the State's claim that the fiancée could not claim a reasonable expectation of privacy in the attic. We explained that the Supreme Court's analysis in ***Carter*** does not support the proposition that one must be an overnight guest in order to enjoy Fourth Amendment protections while occupying premises belonging to another:

> Rather, we read ***Carter*** to say that, under the facts of that case, the guests had not established a reasonable expectation of privacy in the apartment. But this language also reveals that if the guest's relationship with the host and the host's property is more firmly rooted, a guest may have standing to challenge a search.

Id. at ¶59. And, we concluded that because the defendant was the fiancée of the attic's lessee, and because she "had used the attic area on prior occasions for both the criminal enterprise and for socializing," she had established a reasonable expectation of privacy in the premises, entitling her to raise a Fourth Amendment challenge to the police entry. ***Id***. at ¶¶60-61.

¶14 We turn now to the facts of this case. The trial court rejected essentially all of Moss's hearing testimony on credibility grounds. We will therefore evaluate Moss's relationship with Cole and her residence based on the contents of the statements that they gave to police, which were received into evidence at the hearing. The following facts are contained in those statements: Moss had been selling cocaine base from Cole's residence for the past month. He gave Cole free crack cocaine base to use her house for selling cocaine. He also sleeps with Cole and they were "sleeping partners." Moss had stayed at Cole's residence in the past, but he does not reside or keep personal effects there.[4]

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[4] Moss's co-defendant, who was also arrested when the police entered Cole's residence, testified at the suppression hearing, and a statement he gave police was introduced into evidence.

(continued)

¶15 The State acknowledges that a court need not find that a person satisfies the definition of an "overnight guest" in order to allow him or her to raise a Fourth Amendment claim. It asks us to evaluate Moss's entitlement to do so by applying the six-factor test described above. As we did in ***Trecroci***, however, we conclude that the six-factor test is of limited usefulness in assessing Moss's ability to raise a Fourth Amendment challenge to the seizure of evidence from Cole's residence. *See* ***Trecroci***, 2001 WI App 126 at ¶57. Most persons occupying premises as guests of an owner or lessee will have difficulty making the showings on which those factors focus, but it is clear from ***Olson***, ***Carter*** and ***Trecroci*** that guests may, under some circumstances, be entitled to claim Fourth Amendment protections while in another's dwelling.[5] Our primary focus will therefore be on Moss's relationship to Cole and on his connection to her residence under the guidance provided in the cited cases.

By the time the court made its findings and decision, however, the two cases had been severed, and Moss's counsel asked that the co-defendant's statement "be withdrawn" because it was not "admitted for purposes of my client's case." The court agreed that the co-defendant's statement had "nothing to do with Mr. Moss," and did not consider it in making its ruling on Moss's entitlement to raise a Fourth Amendment challenge to the search and seizure.

We note that in his statement to police, the co-defendant referred to Cole's residence as "Robert's [Moss] house," and he said that earlier in the evening of the arrest, Moss had been sleeping at the residence. The co-defendant also stated that "Robert likes to have someone there …. [The co-defendant] would go over there on and off, maybe three times a week and answer the door while [Moss] slept." We conclude that these statements would be relevant in assessing Moss's connection to Cole's residence, in that they support the regularity of Moss's past use of the premises and establish that he often slept there. Nonetheless, given Moss's request to the trial court that it not consider the co-defendant's statement in ruling on his motion, we, like the trial court, will not rely on it in assessing whether Moss had a legitimate expectation of privacy in Cole's residence.

[5] *See* ***Olson***, 495 U.S. at 96 (rejecting a proposed twelve-factor test for evaluating a person's relationship to a certain residence as "needlessly complex").

¶16 We agree with the State that, under the trial court's findings, Moss was not an overnight guest at the time of his arrest, and therefore, he cannot claim a legitimate expectation of privacy in Cole's residence based solely on the holding in ***Olson.*** The State argues that because Moss's "primary" use of the premises was for selling drugs, we must conclude that, under ***Carter***, Moss did not have a legitimate expectation of privacy in what the State characterizes as a commercial "marketplace." We disagree. ***Carter*** does not stand for the proposition that someone who sells drugs out of a residence thereby automatically forfeits any claim to Fourth Amendment protections, regardless of his or her relationship to the premises. Adoption of the State's position would mean that even a homeowner could not raise a Fourth Amendment challenge to a warrantless entry of his or her residence if drugs were being sold there.

