

2002

Utah v. Earl : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

JOSHUA JOHN EARL,

Defendant/Appellant.

Case No. 20020821-CA

BRIEF OF APPELLEE

AN APPEAL FROM A CONVICTION FOR POSSESSION OF CLANDESTINE LABORATORY PRECURSORS AND/OR EQUIPMENT, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37D-4(1) (1998), IN THE THIRD JUDICIAL DISTRICT COURT OF UTAH, SALT LAKE COUNTY, THE HONORABLE SHEILA K. MCCLEVE PRESIDING

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

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vs.

JOSHUA JOHN EARL,

Defendant/Appellant.

Case No. 20020821-CA

BRIEF OF APPELLEE

* * *

STATEMENT OF JURISDICTION

Defendant appeals from a conviction for possession of clandestine laboratory precursors and/or equipment, a second degree felony, in violation of Utah Code Ann. § 58-37d-4(1) (1998). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (2002).

STATEMENT OF ISSUES

Issue. Did the trial court properly deny defendant's motion to suppress evidence seized pursuant to a consent to search and a search incident to arrest?

Standard of Review. "The factual findings underlying a trial court's decision to grant or deny a motion to suppress evidence are reviewed under the deferential clearly-erroneous standard, and the legal conclusions are reviewed for correctness, with a measure of discretion given to the trial judge's application of the legal standard to the facts." *State v. Moreno*, 910 P.2d 1245, 1247 (Utah App.), *cert. denied*, 916 P.2d 909 (Utah 1996).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Summary of Proceedings

Defendant was charged with possessing clandestine laboratory precursors and/or equipment within a drug-free zone, a first degree felony, possession of a dangerous weapon by a restricted person, a second degree felony, and possession of drug paraphernalia, a class B misdemeanor. R. 4-7. Following a preliminary hearing, the magistrate bound defendant over for trial on all charges. R. 26-27, 277. Defendant moved to suppress the evidence, arguing that the warrantless search violated the Fourth Amendment. R. 35-39. After an evidentiary hearing, the trial court denied the motion. R. 127-32, 278-79. Pursuant to a subsequent plea bargain, defendant pled guilty to a reduced charge of possessing clandestine laboratory precursors and/or equipment, a second degree felony, and the remaining two counts were dismissed. R. 233-42. Defendant conditioned his guilty plea on the right to appeal the trial court's suppression order. R. 234-35. The trial court sentenced defendant to a prison term of one-to-fifteen years. R. 256. Defendant timely appealed. R. 262-63.

Summary of Facts

Sheila Gledhill and her husband owned a house that was located next to the husband's business in South Salt Lake. R. 278: 8-11. Pursuant to a verbal agreement reached in May 2001, she rented the house to her son Jeremy Allen. R. 278: 8-9. Although he was supposed to pay \$350 per month in rent, Allen performed yard work and other tasks in lieu of rent. R. 278: 9. However, by November 2001, Mrs. Gledhill decided to evict Allen because "he hadn't followed through with the rent, and [] was not maintaining the inside of the home" as agreed. R. 278: 9.

On the morning of November 4, 2001, Mrs. Gledhill drove to the house to evict her son.¹ R. 278: 8, 23. Upon arriving, she noticed that an unauthorized truck was parked behind her husband's business. R. 278: 10, 23. Assuming that it belonged to someone that was at the house, Mrs. Gledhill called police on her cell phone to have them remove it. R. 278: 10, 23. Dispatch told her that because it was on private property, she would have to call a towing company. R. 278: 23. She then went to a nearby convenience store to look up a towing company in the telephone book. R. 278: 23. While there, a young female clerk informed Mrs. Gledhill that "a skinhead named Marvin" had told the clerk that he was living at the home and "running a meth lab there." R. 278: 8, 10-11. After learning this, Mrs. Gledhill again called police and asked that they accompany her to keep the peace while she evicted her son. R. 278: 8, 12-13, 19-20, 26.

¹ Mrs. Gledhill had not given her son notice of her intent to evict him. R. 278: 20.

Shortly after Mrs. Gledhill called, Officer Dean Brimley from the South Salt Lake Police Department met her at her husband's business. R. 278: 11, 20-21, 26. Mrs. Gledhill told Officer Brimley that she wished to evict her son because he was using methamphetamine and marijuana and because she had received information that a meth lab was inside the house. R. 278: 26-27, 38. After discussing the situation with Mrs. Gledhill, Officer Brimley accompanied her to the house. R. 278: 13.² Using her own key, Mrs. Gledhill entered the house through the front door and Officer Brimley followed her inside. R. 278: 13-14, 21, 27. When they entered the house, Allen, defendant—whom Mrs. Gledhill had never before seen—and two other men were sitting around the kitchen table at a computer. R. 278: 8, 14-17, 20, 27-29.³

The house was “trashed,” with clothes and garbage lying everywhere. R. 278: 21. Small iodine bottles and several boxes of pseudophedrine (Sudafed), both used in the manufacture of methamphetamine, were also lying in plain view on the floor next to the couch, and a glass marijuana pipe was lying on the coffee table in front of the couch. R. 278: 14, 17-18, 29, 50-51-52, 55, 57. A backpack, later discovered to be defendant's, was also in the living room. R. 278: 22, 24-25, 35-36.

