Circuit Court for Baltimore City
Case No. 116088027

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1637

September Term, 2016

STATE OF MARYLAND

v.

KEVIN EVANS

Krauser, C.J.,
Kehoe,
Battaglia, Lynne A.,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: March 27, 2017

Kevin Evans was indicted in the Circuit Court for Baltimore City on firearms and drug charges based upon evidence discovered by the police during a warrantless search of 819 North Bradford Avenue. Evans moved to suppress the items recovered from that location, alleging that the police entry of the building violated the Fourth Amendment. The court granted the motion. The State has appealed pursuant to Courts and Judicial Proceedings Article § 12-302(c)(3), and presents one issue, which we have abridged and reworded:

> Did the "special circumstances" of the case confer standing upon Evans even though he failed to prove that he had a legitimate expectation of privacy in the 819 North Bradford Street residence?

The answer to this question is "no," and we will reverse the circuit court's judgment.

Background

In the winter of 2016, Sergeant Anthony Maggio, together with five members of the Baltimore City police unit[1] that he commanded, conducted an investigation of Evans and other members his family. As part of the investigation, Maggio and his fellow officers executed search and seizure warrants on four locations in east Baltimore during the early morning hours of March 1, 2016. The warrants were executed on a business located on Monument Street and residences located at 817 North Bradford Street, Leverton Avenue

[1] The title of the unit is rendered phonetically in the hearing transcript as "C fire." Maggio testified that the unit "target[s] violent offenders and violent repeat offenders on the east side of Baltimore."

and Ravenwood Avenue.[2] Although the members of Maggio's team apparently had maintained at least some surveillance on 819 North Bradford Street as part of their investigation, no warrant for that location was issued.

Maggio was present when the search warrant was executed at the Leverton Avenue property. Upon entering the home, he found Evans in one of the upstairs bedrooms. Evans was dressed in boxer shorts and asked Maggio if he could put on some pants. Maggio picked up a pair of jeans from the floor and checked the pockets before handing them to Evans. He found a set of keys, which he seized because he believed that the keys might be evidence of Evans's involvement with the other properties.

Maggio proceeded to 819 North Bradford Street and was able to open both the front and back door with the keys from Evans's jeans. At the hearing, he testified that other policemen, presumably the officers who had executed the warrant on 817 North Bradford Street, may have already entered the house from the rear before he got there, but he was no longer sure. During a search of the premises, the police found drugs and a firearm hidden in a kitchen appliance.

Evans filed a motion to suppress that evidence. During the hearing on the motion, the following additional information was presented. Police officers testified that 819 Bradford Street was unoccupied, the utilities were turned off, and the windows were covered over with plywood. There were locks on both the front and back doors, and the

[2] The street addresses for these locations are not in the record.

keys recovered from Evans fit the locks of both the doors. Patsy and Jerome Whitener, also testified. Mr. Whitener is the record owner of 819 North Bradford. Even though title to the property is still in Mr. Whitener's name, Mr. and Mrs. Whitener had given the property to Mr. Whitener's stepson 16 years earlier. Mr. Whitener testified that his stepson was currently "in jail," and that his stepson had told him that "he [had] asked Kevin to watch the house[.]" Mrs. Whitener testified that she had never given Evans permission to be on the property. Evans presented no evidence as to standing other than the fact that he had keys that unlocked the doors at 819 North Bradford Street.

At the conclusion of the hearing, the circuit court stated (emphasis added):

> Having heard the evidence, it -- it's a -- it's a very unusual situation, in my mind. Applying *Whiting*,[3] including the fact that the -- that 819 was locked and that Mr. Evans had the keys, I conclude . . . on the on the facts shown that Mr. Evans has not established standing because he has not established that he is any position superior to Mr. Whiting, which Mr. Whiting was, that is, that this was a vacant house owned by someone else and he -- he who has the burden of proving standing has not proved that there was any actual agreement, whether rising to the level of a written lease or even something informal that would establish that he had permission or some status in those premises to be living there, controlling them, using them or something else.
>
> It's also clear to me that the police violated the Fourth Amendment in this situation because they entered 819, whether it was by knocking down the rear door or by using a key on the front door at a time when even though 819 North Bradford was vacant, it was secured. So, to the extent that there could be any claim that a completely abandoned house that is exposed to the elements and -- and has, you know, is not boarded up, has openings, is not locked, could be entered by the police under some circumstances; these certainly are not those.
>
> I credit the police officers' belief that this was a vacant property and the evidence of its condition inside shows that it was vacant and -- and not being used as a

[3] *Whiting v. State*, 389 Md. 334 (2005).

dwelling at the time. But that doesn't change the Fourth Amendment requirement that they obtain either permission or a warrant to enter it before searching it.

Now, what is unusual in this case to me is the fact that the police used Mr. Evans's keys, at least in terms of Detective Maggio entering the front door of that dwelling. And while the existence of those keys alone would not normally establish standing, I find that, in this case, it establishes the link to the State's entry of that building which connects Mr. Evans to the Fourth Amendment violation.