¶17 We conclude that the key inquiries under ***Carter*** for assessing whether a non-overnight guest may claim a legitimate expectation of privacy in the host's residence are these: Was the guest's use of the premises "purely commercial," or did the guest's occupancy encompass other uses or activities? For what period of time did the guest occupy the premises? Is there "any previous connection between" the guest and the residence, or between the guest and the owner/lessee of the residence? *See* ***Carter***, 525 U.S. at 91.

¶18 After making these inquiries on the present record, we conclude that Moss had a stronger connection to Cole and her residence than that exhibited by the two defendants in ***Carter***, who made a one time, two-and-one-half-hour visit to an apartment for the "sole purpose" of packaging drugs. Moss's presence in Cole's residence was more than transitory, and his occupancy encompassed more than "purely commercial" activities. Cole verified that Moss had stayed at her residence on past occasions. Moss's statement establishes that he had an intimate

relationship with Cole, which was of some continuing duration in that he described the two of them as "sleeping partners."

¶19 Moss's connection to Cole and her premises appears to be at least as strong, if not stronger, than was the fiancée's connection to the attic in ***Trecroci***. There, we concluded that the woman had established a reasonable expectation of privacy because she had "socialized" with the lessee in the attic, as well as apparently participated with him in the marijuana growing operation. ***Trecroci***, 2001 WI App 126 at ¶60. We conclude here that Moss has also met his burden to establish that he had a legitimate expectation of privacy in Cole's residence.

¶20 In so doing, we reject the State's suggestion that the selling of controlled substances must necessarily be treated differently than their manufacture or processing when evaluating a person's use of premises. The State argues that the attic marijuana growing operation in ***Trecroci*** required a different result on the Fourth Amendment "standing" issue because we found it to be a "secretive and private" enterprise, ***id.***, 2001 WI App 126 at ¶43, while Moss "invited customers" into Cole's residence to buy drugs. Although the precise nature of a guest's use of another's premises is a factor we must consider, we see no basis to create a bright line rule that distinguishes one form of commercial criminal activity from another. Indeed, the State's argument that he "invited customers" to Cole's residence is a tacit concession that Moss enjoyed a measure of control over access by others to Cole's residence, a factor which would tend to support his legitimate expectation of privacy in the premises. *See* ***id.***, 2001 WI App 126 at ¶¶39-40 (noting that the fact that defendants "regulated and controlled" the use of a stairway by third parties supported their reasonable expectation of privacy in the stairway).

¶21 The dissent places more emphasis on the "six-factor" analysis than we do, given that we deem the factors not particularly well suited to the assessment of the reasonableness of a guest's expectation of privacy in another's dwelling. Even so, however, we conclude that Moss fares better under the six factors than the dissent suggests. Moss, of course, had no "property interest" in Cole's premises, but the "[c]apacity to claim the protection of the fourth amendment" does not depend "'upon a property right in the invaded place.'" ***State v. Whitrock***, 161 Wis. 2d 960, 973, 468 N.W.2d 696 (1991) (citation omitted). There is no question that Moss was "legitimately" occupying Cole's residence, in that he was there by her invitation, or at least with her consent or acquiescence. As the dissent notes, Cole was apparently absent when the police entered, and thus Moss and his co-defendant exercised a degree of "dominion and control" over the premises, deciding whom to admit or exclude from the residence. And, Moss clearly put Cole's residence to "some private use," in that he was Cole's "sleeping partner," and she having acknowledged that Moss had "stayed at [her] residence in the past."

