[Cite as *State v. Chapman*, 2009-Ohio-5757.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. CHRISTOPHER D. CHAPMAN Appellant	C.A. No. 09CA009546 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 06CR071271

DECISION AND JOURNAL ENTRY

Dated: November 2, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} A landlord called the police to report that she saw three men entering the back door of an apartment while the tenant was away. When officers got to the apartment, a woman who claimed to be the babysitter let them in and told them that she did not think the men belonged there. Because only two of the men were on the main floor, an officer went upstairs to look for the third. He discovered Christopher Chapman in the bathroom and pulled him out of the room. While in the bathroom, the officer saw a bag that appeared to contain cocaine floating in the toilet tank. The Grand Jury indicted Mr. Chapman for possession of cocaine, escape, obstructing official business, resisting arrest, and criminal damaging. Mr. Chapman moved to suppress the drugs found in the bathroom, arguing that the search of the apartment violated his federal and state constitutional rights. The trial court denied his motion. After its decision, Mr. Chapman changed his plea to no contest and was found guilty of the offenses. He has appealed

the denial of his motion to suppress, assigning two errors. This Court affirms because he failed to show that he had a legitimate expectation of privacy in the apartment.

STANDARD OF REVIEW

{¶2} A motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, at ¶8. A reviewing court "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.* But see *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶14 (Dickinson, J., concurring). The reviewing court "must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside*, 2003-Ohio-5372, at ¶8.

FORFEITURE

{¶3} Mr. Chapman's first assignment of error is that the trial court incorrectly let the State argue that he does not have a legitimate expectation of privacy in the apartment because it waited to raise that issue until the end of the suppression hearing. He has argued that the State had to give him notice in writing before the hearing that it would object to his motion on that basis.

{¶4} "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971)). The "capacity to claim the protection of the Fourth Amendment depends," however, "upon whether the person who claims the protection . . . has a legitimate expectation of privacy in the invaded place." *Minnesota v. Olson*, 495 U.S. 91, 95 (1990) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). "A subjective expectation of privacy is legitimate if it is 'one that society is prepared to

recognize as 'reasonable.'" *Id*. at 95-96 (quoting *Rakas*, 439 U.S. at 143 n. 12). "The burden is upon the defendant to prove facts sufficient to establish such an expectation." *State v. Williams*, 73 Ohio St. 3d 153, 166 (1995) (citing *Rakas*, 439 U.S. at 131 n.1).

{¶5} Mr. Chapman has cited Rules 12(C) and 47 of the Ohio Rules of Criminal Procedure in support of his argument. Rule 12(C) provides that, "[p]rior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue." It also provides that certain motions must be filed before trial, including motions to suppress evidence on the ground that the evidence was illegally obtained. Crim. R. 12(C)(1)-(5). Rule 47 provides that "[a]n application to the court for an order shall be by motion. A motion . . . shall be in writing unless the court permits it to be made orally. It shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought. It shall be supported by a memorandum containing citations of authority, and may also be supported by an affidavit." Crim. R. 47.

{¶6} Rules 12(C) and 47 do not support Mr. Chapman's argument that the State must respond to a motion to suppress or that it may not oppose a suppression motion unless it does so in writing before the hearing on the motion. Moreover, whether a defendant may rely on the protection of the Fourth Amendment is an issue the trial court may raise sua sponte. *State v. Bugaj*, 7th Dist. No. 06-BE-27, 2007-Ohio-967, at ¶13; *State v. Smith*, 2d Dist. Nos. 17475, 17476, 17477, 2000 WL 20882, at *1 (Jan. 14, 2000). Accordingly, the trial court correctly considered whether Mr. Chapman established that he had a legitimate expectation of privacy in the apartment, even though the State did not raise that issue until its closing argument at the hearing. Mr. Chapman's first assignment of error is overruled.

EXPECTATION OF PRIVACY

{¶7} Mr. Chapman's second assignment of error is that the trial court incorrectly overruled his motion to suppress, in violation of his constitutional rights. He has argued that the court incorrectly concluded that he did not have a legitimate expectation of privacy in his friend's apartment.

{¶8} Although the text of the Fourth Amendment "suggests that its protections extend only to people in 'their' houses . . . in some circumstances a person may have a legitimate expectation of privacy in the house of someone else." *Minnesota v. Carter*, 525 U.S. 83, 89 (1998) (quoting U.S. Const. amend. IV). For example, in *Minnesota v. Olson*, 495 U.S. 91 (1990), the Supreme Court held that "an overnight guest has a legitimate expectation of privacy in his host's home." *Id*. at 98.

{¶9} The apartment tenant in this case testified that she was at work at the time of the search. She said she received a call from one of her neighbors, telling her that the police had entered her house following Andre Carlton and Antoine McCall. She said the neighbor put one of the officers on the phone, who asked her if she knew Mr. Carlton and Mr. McCall. She told the officer that she knew the men and that they were allowed in her house. According to the officer who spoke with her, she said that Mr. Chapman was also allowed in the house. The tenant testified that she had known Mr. Chapman for six years and regularly allowed him over. According to her, "Mr. Chapman used to come over all the time and he was never a problem. He never had to ask permission to come over." She also said that Mr. Chapman and his girlfriend were "like family."