And, on that basis, I grant the motion and, as to Mr. Evans, will suppress the results of the search in 819 North Bradford. I will note that while I reject the defense's position that there some public interest in automatically excluding evidence because there's a violation of the Fourth Amendment, this is a situation where, almost inexplicably, based on the evidence to me, the police had information about that location. *They're actually looking for the link of Mr. Evans to that location and seizing the keys from him in order to establish that link and then using them to commit a Fourth Amendment violation and those are special circumstances that, I think in this particularly case, confers standing on Mr. Evans to assert the motion.*

So, as to Mr. Evans, the motion is granted.

Standard of Review

The Court of Appeals has summarized the appropriate standard of appellate review in cases such as the one before us:

> In reviewing the grant of a motion to suppress evidence, we ordinarily consider only the evidence before the court at the suppression hearing, and not that of the record of the trial. We view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the prevailing party on the motion. Although we extend great deference to the hearing judge's findings of fact, we review independently the application of the law to those facts to determine if the evidence at issue was obtained in violation of the law and, accordingly should be suppressed.

Whiting v. State, 389 Md. 334, 345 (2005) (internal citations omitted).

Analysis

I.

The Fourth Amendment protects individuals in "their persons, houses, papers, and effects against unreasonable searches and seizures." *Whiting*, 389 Md. at 346 (footnote, citation and quotation marks omitted). In order to invoke the protection of the Fourth Amendment, "a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is 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.'" *State v. Andrews*, 227 Md. App. 350, 373 (2016) (quoting *Minnesota v. Carter*, 525 U.S. 83, 88, (1998)). Evans does not assert that he has any claim to 819 North Bradford based upon principles of property law so our focus is on whether he demonstrated that he had a "legitimate expectation of privacy" in the area searched. *See, Katz v. United States*, 389 U.S. 357, 353 (1967); *Rakas v. Illinois*, 439 U.S. 128, 143 (1978); *Laney v. State*, 379 Md. 522, 545 (2004). To be "legitimate," a person's expectation of privacy must be both subjectively held and be "objective," that is, be one which "society is prepared to recognize as reasonable[.]" *Whiting*, 389 Md. at 353 (quoting *Ricks v. State*, 312 Md. 11, 26–27 (1988), *disapproved on other grounds in Ragland v. State*, 385 Md. 706 (2005)).

At oral argument, the State conceded that Evans had demonstrated that he had a subjective expectation of privacy in 819 North Bradford Street. Therefore, we turn to the reasonableness of his expectation. In this exercise, the analysis in *Whiting* is instructive.

The issue in that case was whether the defendant had an objectively reasonable expectation of privacy in a room in a house which he occupied as a squatter. 389 Md. at 337. The Court of Appeals concluded that the evidence at the suppression hearing demonstrated that Whiting had a subjective expectation of privacy in the room in question.[4] In deciding whether Whiting's expectation was objectively reasonable, the Court looked to three separate lines of appellate decisions: (1) a series of Maryland cases, most of which were decided prior to *Mapp v. Ohio*, 367 U.S. 643 (1961),[5] 389 Md. at 350–52; (2) post-*Mapp* decisions by the Court of Appeals and federal courts which explored the concept of an objectively reasonable expectation of privacy in a variety of factual settings, *id.* at 353–55; and (3) decisions by courts of other jurisdictions which addressed circumstances under which squatters might have a reasonable expectation of privacy in premises that they occupied. *Id.* at 355–58. Synthesizing the teachings of these cases, the Court concluded that Whiting did not have standing because he:

[4] Specifically, the Court noted that the evidence showed that there was a lock on the door to the room in question and that Whiting had the only key; that the room contained his personal property, including letters addressed to Whiting as well as a college registration form. *Id.* at 358.

[5] In *Mapp*, the Court held that the Fourth Amendment applies to the states through the Fourteenth Amendment. 367 U.S. at 655.

> neither lawfully owned, leased, controlled, occupied, nor rightfully possessed 810 East Preston Street, or any part of the premises therein. Accordingly, we find that Whiting lacked standing to challenge the . . . searches because, although he may have possessed a subjective expectation of privacy, that expectation was not objectively reasonable.

Id. at 363.

Returning to the case before us, the suppression court concluded that Evans did not demonstrate that he had an objectively reasonable expectation of privacy in 819 North Bradford Street because he had "not proved that there was any actual agreement, whether rising to the level of a written lease or even something informal that would establish that he had permission or some status in those premises to be living there, controlling them, using them or something else." In reaching this conclusion, the suppression court correctly applied the lessons of *Whiting* and the cases cited therein to the evidence before it.