¶22 With respect to the factor dealing with "historical notions of privacy," the dissent concludes that "Moss's occasional sexual contacts with Cole in the past do not give him an expectation of privacy that is historically recognized."[6] We first note that the trial court made no finding that Moss and

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[6] Unlike the dissent, we do not believe that our analysis must focus only on what Moss was doing at the time of his arrest, selling and packaging illegal drugs. *See* ***Minnesota v. Carter***, 525 U.S. 83 (1998) (noting that a guest's "previous relationship" with the owner or lessee of a residence; other, non-commercial purposes for the guest's visit; and "any previous connection" to the premises; or the lack of these things, are proper considerations in assessing the legitimacy of a guest's expectation of privacy); ***Trecroci***, 2001 WI App 126 at ¶60 (noting that the guest "had used the attic area on prior occasions for both [a] criminal enterprise and for socializing").

Cole had only "occasional sexual contacts"; rather, based on Moss's statement to police, the court noted simply that "he also sleeps with her." Furthermore, in discussing the concept of "historical notions of privacy," the supreme court has explained that, "from a historical analysis," one of the Fourth Amendment's protections "against official invasion" protects a citizen's "right to be secure from intrusion into personal privacy." ***Whitrock***, 161 Wis. 2d at 978. We would not be so quick to conclude that "historical notions of privacy" would not include the reasonableness of a guest's expectation of privacy in a host's dwelling, when the guest and host have engaged in consensual sexual activities on the premises on a regular or ongoing basis.

¶23 In short, it appears that the difference between our conclusion and that of the dissent lies not so much in a differing view of the law, but in a differing emphasis on the relevant facts and factors present in this case. Our differences with the dissent are thus not fundamental or exceptional, and perhaps even to be expected, given that the present question, like so many inquiries under the Fourth Amendment, involves an assessment of "reasonableness" under the "totality of the circumstances." *See* ***id.***, 161 Wis. 2d at 974.

¶24 Finally, we note that the State asks us, if we conclude Moss is entitled to raise a constitutional challenge to the warrantless entry of Cole's residence, to go on and to conclude that the police entry was reasonable under the Fourth Amendment. We decline to do so. The State claims that the entry "was justified by probable cause and exigent circumstances," because the officer observed Moss through a window engaged in packaging marijuana, and a delay to obtain a warrant would have risked the destruction of evidence. As we have noted, however, no facts related to the circumstances of the police entry were presented at the suppression hearing. The testimony on which the State relies was

presented at the preliminary hearing, which was conducted by a court commissioner, and at which Moss had only limited opportunity to cross-examine the officer relating to the circumstances of the entry and seizure of evidence. The officer's testimony was thus not presented before the judge who decided Moss's suppression motion, nor was it given in a context conducive to the determination of Fourth Amendment issues. Because we do not have the benefit of the trial court's factual findings that might bear on the reasonableness inquiry, we do not address whether the present seizure of evidence comports with the Fourth Amendment.

¶25 Following the initial release of this opinion, the State moved for reconsideration, requesting us to provide further direction regarding proceedings on remand. *See* WIS. STAT. RULE 809.24. Specifically, the State asks that we specify what is to occur if the trial court determines that the challenged search and seizure was reasonable under the Fourth Amendment and therefore again denies Moss's motion to suppress. Relying on ***State v. Stevens***, 217 Wis. 2d 369, 577 N.W.2d 335 (1998), and ***State v. Meyer***, 216 Wis. 2d 729, 576 N.W.2d 260 (1998), the State requests that we direct the trial court to conduct a suppression hearing, and if it determines that no violation of Moss's Fourth Amendment rights occurred, to reinstate the appealed judgment of conviction. We agree with the State that the trial court should proceed in that fashion. *See* ***Meyer***, 216 Wis. 2d at 754.

¶26 In his response to the State's motion, Moss contends that if the trial court denies his motion to suppress following remand, he should have the option to either re-enter his guilty plea or proceed to trial. He attempts to distinguish the precedents the State relies on by noting that in ***Meyer*** and ***Stevens***, the defendants "had the benefit of a suppression hearing and all the information it afforded,"

while his initial suppression hearing was terminated before any testimony was given by the officers who searched Cole's residence, seized incriminating evidence and arrested Moss. According to Moss, the officers' testimony will "shed significant light on the strength of the state's case and on the propriety of proceeding to trial as opposed to entering a plea." He claims that he was "forced to make a decision as to whether or not to waive his right to a jury trial without the benefit of this hearing," and that he should be given the opportunity to decide anew following the suppression hearing on remand.