² Mrs. Gledhill testified that Officer Brimley and a second officer accompanied her into the house. R. 278: 13-14. Officer Brimley, on the other hand, testified that only he accompanied her into the house and that Officer Loosle joined them shortly thereafter. R. 278: 27.

³ Mrs. Gledhill later learned that defendant is the stepson of her ex-husband. R. 278: 19; *see also* R. 278: 58.

On seeing the drug paraphernalia, Officer Brimley radioed to his backup officer and requested that he hasten his arrival. R. 278: 30. To ensure his safety, Officer Brimley directed all four men to step out of the kitchen into the living room, within eight to ten feet of the backpack, and requested their identification. R. 278: 31, 37, 40-41. At about this same time, Officer Loosle arrived as backup. R. 278: 31. All but defendant provided Officer Brimley photo identification. R. 278: 30. Defendant claimed that he had no identification and verbally identified himself as Justin Gannon. R. 277: 8; R. 278: 30. Officer Brimley asked defendant whether he had any weapons on him. R. 278: 32. When defendant affirmed that he did, Officer Brimley frisked him, discovering a large knife concealed under his shirt in the small of his back. R. 278: 32, 43-44. He also found a pocket knife in defendant's pocket. R. 278: 32.

During the pat down, Officer Brimley felt a wallet and requested permission to retrieve the wallet, which defendant granted. R. 278: 32-33, 44. When Officer Brimley examined the identification in the wallet, he found a Utah I.D. card and discovered that defendant had given him a false name and date of birth. R. 278: 33, 44. On learning defendant's real identity, Officer Brimley arrested him for giving false information, handcuffed him, sat him on the couch against which the backpack was leaning, and radioed for a warrants check. R. 278: 33-34, 45.

Then, because of his concerns for safety, Officer Brimley escorted all four men outside and obtained Allen's written consent to search the house. R. 278: 35, 42, 45. He also requested the presence of Officer Scott Daniels, the team leader for the department's

meth lab unit. R. 278: 45, 47-48. A search of the house did not uncover any glassware for a meth lab, but did uncover various chemicals used in the manufacture of methamphetamine. R. 278: 48, 50. While searching the house, Officer Brimley searched the backpack lying in the living room. R. 278: 36, 45. In it, Officer Brimley found scales, rubber stoppers, additional bottles of iodine, red sludge (red phosphorous), a blue plastic container with 48 pseudophedrine pills, and a book entitled, "Advanced Techniques for Clandestine Labs." R. 277: 11, 14-15; R. 278: 36, 50-53. Officer Brimley also found some court documents which he traced to defendant. R. 278: 36. Allen later confirmed that the backpack belonged to defendant. R. 278: 36, 42-43.⁴

Mrs. Gledhill testified that although defendant did not have permission to stay at the house, Allen had authority to allow him to be there as a visitor. R. 278: 19. Defendant testified that Allen said he could live at the house until he found another place to stay and claimed that he had been living there since October. R. 278: 58-60. However, defendant never told any of the officers that he was living there, nor did he tell them not to search the residence. R. 278: 59-61. He paid no rent. R. 278: 61.

⁴ A call to the court revealed that the case number on the court documents matched defendant. R. 278: 36.

SUMMARY OF ARGUMENT

The trial court concluded that the search of defendant's backpack was justified as a search incident to arrest, pursuant to the plain view doctrine, and pursuant to Jeremy Allen's consent to search. Although defendant challenges all three justifications, the Court must affirm if any one supports the search.

A search incident to arrest is valid if (1) the arrest is lawful, (2) the search is within the area of the arrestee's immediate control, and (3) the search is contemporaneous with the arrest. The trial court concluded that the search satisfied all three requirements. Defendant challenged only the lawfulness of the arrest in his suppression motion, but he has conceded its lawfulness on appeal. And as in the trial court below, defendant has not challenged the trial court's conclusions respecting the last two requirements of the analysis. Instead, defendant urges the Court to adopt a different analysis requiring an inquiry into whether there was a reasonable concern for safety justifying the search. Because he did not make this argument below, he has waived it and this Court should not consider it on appeal. In any event, the United States Supreme Court has concluded that *all* custodial arrests should be treated alike and has rejected the analysis proposed by defendant. This Court should thus affirm the trial court's conclusion that the search was valid as a search incident to arrest.

