COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP659-CR **Cir. Ct. No. 2008CF16**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT E. BRANDSTETTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rusk County: FREDERICK A. HENDERSON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Scott E. Brandstetter was convicted of three drug-related crimes. The only issue on appeal concerns the propriety of the search that led to the discovery of marijuana and drug paraphernalia in Brandstetter's

bedroom. Because the house in which Brandstetter lived was listed for sale, he had no reasonable expectation of privacy and, therefore, we affirm.

BACKGROUND

¶2 The following facts, taken from testimony presented at the preliminary hearing and at the suppression motion hearing, are not disputed. Brandstetter lived in a house owned by his mother, Sue Moore. Moore did not live at the house. Brandstetter had told Moore not to go into his bedroom, and he kept that door closed. Brandstetter lived in the house under an unwritten, month-to-month arrangement. Brandstetter did not pay the rent for January and February 2008. Throughout Brandstetter's tenancy, the house was listed for sale.

¶3 In early February 2008, Moore told Brandstetter the house was going to be shown to prospective buyers, and she asked him to make sure the house was neat. On February 17, 2008, Brandstetter was arrested on an unrelated matter and jailed. Moore went to the house to make sure the house was in acceptable condition for the showing and to check on the heat and water pipes. While inside the house, Moore went into Brandstetter's bedroom and saw "a couple of plants of some kind" growing in the bedroom closet.

¶4 Moore called the police the next day and told the police chief what she had seen in the bedroom. On February 21, 2008, two police officers went to the house with Moore. Moore met the officers outside the house, unlocked the door, and accompanied the officers inside the house. Moore told the officers she had "found some things that concerned her," but she "wasn't going to tell exactly where" the items would be found or what they were. The officers walked from the kitchen into the first-floor bedroom. The closet door was open, and they saw a

hanging fluorescent lamp and two potted plants that appeared to be marijuana plants.

¶5 The officers and Moore then left the house. An officer stayed at the house while another contacted the district attorney to obtain a search warrant, which was executed later that day. In the search-warrant affidavit, the officer indicated that Moore had told police she had seen "drug-related" items in the house. The officer knew Brandstetter was in jail and he did not try to obtain Brandstetter's consent to search the house. Before walking through the house with Moore, the officer did not believe he had enough information to support a search warrant request.

¶6 Because the house was listed for sale, Moore's realtor had a key. A lock box had been placed on the front door and any other realtor who knew the code to the lock box could get into the house.

DISCUSSION

¶7 Whether a search complies with Fourth Amendment requirements is a question of law we review de novo. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). A person cannot raise a Fourth Amendment challenge unless the person has "a legitimate expectation of privacy in the invaded place." ***Rakas v. Illinois***, 439 U.S. 128, 143 (1978). A defendant bears the burden of establishing their reasonable expectation of privacy by a preponderance of the evidence. ***State v. Whitrock***, 161 Wis. 2d 960, 972, 468 N.W.2d 696 (1991). A person has a reasonable expectation of privacy if the individual "has exhibited an actual, subjective expectation of privacy in the area inspected and in the item seized" and if "society is willing to recognize the expectation of privacy as

reasonable." ***State v. Trecroci***, 2001 WI App 126, ¶35, 246 Wis. 2d 261, 630 N.W.2d 555.

¶8 We have no hesitation concluding that Brandstetter had an actual subjective expectation of privacy. He had told Moore to stay out of the bedroom and he kept that door closed. However, the second inquiry is Brandstetter's downfall.

¶9 Whether society is willing to recognize a defendant's subjective expectation of privacy as reasonable is an objective test. ***Id.***, ¶36. The following factors are relevant to that determination:

> 1. Whether the person had a property interest in the premises;
>
> 2. Whether the person was legitimately on the premises;
>
> 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.

Id.

¶10 Five of those six factors arguably support Brandstetter's position. As a tenant, Brandstetter had a property interest in the house and his presence was legitimate, despite his delinquency in rent payment. While there is no suggestion that he locked either the bedroom door or closet door, he kept the bedroom door closed and he told Moore to not go into the bedroom. Presumably, Brandstetter

slept in the bedroom when he was not in jail, and a claim of privacy in one's sleeping quarters is expected and consistent with historical notions of privacy.

¶11 We conclude, however, under the facts and circumstances of this case, the third factor—whether Brandstetter had complete dominion and control and the right to exclude others—outweighs the other considerations. Throughout Brandstetter's tenancy, the house was listed for sale, and Brandstetter knew his mother was trying to sell the house. A lock box had been placed on the house, and realtors had unrestricted access to the house. Moore had told Brandstetter prospective buyers were coming to look at the house. A reasonable person would expect a prospective buyer to go into every room and closet of a house they were contemplating buying. *See* ***State v. Hyem***, 630 P.2d 202, 209 (Mont. 1981), *overruled on other grounds in* ***State v. Long***, 700 P.2d 153 (Mont. 1985) (defendants who knew their rented house was for sale "could not have a reasonable expectation of privacy in the areas of the house which are normally subject to inspection by prospective purchasers"); *see also* ***United States v. Harnage***, 662 F. Supp. 766, 776 (D. Colo. 1987) (defendant had no reasonable expectation of privacy when his house was for sale and open to real estate agents and prospective buyers). Because Moore's house was for sale and open to prospective buyers, Brandstetter did not have a reasonable expectation of privacy in any area of the house. Therefore, his Fourth Amendment challenge to the search fails.[1]

[1] The circuit court based its denial of Brandstetter's motion to suppress on Moore's consent to the search. We reach the same ultimate conclusion as the circuit court, albeit upon different grounds. *See* ***State v. Kletzien***, 2008 WI App 182, ¶2, 314 Wis. 2d 750, 762 N.W.2d 788.

¶12 Because Brandstetter's challenge to the initial search fails, his challenge to the search warrant, obtained in reliance on the officers' observations during the initial search, necessarily fails.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.