¶27 We reject Moss's contentions. The record discloses that Moss entered into his plea agreement with the State prior to the completion of the hearing on his motion to suppress. His trial counsel informed the court as follows at the start of the continued hearing on his suppression motion: "Judge, we're prepared to continue and complete the argument of the motion and the testimony, and we—the motion's dispositive here. It's not our intention to try this case." At the conclusion of the testimony and argument regarding whether Moss could claim a reasonable expectation of privacy in Cole's residence, but before it recessed to consider its ruling, the trial court inquired of Moss, "If I'd rule against you on your motion, you're going to resolve the matter with a plea?", and Moss replied "Yes." When the court reconvened and made its ruling, Moss immediately tendered his "waiver of rights form" and guilty plea to the charge of possession of cocaine with intent to deliver it. During the plea colloquy, Moss acknowledged that he had discussed with his attorney "what the State would have to prove" in order to convict him of the offense, and that he had "had enough time to talk with [trial counsel] to discuss [his] case and to discuss any possible defenses or strategies or tactics that [he] might use to defend [him]self to this charge."

¶28 In short, we conclude that there is no basis in the record for Moss's claim that he was in some way prejudiced by the lack of a full suppression hearing prior to entering his plea. The record shows that he had decided to plead guilty if his motion was denied for any reason, regardless of what might come out in testimony at the hearing on his suppression motion. He and his counsel had apparently concluded they had enough information regarding the strength of the State's case before the suppression hearing was completed to enter into a negotiated disposition, contingent on denial of the motion. This was a reasonable conclusion, given that if his motion was denied, Moss's post-arrest statement to police, in which he admitted to possessing and selling cocaine "for the past month," would be admissible at trial. Accordingly, we clarify below our directions for proceedings on remand in accordance with the State's request.

CONCLUSION

¶29 For the reasons discussed above, we reverse the appealed judgment and remand for a determination by the trial court whether the evidence Moss seeks to suppress was gathered in violation of his Fourth Amendment rights. If the trial court determines that the warrantless entry into Cole's residence did not violate the Fourth Amendment, the court shall reinstate the judgment of conviction.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

¶30 ROGGENSACK, J. (*dissenting*). Based solely on Moss's statement to Officer Delgado,[7] that he sometimes "sleeps" with Cole, in whose residence he was arrested and to whom he makes payment in cocaine base for permitting him to use her residence to sell drugs, the majority accords Moss Fourth Amendment protection. Because I conclude that selling cocaine while lawfully in the residence of another with whom one has had occasional sexual contact are insufficient facts to meet Moss's burden to prove a reasonable expectation of privacy, I would affirm the judgment of the circuit court. Accordingly, I respectfully dissent from the majority opinion.

¶31 Moss had the burden to establish that *his own* Fourth Amendment rights were violated by the search and seizure under review. ***State v. Whitrock***, 161 Wis. 2d 960, 972, 468 N.W.2d 696, 701 (1991). If Moss does not establish by a preponderance of the credible evidence that he had a reasonable expectation of privacy in Cole's residence, the motion to suppress must be denied. ***Id.***

¶32 In ***Minnesota v. Carter***, 525 U.S. 83 (1998), the Supreme Court sets out the requirements that must be satisfied before protection under the Fourth Amendment will be afforded. ***Carter*** holds that it is the defendant's burden to:

> demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is

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[7] The majority concludes that the finding of the circuit court that Moss's testimony was not believable is not clearly erroneous. I agree with this conclusion. Therefore, only the testimony of others or the exhibits received into evidence may form the factual basis for our analysis of Moss's claim of Fourth Amendment protection in the residence of another.

> reasonable; *i.e.*, one that has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."

