IN THE COURT OF APPEALS FOR THE
FIFTH DISTRICT OF TEXAS AT DALLAS

STATE OF TEXAS,	§	
APPELLANT	§	**No. 05-10-00697-CR**
	§	
V.	§	
	§	
JOHN NAYLOR ANDERSON, JR.	§	
APPELLEE	§	

APPEALED FROM CAUSE NUMBER 002-84117-09 IN COUNTY COURT AT LAW NUMBER SIX OF COLLIN COUNTY, TEXAS, THE HONORABLE DON JARVIS, VISITING JUDGE PRESIDING.

§ § §

APPELLANT'S BRIEF

§ § §

JOHN R. ROACH
Criminal District Attorney
Collin County, Texas

JOHN R. ROLATER, JR.
Assistant Criminal District Attorney
Chief of the Appellate Division

Oral argument is requested

KATHARINE K. DECKER
Assistant Criminal District Attorney
2100 Bloomdale Road, Suite 20004
McKinney, Texas 75071
(972) 548-4323
FAX (972) 548-4324
State Bar No. 05630480

MATTHEW M. ROLSTON
Assistant Criminal District Attorney

IDENTITY OF PARTIES AND COUNSEL

In accordance with the requirements of Texas Rule of Appellate Procedure 38.1, the following listed persons and entities are parties to the order of the trial court from which the State of Texas now appeals:

Trial Court ..... Honorable Don Jarvis
..... Assigned Judge

Appellee ..... John Naylor Anderson, Jr.

Gary L. Redman, II
Trial and Appellate Counsel
Milner, Finn & Price
2828 N. Harwood Street, Suite 1950
Dallas, Texas 75201

Appellant ..... State of Texas

John R. Roach
Collin County Criminal District Attorney

John R. Rolater, Jr.
Assistant Criminal District Attorney
Chief of the Appellate Division

Matthew M. Rolston (trial counsel) and
Katharine K. Decker (appellate counsel)
Assistant Criminal District Attorneys

2100 Bloomdale Road, Suite 20004
McKinney, Texas 75071

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL i

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SOLE ISSUE PRESENTED 2

STATEMENT OF FACTS 3

SUMMARY OF THE STATE'S ARGUMENTS 6

SOLE ISSUE 7

> A defendant cannot challenge the admission of evidence obtained by a governmental intrusion unless he had a legitimate expectation of privacy in the place invaded. Anderson failed to adduce any evidence that he was anything more than a late-night transitory visitor at his friend's duplex with no expectation of privacy. Did the trial court err in nevertheless granting Anderson's motion to suppress the evidence obtained when police entered and searched the duplex?

I. Standard of Review 7

II. Argument and Authorities 8

CONCLUSION AND PRAYER 14

CERTIFICATE OF SERVICE 15

INDEX OF AUTHORITIES

Statutes, Codes, & Rules:

TEX. CONST. ART. I § 9 8

U.S. CONST. amend IV 8

Treatises:

TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 42.25 (2009-2010 Supp.) ... 10

Cases:

Black v. State, 776 S.W.2d 700
(Tex. App.—Dallas 1989, pet. ref'd) 9

Calloway v. State, 743 S.W.2d 645
(Tex. Crim. App. 1998) 8, 9, 11, 12

Carmouche v. State, 10 S .W.3d 323
(Tex. Crim. App. 2000) 7

Granados v. State, 85 S.W.3d 217
(Tex. Crim. App. 2002) 8

Guzman v. State, 955 S.W.2d 85
(Tex. Crim. App. 1997) 7

Johnson v. State, 68 S.W.3d 644
(Tex. Crim. App. 2002) 7

Kothe v. State, 152 S.W.3d 54
(Tex. Crim. App. 2004) 7, 10

Luna v. State, 268 S.W.3d 594
(Tex. Crim. App. 2008) 9

Minnesota v. Carter, 525 U.S. 83
(1998) 9

Richey v. State, No. 06-03-00104-CR, 2003 WL 22957005
(Tex. App.-Texarkana Dec. 17, 2003, no pet.)
(not designated for publication)..... 10

Roberts v. State, Nos. 05-98-01316-CR, 05-98-01317-CR, 05-98-01318-CR, 05-98-01319-CR, 05-98-01320-CR, 05-98-01321-CR, 2000 WL 31809
(Tex. App.—Dallas Jan. 18, 2000, pet. ref'd)
(not designated for publication)..... 11

State v. Calhoun, No. 05-05-01004-CR, 2006 WL 164631
(Tex. App.-Dallas Jan. 24, 2006, no pet.)
(not designated for publication)..... 7, 10

Wilson v. State, No. 04-09-002226-CR, 2010 WL 1905000
(Tex. App.-San Antonio May 12, 2010, no pet.)
(not designated for publication)..... 9