Because defendant was not a resident, temporary or otherwise, but merely a casual visitor, he had no reasonable expectation of privacy in Jeremy Allen's home and he may not challenge the trial court's ruling pertaining to the plain view doctrine or the validity of Allen's consent. Nor did defendant demonstrate an expectation of privacy in the backpack.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE

In denying the motion to suppress, the trial court concluded that the search was justified (1) as a search incident to arrest, *see* R. 131-32: ¶¶ 11-15; (2) under the plain view doctrine, *see* R. 129-30: ¶¶ 1-6; and (3) pursuant to Jeremy Allen's consent, *see* R. 130-31: ¶¶ 7-9.⁵ On appeal, defendant challenges the application of all three exceptions. First, he argues that the plain view doctrine does not apply because Mrs. Gledhill had neither actual nor apparent authority to enter the house and authorize police entry into the premises. *See* Aplt. Brf. at 9-25. Second, he argues that Allen's consent to search the premises was not voluntary, was the product of the prior illegality, and did not, in any event, extend to the backpack. *See* Aplt. Brf. at 26-39. Third, he acknowledges that the arrest was lawful, but urges the Court to discard in this case the present standard for searches incident to arrest in favor of a different standard never before applied by any court. *See* Aplt. Brf. at 40-46.

A. THE SEARCH OF DEFENDANT'S BACKPACK WAS JUSTIFIED AS A SEARCH INCIDENT TO ARREST

Searches conducted by police without a warrant are "presumptively unreasonable." *See Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380 (1980). Nevertheless, "the presumption against warrantless searches is not without its exceptions . . ." *City of Orem v. Henrie*, 868 P.2d 1384, 1387 (Utah App. 1994). One such exception is a search incident to a

⁵ The court also concluded that Officer Brimley was justified in conducting a pat-down search for weapons. R. 131: ¶ 10. Defendant has not challenged this conclusion.

lawful arrest. *State v. Trane*, 2002 UT 97, ¶ 22, 57 P.3d 1052. Under this exception, police may search a lawfully arrested person and areas within his or her immediate control for both weapons and evidence. *Chimel v. California*, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 2040 (1969); “The fact of a lawful arrest, standing alone, authorizes [the] search.” *Michigan v. DeFillippo*, 443 U.S. 31, 35, 99 S.Ct. 2627, 2631 (1979). A search incident to arrest is justified “if (1) the arrest is lawful; (2) the search is of the area within the arrestee’s immediate control; and (3) the search is conducted contemporaneously to the arrest.” *State v. Giron*, 943 P.2d 1114, 1117-18 (Utah App. 1997) (citations omitted).

On appeal, defendant does not challenge the trial court’s conclusion that the search of his backpack met these requirements, nor could he. *See* Aplt. Brf. at 40-46. An arrest is lawful “if it is supported by probable cause and authorized by statute.” *Trane*, 2002 UT 97, at ¶ 25. Where defendant gave a false name and date of birth in violation of Utah Code Ann. § 76-8-507 (1999), Officer Brimley was authorized to arrest him. *See* Utah Code Ann. § 77-7-2(1) (1999); *Trane*, 2002 UT 97, at ¶ 28. Although elsewhere in his brief defendant challenges the legality of Officer Brimley’s entry into Allen’s residence, Aplt. Brf. at 13-25, he concedes that the alleged illegal entry did not render unlawful his subsequent arrest for an intervening offense. *See* Aplt. Brf. at 40 (acknowledging applicability of *State v. Griego*,

933 P.2d 1003, 1008 (Utah App. 1997)).⁶ Defendant does not challenge, nor did he below, the trial court's conclusion that the search of the backpack, which was only 8-10 feet away from him when he was arrested, R. 278: 37, "was within the area of Defendant's immediate control considering Defendant's physical proximity to the backpack, the position of the Officer and the Defendant in relation to the area of the backpack, and the number of Officers (one) verses the number of suspects (four)," R. 131(13).⁷ See Aplt. Brf. at 41-46. And finally, defendant does not challenge, nor did he below, the trial court's conclusion that the search "was contemporaneous with Defendant's lawful arrest," R. 132(14). Because the

⁶ In *Griego*, this Court held that "[a]n illegal entry or prior illegality by officers does not affect the subsequent arrest of the defendant where there is an intervening illegal act by the suspect." *Griego*, 933 P.2d at 1008; accord *Trane*, 2002 UT 97, at ¶¶ 33-35. In the court below, defendant argued that his arrest "was unlawful because the officers' warrantless entry into the home was unlawful" R. 66. However, defendant has abandoned that claim on appeal in light of *Griego*, acknowledging that he committed an "intervening illegal act" justifying his arrest when he gave police a false name and date of birth. Aplt. Brf. at 40-41.