{¶10} Although the tenant said that Mr. Chapman had permission to be in her apartment, the trial court found that he did not present credible evidence that he had ever been an overnight

guest. Accordingly, he failed to establish that he had a legitimate expectation of privacy in the apartment under *Minnesota v. Olson*, 495 U.S. 91 (1990). The fact that he was in the bathroom at the time of the search is immaterial. See *State v. Draper*, 6th Dist. No. F-04-026, 2005-Ohio-920, at ¶3, 18; *United States v. Harris*, 255 F.3d 288, 295 (6th Cir. 2001).

{¶11} In *Minnesota v. Carter*, 525 U.S. 83 (1998), the United States Supreme Court considered whether two men, who were observed sitting in the living room of an apartment bagging cocaine with the tenant, had a legitimate expectation of privacy in the apartment sufficient to contest a search of it under the Fourth Amendment. *Id*. at 85. The men had driven to the Eagen, Minnesota, apartment from Chicago for the sole purpose of packaging the cocaine. *Id*. The Supreme Court noted that the men "were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours. There is no suggestion that they had a previous relationship with [the lessee], or that there was any other purpose to their visit. Nor was there anything similar to the overnight guest relationship in *Olson* to suggest a degree of acceptance into the household. While the apartment was a dwelling place for [the lessee], it was for these respondents simply a place to do business." *Id*. at 90. The Supreme Court concluded 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.

{¶12} While the Supreme Court concluded that the defendants in *Carter* did not have a legitimate expectation of privacy in the apartment because they were only present for a business transaction, five of the justices wrote that the protection of the Fourth Amendment extends to social guests, even if they are not overnight guests. Justice Kennedy wrote that it was his "view that almost all social guests have a legitimate expectation of privacy, and hence protection

against unreasonable searches, in their host's home." *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring). Justices Ginsburg, Stevens, and Souter opined that the protection of the amendment goes even further, writing that, "when a homeowner or lessee personally invites a guest into her home to share in a common endeavor, whether it be for conversation, to engage in leisure activities, or for business purposes licit or illicit, that guest should share his host's shelter against unreasonable searches and seizures." *Id*. at 106 (Ginsburg, J., dissenting). Justice Breyer agreed with Justice Ginsburg's opinion regarding the scope of the Fourth Amendment, but concurred in the judgment because he thought the search was constitutional. *Id*. at 103 (Breyer, J., concurring).

{¶13} Even if this Court were to conclude that the protection of the Fourth Amendment extends to all social guests, Mr. Chapman did not establish that he was a social guest. According to Justice Ginsburg, a guest may "share his host's shelter against unreasonable searches and seizures" if the "homeowner or lessee personally invites [him] into her home to share in a common endeavor . . . ." *Minnesota v. Carter*, 525 U.S. 83, 106 (1998) (Ginsburg, J., dissenting). It is "[t]hrough the host's invitation [that] the guest gains a reasonable expectation of privacy in the home." *Id*. at 108 (Ginsburg, J., dissenting). Similarly, this Court has held in the context of premises liability that "[a] social guest is a person who comes onto the premises, pursuant to an invitation, presumably giving the possessor some personal benefit, intangible though it may be." *White v. Brinegar*, 9th Dist. No. 16429, 1994 WL 232692 at *2 (June 1, 1994).

{¶14} In this case, there was no evidence that the tenant invited Mr. Chapman to her apartment. To the contrary, the testimony established that she did not know Mr. Chapman was in her home until a police officer asked her if he was allowed to be there. Although the tenant

said Mr. Chapman had permission to be in her house, her "after the fact" acquiescence does not amount to an invitation as contemplated by the United States Supreme Court. Mr. Chapman, therefore, failed to establish that he had a legitimate expectation of privacy in the apartment under the Fourth Amendment of the United States Constitution.

{¶15} This Court notes that Mr. Chapman challenged the validity of the search under both the Fourth Amendment and Article I, Section 14 of the Ohio Constitution. The Ohio Supreme Court, however, has explained that those provisions "should be harmonized whenever possible." *State v. Murrell*, 94 Ohio St. 3d 489, 496 (2002). Accordingly, this Court concludes that Mr. Chapman has also failed to establish that he had a legitimate expectation of privacy in the apartment under the Ohio Constitution. His second assignment of error is overruled.

CONCLUSION

{¶16} The trial court correctly concluded that, because Mr. Chapman did not have a legitimate expectation of privacy in the apartment of his friend, he could not challenge the constitutionality of the police officers' warrantless search. The judgment of the Lorain County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

PAUL GRIFFIN, attorney at law, for appellant.

DENNIS P. WILL, prosecuting attorney, and MARY R. SLANCZKA, assistant prosecuting attorney, for appellee.