Smith v. Maryland, 442 U.S. 735
(1979)..... 8

Smith v. State, 176 S.W.3d 907
(Tex. App.—Dallas 2005, pet. ref'd) 8, 11, 12

State v. Jenkins, No. 05-09-00028, 2009 WL 3467014
(Tex. App.—Dallas Oct. 29, 2009, pet. ref'd)
(not designated for publication)..... 10

State v. Klima, 934 S.W.2d 109
(Tex. Crim. App. 1996) 10

Taylor v. State, 995 S.W.2d 279
(Tex. App.-Texarkana 1999), *pet. dism'd as improvidently granted,* 55 S.W.3d 584
(Tex. Crim. App. 2001)..... 9

Villarreal v. State, 935 S.W.2d 134
(Tex. Crim. App. 1996) 7, 8, 9, 11, 12

STATEMENT OF THE CASE

John Naylor Anderson, Jr. ("Anderson") was charged by information with the misdemeanor offense of possession of marijuana, two ounces or less. CR 9. He filed a motion to suppress the evidence obtained as a result of the search of the home where the marijuana was found. CR 16. Following a hearing, the trial court granted his motion.[1] CR 18. The trial court made written findings of fact and conclusions of law. CR 33-36. The State filed a timely notice of appeal. CR 25.

[1] Anderson's motion to suppress was consolidated with the motion to suppress filed in a related case against Andrew Leighton Reece. 2 RR 5. The State filed a notice of appeal in the Reece case as well. *See* Appellate Cause Number 05-10-00611-CR. But the State has withdrawn the appeal in the Reece case, and this brief concerns only the Anderson case.

SOLE ISSUE PRESENTED

A defendant cannot challenge the admission of evidence obtained by a governmental intrusion unless he had a legitimate expectation of privacy in the place invaded. Anderson failed to adduce any evidence that he was anything more than a late-night transitory visitor at his friend's duplex with no expectation of privacy. Did the trial court err in nevertheless granting Anderson's motion to suppress the evidence obtained when police entered and searched the duplex?

STATEMENT OF FACTS

Anderson was one of three men and one woman, Beth Chance, who were present in a Frisco duplex on May 2, 2009 when the Frisco police arrived shortly after midnight on a welfare check. 2 RR 8, 11-12, 28-29, 32, 35, 58-59, 65; CR 33-34 (Findings of Fact 9, 11). The police had received a telephone call from one of Beth's friends who reported that Beth had called her crying and asking for help because she was on a date and someone had locked her in a room in the duplex. 2 RR 10, 27, 29-30, 58-59, 64; CR 33 (Findings of Fact 7, 8, 9).

From outside the door to the duplex, police were able to look through a window and see Anderson, the other men—Andrew Reece and Craig Clawson—and Beth in the living room. 2 RR 12-13, 32-35, 65; CR 34 (Finding of Fact 11). When the police knocked on the door and announced their presence, they saw all three men run from the living room. 2 RR 12-13, 16, 33, 46, 60, 61, 66, 68; CR 34 (Finding of Fact 14, finding the men "went to the back of the house"); *but see* 2 RR 74-75 (Clawson's testimony that, after the police knocked, he "walked" upstairs without knowing why).

Beth then opened the door (2 RR 13, 36, 39, 60, 66; CR 34 (Finding of Fact 14)), and the police entered the duplex without a warrant and performed a protective sweep. 2 RR 16-18, 43-44, 53-54, 62, 66, 70; CR 34 (Findings of Fact 16, 19, 22). During the sweep, they found Anderson lying across the bed in one of the upstairs bedrooms, with Clawson in the same room. 2 RR 62-63. The bedroom light was on as the officer walked up the stairs, but it was turned off when he announced he was a police officer. 2 RR 62.

The duplex smelled of freshly burnt marijuana, and there was marijuana on the kitchen counter. 2 RR 14-15, 18-19, 22, 23, 39-40, 54-56, 60-61, 66, 70. Anderson was charged with possessing marijuana. 2 RR 21-22; CR 9.

Anderson filed a motion to suppress the evidence because the police entered the duplex without a warrant. CR 16. Clawson was the only occupant of the duplex who testified at the suppression hearing, and when he described his whereabouts on May 2, he stated that he was "in the living room at Andy Reece's house." 2 RR 74. Similarly, in an argument to the trial court, Anderson's counsel referred to the duplex as "Mr. Reece's residence." 2 RR 72. And the motion to suppress refers to the duplex only as a "home where Defendant was located." CR 16. The address of the duplex was 6757 Cortona Lane in Frisco. 2 RR 8, 11, 58; CR 33 (Finding of Fact 8). And Anderson's address, as listed in the Surety Bond, Arrest Record, Information, and Notice to Appear, was 5740 Lusford in Plano. CR 3, 7, 9, 11.