⁷ As observed by this Court, "[p]olice restraint and physical removal of the arrestee, . . . while limiting the arrestee's ability to actually reach into a particular area, does not automatically prohibit police from search the area." *State v. Harrison*, 805 P.2d 769, 785 n.29 (Utah App.), cert. denied, 817 P.2d 327 (Utah 1991). Indeed, where the officers were outnumbered four to two, R. 278: 27, 31, all of the men were larger than at least Officer Brimley, R. 278: 28, and the officer expressed concern for his safety, see R. 278: 35, removal of the men from the living room before conducting the search was eminently reasonable, especially in light of the fact that defendant had already been found with a large knife and apparently only he was handcuffed. See *State v. Gallegos*, 967 P.2d 973, 979 (Utah App. 1998) (noting that "the number of officers present in relation to the number of arrestees or other persons" is a relevant factor); see also *United States v. Turner*, 926 F.2d 883 (9th Cir.) (upholding search incident to arrest where only a few minutes had passed between arrest and search, defendant was taken to next room out of concern for safety, a gun was found in the room where defendant had been arrested, and defendant was held near the site of arrest), cert. denied, 502 U.S. 830, 112 S.Ct. 103 (1991).

three requirements have been satisfied, this Court should affirm the trial court's order denying the motion to suppress.

Defendant urges the Court to add "an extra layer of analysis" to the inquiry to determine whether there was in fact a reasonable concern for safety, similar to that required for a reasonable suspicion weapons frisk under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). Aplt. Brf. at 42-43. However, he did not make this argument to the trial court as a basis for suppression, opting instead to merely challenge the lawfulness of the arrest, and the trial court thus had no opportunity to address defendant's novel argument. See R. 35-39, 56-66, 278. Where, as here, a defendant seeks reversal based on a theory not presented to the trial court below, it is "waived and cannot be presented on appeal." *State v. Weeks*, 2002 UT 98, ¶ 22, 61 P.3d 1000. Therefore, this Court should affirm the trial court's order.

Even on the merits, defendant's proposed standard should be rejected. In *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467 (1973), the United States Supreme Court rejected the very analysis proposed by defendant here. As noted by this Court, searches incident to arrest "are necessary to remove any weapons that the arrestee might seek to use in order to resist arrest or effect his escape as well as to search for and seize any evidence . . . to prevent the concealment or destruction of evidence." *State v. Moreno*, 910 P.2d 1245, 1247 (Utah App.), *cert. denied*, 916 P.2d 909 (Utah 1996). The U.S. Supreme Court in *Robinson* held that the extended exposure that necessarily follows an arrest provides "an adequate basis for treating *all* custodial arrests alike for purposes of search justification," regardless of the particular circumstances of the arrest. *Robinson*, 414 U.S. at 234-35, 94 S.Ct. at 476

(emphasis added); accord *DeFillippo*, 443 U.S. at 35, 99 S.Ct. at 2631. For this reason, *Robinson* rejected the very *Terry*-type analysis now proposed by defendant. *Id.* at 235, 94 S.Ct. at 476. Moreover, because a custodial arrest based on probable cause is reasonable under the Fourth Amendment, a search incident to that arrest is also reasonable under the Fourth Amendment. *Id.* at 235, 94 S.Ct. at 477. In other words, so long as the arrest is lawful, officers should not be handicapped in their ability to ensure their safety and preserve evidence.⁸

Defendant nevertheless argues that this “extra layer of analysis is required to ensure that the officers are not exploiting the illegal conduct to arrest a person and search their belongings under the pretext of a search incident to arrest.” Aplt. Brf. at 42. A pretext is defined as “an appearance assumed in order to cloak the real intention or state of affairs,” *Webster’s Third New Int’l Dictionary* 1797 (1993), or, stated colloquially, as “a phony reason for some action,” *Logan v. Caterpillar, Inc.*, 246 F.3d 912, 920 (7th Cir. 2001). Yet, the authority of police to make an arrest following a prior police illegality arises only if there is an intervening illegal act. *See State v. Griego*, 933 P.2d 1003, 1008 (Utah App. 1997). In other words, the lawfulness of the arrest is wholly dependent on the actions of the suspect after the police illegality. That police would act illegally in the hope that a suspect would

⁸ It is also worthy of note that the Utah Supreme Court in *Trane* upheld a search incident to an arrest for interfering with an officer although the interference arose out of an alleged unlawful order by police. *See Trane*, 2002 UT 97, at ¶¶ 30-36 (holding that “[t]he societal interest in the orderly settlement of disputes between citizens and their government outweighs any individual interest in resisting a questionable search”).

commit an intervening offense seems highly improbable. They not only risk losing evidence, but they might also risk liability under 42 U.S.C. § 1983.