Id. at 88. Therefore, in order for Moss to have an expectation of privacy in Cole's residence, which is a "reasonable expectation," he must prove a basis for that expectation from a source outside the Fourth Amendment. ***Carter*** instructs that such proof may be provided by reference to concepts of ownership of real or personal property, neither of which is applicable here because Moss did not own, rent or reside on the premises, or by proving that his expectation of privacy is "recognized and permitted by society."

¶33 Moss did not identify what understanding, recognized and permitted by society, would be vindicated by affording him Fourth Amendment protection in Cole's residence. Moss's sole attempt to meet his burden of proof was to assert to Officer Delgado that he was a "sleeping partner" of Cole. Officer Delgado said it was his understanding that Moss was asserting he and Cole had sexual relations, on occasion.[8] Moss does not even attempt to identify, nor does the majority opinion identify, why such an assertion should afford him Fourth Amendment protection. To the contrary, Cole's statement received in evidence at the suppression hearing proves that Moss kept no personal effects in her house, that

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[8] In clarifying what was meant by "sleeping partner," Delgado was asked and answered as follows:

> Q Did you understand that to mean that he spends the night at her house or that he has sexual intercourse with her?
>
> A It was in a sexual context.

In response to the question, "Did he tell you how often he sleeps with her at that address?" Delgado responded, "I recall it wasn't too often …."

she rented the house for the sole purpose of her use and that of her children and that Moss had come over to her house on the date he was arrested, but that he did not live there.

¶34 The statements to police and the testimony of Officer Delgado are the only credible evidence presented at the suppression hearing. However, while the majority opinion reviews the six-factor test of ***State v. Trecroci***, 2001 WI App 126, 246 Wis. 2d 261, 630 N.W.2d 555, which is used to analyze whether Moss's expectation of privacy in Cole's residence was reasonable, it does not apply it to the facts as found by the circuit court. And, although I agree with the majority that no single factor is controlling, I conclude that the test does provide a relevant framework to determine whether the totality of the circumstances either supports or does not support an expectation of privacy recognized and permitted by society.

¶35 For example, the first factor of ***Trecroci*** is whether the person has a property interest in the premises. Here, Moss has none. The second factor is whether the person was legitimately on the premises. Apparently Cole knew that Moss sold cocaine from the premises because he paid her in cocaine base to permit him to do so. A third factor is whether the person had complete dominion and control and the right to exclude others. Moss provided no testimony that he had either. There is no testimony that Moss had a key or that he had the right to exclude people from coming into the residence or to let those persons into the residence whom he believed should be there. At the time the police arrived, there was another a person on the premises and Cole, herself, was not there. The fourth factor is whether the person took precautions customarily taken by those seeking privacy. Moss was in the residence to sell crack cocaine to people who knocked at the door. His selling drugs was not a private activity, but rather, one that involved any purchaser who came to the door. Because Moss was there to make sales, he

did not take precautions to keep others from entering the residence. In regard to the fifth factor, whether the person put the property to some private use, while Moss may have put Cole's residence to a private use in that he was the one who was dealing crack cocaine, his use was not one that he conducted "in private" as was the case in ***Trecroci***, 2001 WI App 126 at ¶57. And in regard to the last factor, whether the claim of privacy is consistent with historical notions of privacy, I conclude there is no evidence of record which proves that it is. Moss's occasional sexual contacts with Cole in the past, do not give him an expectation of privacy that is historically recognized. They were not married, nor even engaged, and he was not at the residence to have sexual contact with Cole. He was there to sell crack cocaine. Additionally, if sexual contact were all it took to produce Fourth Amendment rights and if Moss had sexual contact with ten women, would he then have Fourth Amendment rights in all ten of their residences at any time and for any purpose? I conclude that as a society we have no such recognized understanding.

¶36 Therefore, because Moss did not reside there, paid nothing toward the rent, was not an overnight guest, kept no personal effects there, had no key to the residence and was conducting commercial transactions at the time of his arrest, his occasional sexual contacts with Cole are insufficient to prove any identifiable, generally recognized societal interest which would be furthered by affording him Fourth Amendment protection in Cole's residence. Accordingly, I respectfully dissent.