The trial court granted Anderson's motion to suppress after finding that the police could not smell or see the marijuana until after they entered the duplex. CR 34 (Findings of Fact 17, 18, 20, 21, 24). The court made the following Findings of Fact relevant to this appeal:

> 26. The Court did not hear any credible evidence that showed John Anderson did not reside [at] 6757 Cortona Lane.
>
> 27. No evidence at the hearing indicated that John Anderson was not an overnight guest at the residence on or around May 2, 2009.
>
> 28. John Anderson was sitting in the living room watching tv when the officers arrived.

> 29. When the officers knocked on the door, John Anderson went upstairs to a bedroom.

CR 35. The trial court also made the following Conclusion of Law: "John Anderson was an overnight guest and he had a reasonable expectation of privacy in the residence." CR 35.

SUMMARY OF THE STATE'S ARGUMENT

In order to challenge the police entry into Reece's duplex, Anderson bore the burden of proving that he had a legitimate expectation of privacy in the duplex. But Anderson failed to adduce any evidence that he was anything more than a late-night transitory visitor at his friend's duplex with no expectation of privacy. The trial court therefore erred in granting Anderson's motion to suppress the evidence obtained when police entered and searched the duplex.

SOLE ISSUE

A defendant cannot challenge the admission of evidence obtained by a governmental intrusion unless he had a legitimate expectation of privacy in the place invaded. Anderson failed to adduce any evidence that he was anything more than a late-night transitory visitor at his friend's duplex with no expectation of privacy. Did the trial court err in nevertheless granting Anderson's motion to suppress the evidence obtained when police entered and searched the duplex?

I. Standard of Review

A trial court's ruling on a motion to suppress evidence is reviewed under a bifurcated standard of review. *Carmouche v. State,* 10 S .W.3d 323, 327 (Tex. Crim. App. 2000); *Guzman v. State,* 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). A reviewing court gives almost total deference to the trial court's rulings on (1) questions of historical fact and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. *Johnson v. State,* 68 S.W.3d 644, 652-53 (Tex. Crim. App. 2002). But an appellate court reviews *de novo* a trial court's rulings on mixed questions of law and fact that do not turn on the credibility and demeanor of the witnesses. *Johnson,* 68 S.W.3d at 652-53.

The issue of whether a defendant had a legitimate expectation of privacy that permits him to challenge the admission of evidence obtained by a governmental intrusion is a question of law and is reviewed *de novo. Kothe v. State,* 152 S.W.3d 54, 59 (Tex. Crim. App. 2004); *Villarreal v. State,* 935 S.W.2d 134, 138 n.5 (Tex. Crim. App. 1996)*; State v. Calhoun,* No. 05-05-01004-CR, 2006 WL 164631, at *3 (Tex. App.—Dallas Jan. 24, 2006, no pet.) (not designated for publication).

II. Argument and Authorities

The purpose of both the Fourth Amendment and Article I, § 9 of the Texas Constitution is to safeguard an individual's legitimate expectation of privacy from unreasonable government intrusions. *Villarreal,* 935 S.W.2d at 138 (citation omitted). A defendant can challenge the admission of evidence obtained by a governmental intrusion only if he had a legitimate expectation of privacy in the place invaded. *Villarreal,* 935 S.W.2d at 138; *Smith v. State,* 176 S.W.3d 907, 913 (Tex. App.—Dallas 2005, pet. ref'd). And the defendant bears the burden of proving he had a legitimate expectation of privacy in the place invaded. *Villarreal,* 935 S.W.2d at 138; *Calloway v. State,* 743 S.W.2d 645, 650 (Tex. Crim. App. 1998); *Smith,* 176 S.W.3d. at 913.

To carry his burden, a defendant must show that (1) he had an actual, subjective expectation of privacy in the place invaded, and (2) his expectation of privacy was one that society accepts as reasonable. *Smith v. Maryland,* 442 U.S. 735, 740 (1979); *Villarreal,* 935 S.W.2d at 138. In determining whether the defendant's alleged expectation of privacy is one that society accepts as reasonable, an appellate court considers (1) whether the defendant had a property or possessory interest in the place invaded and (2) whether he was legitimately in the place invaded; (3) whether he had complete dominion or control and the right to exclude others; (4) whether, prior to the intrusion, he took normal precautions customarily taken by those seeking privacy; (5) whether he put the place to some private use; and (6) whether his claim of privacy is consistent with historical notions of privacy. *Granados v. State,* 85 S.W.3d 217, 223 (Tex. Crim. App. 2002); *Villarreal,* 935 S.W.2d at 138. The list is not exhaustive, and

none of the factors is dispositive. *Id.* at 138-39. Rather, courts must examine the circumstances surrounding the search in their totality. *Id.* at 139.