Because resolution of this claim is dispositive of the appeal, this Court may affirm on that basis alone and need not address the latter two claims. Nevertheless, defendant's latter two claims also fail.

B. DEFENDANT DID NOT HAVE A LEGITIMATE EXPECTATION OF PRIVACY IN THE HOUSE

Defendant also challenges the trial court's conclusion that the evidence was lawfully seized under the plain view doctrine and pursuant to Jeremy Allen's consent. *Aplt. Brf.* at 9-34. These claims, however, fail because defendant did not have a legitimate expectation of privacy in Mrs. Gledhill's house.

"Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Rakas v. Illinois*, 439 U.S. 128, 133-34, 99 S.Ct. 421, 425 (1978) (quoting *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 966 (1969)). Accordingly, "in order to claim 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" *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S.Ct. 472 (1998); *accord State v. Kolster*, 869 P.2d 993, 995 (Utah App. 1994).⁹

⁹ A reasonable expectation of privacy is defined as "one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516 (1967) (Harlan, J., concurring); *accord Kolster*, 869 P.2d at 995.

In *Minnesota v. Olson*, 495 U.S. 91, 96-97, 110 S.Ct. 1684, 1688 (1990), the United States Supreme Court held that an overnight guest enjoys “an expectation of privacy in the home [of his or her host] that society is prepared to recognize as reasonable.” As such, an overnight guest may claim the protections of the Fourth Amendment against an unreasonable search of that home. *Id.* However, the trial court specifically found that defendant “was not a resident” of the house, discounting entirely as “not credible” defendant’s testimony to the contrary. R. 129: ¶ 22; R. 130: ¶ 8. As such, the trial court correctly concluded that he had no standing to challenge the entry or subsequent search.

Defendant challenges the trial court’s finding, Aplt. Brf. at 9, but does not meet the heavy burden required to upset that finding. The trial court’s factual findings at a suppression hearing are reviewed for clear error. *State v. Galli*, 967 P.2d 930, 933 (Utah 1998). To successfully challenge a trial court finding, “defendant ‘must demonstrate to appellate courts first how the trial court found the facts from the evidence, and second why such findings contradict the weight of the evidence.’” *State v. Loya*, 2001 UT App 3, ¶ 7, 18 P.3d 1116 (quoting *In re S.T.*, 928 P.2d 393, 400 (Utah App. 1996)). In reviewing the trial court’s decision, the Court “‘consider[s] the facts in a light most favorable to the trial court’s determination’ and defer[s] to the trial court’s assessment of witness credibility.” *State v. Mogen*, 2002 UT App 235, ¶ 16, 52 P.3d 462 (quoting *State v. Patefield*, 927 P.2d 655, 657 (Utah App. 1996)). The Court will not upset a factual finding unless it reaches “a definite and firm conviction that a mistake has been made.” *Loya*, 2001 UT App 3, at ¶ 7 (internal quotes and citations omitted).

Defendant incorrectly asserts that the State presented no evidence that he was not living at the house. Aplt. Brf. at 11-12. To the contrary, Mrs. Gledhill testified that only her son Jeremy had permission to reside at the house. R. 278: 10. And although Mrs. Gledhill indicated a concern that another person might also have been staying at the house, the evidence suggested that it was someone named Marvin, not defendant. *See* R. 278: 10 (store clerk indicating that “a skinhead named Marvin” had told her that he lived there).

In challenging the trial court’s finding, defendant points only to his testimony that he was living there until he found another place to stay. Aplt. Brf. at 11-12. However, the trial court specifically found that defendant was “not credible” and discounted his testimony “entirely.” R. 129: ¶ 22. Because the trial court is “in the best position to assess the credibility of witnesses,” *State v. Pena*, 869 P.2d 932, 936 (Utah 1994), this Court must defer to that assessment. *Mogen*, 2002 UT App 235, at ¶ 16. Certainly, it cannot be said with any conviction that the trial court made a mistake in finding that defendant was not a resident, temporary or otherwise. *See Loya*, 2001 UT App 3, at ¶ 7.

Relying on *State v. Rowe*, 806 P.2d 730 (Utah App. 1991), *rev’d*, 850 P.2d 427 (Utah 1992), defendant nevertheless argues that as a social visitor, he had a legitimate expectation of privacy in Allen’s house sufficient to challenge the search. Aplt. Brf. at 12. In *Rowe*, the Court of Appeals held that depending on the circumstances of the case, even visitors of relatively short duration have a reasonable expectation of privacy sufficient to challenge the validity of an intrusion into the premises. 806 P.2d at 735-36. The Utah Supreme Court, however, “reverse[d] the decision of the court of appeals,” albeit on different grounds. *State*

v. Rowe, 850 P.2d 427, 430 (Utah 1992). The authority of the court of appeals decision is thus tenuous at best, especially in light of *Minnesota v. Carter*, 525 U.S. 83, 119 S.Ct. 469 (1998).