However, the court went on to grant the motion to suppress because (1) Maggio used the key that he had previously, and completely lawfully, obtained from Evans to unlock the door to 819 North Bradford Street; and (2) the State had indicated that it intended to use Evans's possession of that key as evidence to prove that he was in constructive possession of the drugs and the firearm found in the premises. The fatal difficulty with this sort of reasoning is that both the Supreme Court and the Court of Appeals have repeatedly made it clear that "[t]he capacity to invoke Fourth Amendment protection requires the individual to establish that he or she maintained 'a legitimate expectation of privacy' in the house, papers, or effects searched or seized." *Whiting*, 389 Md. at 346

(citing, among other authorities, *Katz v. United States*, 389 U.S. 347, 353 (1967); *Rakas v. Illinois*, 439 U.S. 128, 143 (1978); *United States v. Chadwick*, 433 U.S. 1, 7 (1977); and *United States v. White*, 401 U.S. 745, 752, (1971). The facts in this case provide no reason for us to disregard the clear teachings of these authorities.

II.

As an alternative ground for affirming the suppression court, Evans argues that the entry into 819 North Bradford by the police without consent or warrant was a trespass, and therefore the evidence found there should not be admitted against him even though the search violated the Whitener's—as opposed to his—Fourth Amendment rights. To support this contention he directs us to *United States v. Jones*, 565 U.S. 400 (2012), and *McDonald v. United States*, 335 U.S. 451 (1948).

In *Jones*, the Court held that, when police placed a GPS tracker on an automobile, they physically intruded private property in a way that would have been considered a trespass upon a chattel when the Constitution was ratified and thus violated the Fourth Amendment. 565 U.S. 400 at 404–05. The Court explained that "the Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 409 (emphasis in original).[6] Assuming for purposes of analysis that the police trespassed when they entered 819 North Bradford, they violated the

[6] The majority's opinion in *Jones* expressly did not address the issue of standing. 565 U.S. at 404 n.2 (noting that the Government had not challenged Jones's standing in either the lower courts or before the Supreme Court.).

Whiteners' (and perhaps the stepson's) property interests. But they did not injure any property interest of Evans because he had no right to possess or occupy the premises. Therefore, Evans is not assisted by *Jones's* focus on property rights—as opposed to reasonable expectations of privacy—as the conceptual basis for deciding what the Fourth Amendment protects.

In *McDonald*, the police broke into a rooming house, crept up to the room that McDonald rented, peeked over the transom and saw McDonald and his co-defendant, Washington, in the throes of tallying the day's result from their illegal numbers game. They called upon McDonald to open the door and, when he did so, the police arrested the two men and seized currency, adding machines and documents. 335 U.S. at 452–53. The Court held that the failure to obtain a search warrant required the evidence to be suppressed in McDonald's trial. *Id.* at 455–56.[7]

[7] Although the analysis in Justice Douglas's opinion for the majority did not address standing, Justice Jackson did so in his concurring opinion. His reasoning foreshadowed the Supreme Court's adoption of the *Katz* "reasonable expectation of privacy" test:

> The Government argued, and the court below held, that since the forced entry into the building was through the landlady's window, in a room in which the defendant as a tenant had no rights, no objection to this mode of entry or to the search that followed was available to him.
>
> Doubtless a tenant's quarters in a rooming or apartment house are legally as well as practically exposed to lawful approach by a good many persons without his consent or control. . . .
>
> *But it seems to me that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry.* Here the police gained

What makes this case interesting from Evans's perspective is the Court's second holding, which pertained to McDonald's co-defendant. The Court "assume[d], without deciding, that Washington . . . had no right of privacy" that was violated by the search. *Id.* Nonetheless, the Court held that items seized were also inadmissible against the co-defendant because:

> the unlawfully seized materials were the basis of evidence used against the codefendant. If the property had been returned to McDonald, it would not have been available for use at the trial.

Id. at 456.

Evans asks us to follow this part of the Court's analysis and hold that the evidence is to be suppressed because the police violated the Whiteners' property rights. However, the shelf-life of *McDonald's* second holding expired long ago. As the Court noted in *Palmer v. State*, 14 Md. App. 159, 167 n.11 (1972), this holding was "eroded by *Wong Sun v. United States*, 371 U.S. 471, 492 (1963),[8] and clearly administered the *coup de grace* by *Alderman v. United States*, 394 U.S. 165, 171 (1969).[9]" *See also Jones v. State*, 407 Md.

> access to their peeking post by means that were not merely unauthorized but by means that were forbidden by law and denounced as criminal.

335 U.S. at 458 (emphasis added).

[8] "The seizure of this heroin [from a co-defendant] invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial." 371 U.S. at 492.

[9] "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the

33, 49 (2008) ("Fourth Amendment rights are personal in nature and may only be enforced by the person whose rights were infringed upon."); *State v. Savage*, 170 Md. App. 149, 175 (2006) ("A defendant may not seek to vindicate vicariously the Fourth Amendment rights of someone else.").

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS VACATED AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS. APPELLEE TO PAY COSTS.

search itself, not by those who are aggrieved solely by the introduction of damaging evidence." 394 U.S. at 171.