The Supreme Court's decision in *Carter* may be viewed as treating visitors at the home of another as falling along a continuum. At one end of the spectrum is the overnight guest, who "typif[ies] those who may claim the protection of the Fourth Amendment in the home of another." *Id.* at 91, 119 S.Ct. at 474. At the other end of the spectrum is one that is "merely present with the consent of the householder" or is otherwise "legitimately" on the premises, who typif[ies] those who may not [claim the protection of the Fourth Amendment]." *Id.* at 90-91, 119 S.Ct. at 473-74. With this continuum in mind, the Court observed that the respondents (1) were not overnight guests, (2) were in the home for only a few hours, (3) were only in the home to conduct a commercial transaction (a drug deal), and (4) had no prior relationship with the householder. *Id.* at 90-91, 119 S.Ct. at 473-74. Based on these facts, the Supreme Court "conclude[d] that the respondents' situation [was] closer to that of one simply permitted on the premises." *Id.* at 91, 119 S.Ct. at 474. The Court thus held that the search did not violate the respondents' Fourth Amendment rights.

Where, as here, the State challenges a defendant's "standing" to make a Fourth Amendment challenge, *see* R. 46, the burden of establishing a legitimate expectation of privacy is on the defendant. *State v. Marshall*, 791 P.2d 880, 886-87 & n.8 (Utah App. 1990); *accord United States v. Dunning*, 312 F.3d 528, 531 (1st Cir. 2002). Defendant failed to meet this burden.

The only evidence defendant presented at the suppression hearing was his own testimony that he was staying at the house until he found another place to live. *See* R. 278: 58, 61. As noted, the trial court found defendant’s testimony “not credible,” R. 129: ¶ 22, and no one else testified to establish defendant’s connection to the premises. At best, therefore, the evidence establishes that defendant was merely a casual visitor at Allen’s home. At worst—given the contraband lying in open view around defendant’s backpack, the contraband found inside defendant’s backpack, and the meth lab instruction book in the backpack—the evidence suggests that defendant was at the residence in connection with a commercial enterprise to manufacture methamphetamine. In either case, defendant cannot claim the protection of the Fourth Amendment in the premises. *See United States v. Torres*, 162 F.3d 6, 10 (1st Cir. 1998) (holding that defendant “was nothing more than a casual visitor in the apartment, and, as such, had no reasonable expectation of privacy there”), *cert. denied*, 526 U.S. 1057, 119 S.Ct. 1370 (1999); *United States v. Harris*, 255 F.3d 288, 294-95 (6th Cir.) (holding that a temporary visitor may not claim Fourth Amendment protection, particularly where he is “on the premises for the sole purpose of engaging in drug-related business transactions”), *cert. denied*, 534 U.S. 966, 122 S.Ct. 378 (2001).

In summary, as in *Carter*, defendant's situation "is closer to that of one simply permitted on the premises" and the entry and search by police did not therefore violate his Fourth Amendment rights. *Carter*, 525 U.S. at 91, 119 S.Ct. at 474.¹⁰

Defendant nevertheless contends that Allen did not have authority to consent to the search of his backpack. However, under the circumstances of the case, the officers were justified in believing that Allen's consent covered a search of the backpack. This Court "look[s] to how defendants manifest their expectations regarding the object searched to determine their subjective privacy interest." *Kolster*, 869 P.2d at 995. Defendant here manifested no expectation of privacy in the backpack. While it is true that a backpack could belong to any one of the four men in the premises, defendant took no steps to secure it. It was left in a common area of the house (the living room) and was surrounded by contraband, thus reducing any expectation of privacy he may have had in it. See *United States v. Burnett*, 890 F.2d 1233, 1237 (D.C. Cir. 1989) (holding that "[a] visitor's expectation of privacy is particularly tenuous in an apartment's common areas"). Moreover, when the four men were taken outside and Allen was asked to consent to a search, defendant did not assert a right of ownership over anything in the house. See *Kolster*, 869 P.2d at 995 (noting that defendant

¹⁰ Moreover, unlike a co-habitant of a home, a casual visitor may not consent to a search of even the common areas of a home. Cf. *United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 993 (1974). Accordingly, it cannot be said that he has a reasonable expectation of privacy in those premises such that he may assert Fourth Amendment protection.

never asserted an interest in the package).¹¹ Finally, Officer Daniels testified that defendant “originally said that he owned nothing in the backpack and it wasn’t his.” R. 277: 13. It was not until they identified the backpack as belonging to him did he claim ownership. *See* R. 278: .36. Having originally denied ownership, defendant cannot now legitimately claim that he had an expectation of privacy in the backpack. *See State v. Holbert*, 2002 UT App 426, ¶ 47, 61 P.3d 291; *United States v. Garzon*, 119 F.3d 1446, 1449-52 (10th Cir.1997) (holding that defendant abandons any expectation of privacy when he denies ownership of the property).

In sum, because defendant did not have a legitimate expectation of privacy in the premises and things searched, he cannot claim the protection of the Fourth Amendment. This Court should not therefore address his challenges to the trial court’s conclusions regarding the plain view doctrine and Allen’s consent.

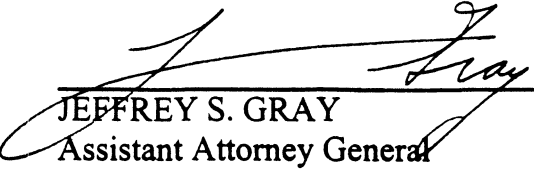
CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant’s convictions.

¹¹ Contrary to defendant’s claim on appeal, it is reasonable to assume that defendant was aware of the request for consent since all four were escorted outside together.

Originally submitted May 9, 2003 and resubmitted July 15, 2003.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL



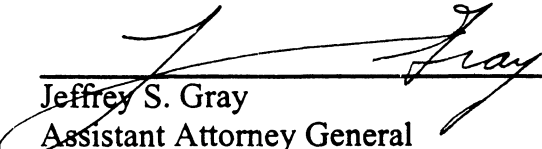
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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2003, I served two copies of the original Brief of Appellee and on July 15, 2003 I served two copies of the corrected Brief of Appellee upon the defendant/appellant, Joshua John Earl, by causing them to be delivered by first class mail to his counsel of record as follows:

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ADDENDUM

FILED DISTRICT COURT
Third Judicial District

MAY 28 2002

SALT LAKE COUNTY

By _____ Deputy Clerk

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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

Screened by: Colleen K. Coebergh
Assigned to: Colleen K. Coebergh

-vs-

JOSHUA JOHN EARL

Defendant.

**ORDER DENYING
DEFENDANT'S MOTION TO
SUPPRESS**

Case No. 011919597

Judge Hon. Sheila McCleve

This matter having come before the Court on the 3rd day of April, 2002, on the Defendant's Motion to Suppress, the State of Utah, appearing by and through its prosecutor, Colleen K. Coebergh, Defendant appearing personally and by and through his counsel, Ralph Dellapiana of the Salt Lake Legal Defenders Association; the Court having heard and considered testimony of witnesses Sheila Gledhill, Dean Brimley, and Scott Daniels, and having received

and considered Defendant's Motion, the State's Response thereto, and the Defendant's Reply, and being fully advised in the premises DENIED Defendant's Motion at hearing April 15th, 2002, for grounds and reasons outlined herein.

FINDINGS OF FACT

- (1) Property owner Sheila Gledhill requested assistance of the police to enter into her property at 34 West 2700 South, an address within South Salt Lake City.
- (2) Ms. Gledhill reported her belief that drug activity was occurring at the residence, and stated her intention to enter to evict her son, Jeremy Allen, but was afraid of other individuals who might be within the apartment, and requested the police go along to ensure her safety.
- (3) Jeremy Allen was the only person whom Sheila Gledhill had authorized to live at the address.
- (4) The Officer followed Sheila Gledhill as she entered the front room after opening the locked front door with her key.
- (5) From the landing just inside the front door, the Officer could see four males.
- (6) At least three of the males were in a kitchen area, presumably where they could have access to knives or other sharp objects.
- (7) Also from the landing area, in an adjacent living room area could be seen drug paraphernalia as well as boxes of pseudoephedrine-based medicine, bottles later determined to be iodine, a red substance visually consistent with red phosphorus.
- (8) Defendant Joshua John Allen was the male sitting closest to the doorway to the livingroom, and as such was closest, within eight to ten feet, to a backpack sitting in the area of the couch.
- (9) Substantially contemporaneously with another Officer's arrival, Officer Dean Brimley summoned the four males toward him for the purpose of identifying them, and removing them from the kitchen for officer safety reasons.

- (10) The males were asked for identification.
- (11) The Defendant indicated he had no proper identification, and stated his name was "Justin Ganon."
- (12) During the pat down of Defendant, a long knife was found concealed under his clothing in the small of his back.
- (13) Another knife was found in his front pants pocket.
- (14) The Officer felt what he believed to be a wallet in Defendant's pocket.
- (15) The Defendant was asked for, and granted permission for Officers to remove the wallet.
- (16) Inside the wallet was identification indicating Defendant's true identity was that of Joshua John Earl.
- (17) Defendant was taken into custody for false information.
- (18) Officers were able to ascertain a backpack near or on the couch was Defendant's.
- (19) Evidence was found in the backpack pertinent to the clandestine laboratory offense charged as well as documents suggesting the pack indeed belonged to Defendant.
- (20) Jeremy Allen signed a written "consent to search" form authorizing the Officer to search 34 West 2700 South.
- (21) The Court finds that Sheila Gledhill granted consent to search the residence.
- (22) Though the Defendant took the stand on April 3rd, 2002, and asserted that he had been living at or staying at the residence overnight, the Court finds that testimony was not credible, and discounts it entirely.

CONCLUSIONS OF LAW

- (1) Though the initial entry by Officer Brimley was "warrantless," he accompanied

the landowner at her request. Therefore, the Court finds that because the landowner had a right to enter the property to inspect it, she could confer upon the Officer, her invitee, the right to enter with her.

- (2) In other words, entry was with consent given by a person authorized to give consent.
- (3) Further, Officer Brimley was justified in believing Ms. Gledhill had authority to grant consent to enter the residence, going with her as he did for her inspection of the property, and in furtherance of her request to “keep the peace” or protect her from unknown dangers during the eviction notice.
- (4) Officer Brimley took reasonable steps to ensure that his entry with the owner was lawful by interviewing Ms. Gledhill before the entry to ascertain her ownership, relationship to the property and the occupants.
- (5) Ms. Gledhill specifically granted consent to the entry and search conducted by the Officers.
- (6) Once inside, from the lawful vantage point Officer Brimley occupied, the items he observed in plain view are admissible pursuant to that doctrine.
- (7) Further, the court specifically finds Mr. Jeremy Allen voluntarily granted consent to search the residence, and as the renter and occupant of the property, he had authority to grant consent to search the residence.
- (8) Joshua John Allen was not a resident, and his consent to search the residence was

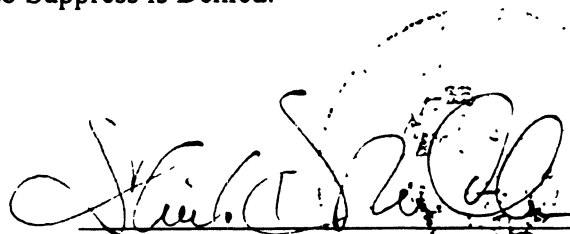
not required.

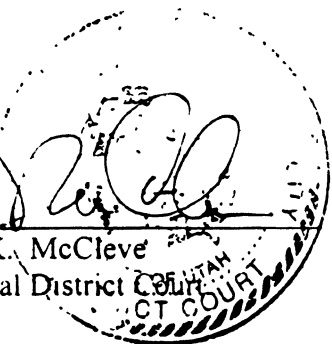
- (9) Further, even if Joshua John Allen was a resident, the search of the residence was of common areas, for which Jeremy Allen was empowered to, and did grant consent.
- (10) The pat down of the person of Defendant which yielded two knives was lawful as a “Terry frisk,” the court being satisfied that such was justified under the circumstances to ensure the Officer’s safety because there were four male suspects and initially one, then two Officers; the proximity of the male suspects to possible weapons; and the Defendant’s offering of what the Officer suspected was a false identity, heightening the Officer’s concern.
- (11) The Defendant voluntarily consented to removal of his wallet. Therefore, evidence of his true identity found therein is admissible.
- (12) The Officer was empowered to arrest Defendant for false personal information pursuant to §77-7-2(1) U.C.A., 1999, which allows arrest of suspects who commit crimes in the presence of the Officer. Therefore the arrest of Defendant was lawful.
- (13) The Court concludes the backpack was within the area of Defendant’s immediate control considering Defendant’s physical proximity to the backpack, the position of the Officer and the Defendant in relation to the area of the backpack, and the number of Officers (one) verses the number of suspects (four).

- (14) The search of the backpack was contemporaneous with Defendant's lawful arrest.
- (15) As such, search of Defendant's backpack was lawful incident to his arrest, and evidence seized pursuant to that search admissible.
- (16) Finally, because the Court finds no illegal search occurred, Defendant's Motion to Suppress Defendant's Statements based on alleged violations of the Fourth Amendment is Denied.
- (17) The Court finds it unnecessary to make any finding regarding whether Ms. Gledhill's actions were in violation of State Statutes on Forcible Entry and Detainer (§78-36-1 U.C.A., et. seq.) concluding that even if such violation occurred, the Statute does not provide a suppression remedy in this criminal context, but rather a civil remedy for those aggrieved.

Accordingly, the Defendant's Motion to Suppress is Denied.

Dated this 28 day of May, 2002.


Honorable Sheila K. McCleve
Judge, Third Judicial District Court



cc:

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