An "overnight guest" has a legitimate expectation to privacy in the place where he spends the night. *Luna v. State,* 268 S.W.3d 594, 603 (Tex. Crim. App. 2008) (citing *Minnesota v. Olson,* 495 U.S. 91, 99 (1990)). However, the legitimate privacy expectation of an overnight guest does not extend to a casual visitor or guest who is merely present with the consent of the homeowner. *Minnesota v. Carter,* 525 U.S. 83, 90 (1998); *see Calloway,* 743 S.W.2d at 650 (holding guest with no possessory or proprietary interest in premises, who had no clothes or other belongings in house, had no legitimate privacy interest in premises); *Black v. State,* 776 S.W.2d 700, 701 (Tex. App.—Dallas 1989, pet. ref'd) (holding evening guest had no valid expectation of privacy in home where he was simply a guest and did not control entrances or exits); *Villarreal,* 935 S.W.2d at 138 (refusing to impute expectation of privacy to invited evening guest who did not provide evidence of property interest in, unrestricted access to, or dominion or control over the residence or evidence of intent to stay overnight).

Moreover, mere presence during nighttime hours does not establish "overnight guest" status. *See Taylor v. State,* 995 S.W.2d 279, 282 (Tex. App.—Texarkana 1999) (concluding appellant was not overnight guest "[a]lthough he was indisputedly there at night"), *pet. dism'd as improvidently granted,* 55 S.W.3d 584 (Tex. Crim. App. 2001); *Wilson v. State*, No. 04-09-002226-CR, 2010 WL 1905000, at *3 (Tex. App.—San Antonio May 12, 2010, no pet.) (not designated for publication) (holding defendant who had asked permission to lie down in bedroom then napped while friends drank and played

games in next room was an invited guest at night but not an "overnight guest," noting he did not demonstrate any proprietary interest in the property, kept no personal items there, and did not provide any evidence of any control over entrances or exits); *Richey v. State,* No. 06-03-00104-CR, 2003 WL 22957005, at *2-3 (Tex. App.—Texarkana Dec. 17, 2003, no pet.) (not designated for publication) (finding defendant was not an "overnight guest" though he had arrived at house at night, stayed eight to twelve hours, and opened door for police, noting the absence of evidence that he had slept, bathed, eaten, or kept personal effects in the house).

The State may assert a defendant's lack of a legitimate expectation of privacy for the first time on appeal.[2] *Kothe,* 152 S.W.3d at 59*; State v. Klima,* 934 S.W.2d 109, 111 (Tex. Crim. App. 1996); *Calhoun,* 2006 WL 164631, at *3. As this Court has noted, a defendant's showing of an expectation of privacy in the premises searched "is so essential to the raising of a Fourth Amendment claim that the State may challenge a

[2] In *Kothe,* the Court of Criminal Appeals noted that, when the State raises the expectation of privacy issue for the first time on appeal, the appellate court may analyze the issue or conclude the State forfeited it. *Kothe,* 152 S.W.3d at 60. But as this Court has recognized, the hearing on the motion to suppress is itself enough to put the trial court on notice that the State contests every element of the defendant's burden of production, including the burden to show a legitimate expectation of privacy. *State v. Jenkins*, No. 05-09-00028, 2009 WL 3467014, at *4 (Tex. App.—Dallas Oct. 29, 2009, pet. ref'd) (not designated for publication) (citing *Klima,* 934 S.W.2d at 112 (Clinton, J., concurring)). In any case, Professors Dix and Dawson have suggested that, in interpreting *Kothe,* the standard ought to focus on whether the defendant is disadvantaged by the State's failure to challenge his expectation of privacy in the trial court. 43A GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 42.25 (2009-2010 Supp.). Here, there is no evidence that Anderson was disadvantaged by the State's failure to challenge his expectation of privacy in the trial court, as there is no suggestion of any latent evidence that would have established his expectation of privacy. Therefore, this Court should not conclude that the State forfeited the issue.

defendant's standing to complain of an illegal search or seizure for the first time on appeal." *Roberts v. State,* Nos. 05-98-01316-CR, 05-98-01317-CR, 05-98-01318-CR, 05-98-01319-CR, 05-98-01320-CR, 05-98-01321-CR, 2000 WL 31809, at *3 n.2 (Tex. App.—Dallas Jan. 18, 2000, pet. ref'd) (not designated for publication).

Here, Anderson failed to meet his burden of showing that he had a legitimate expectation of privacy in the searched duplex. He did not present any evidence that he owned, resided at, or had a possessory interest in the duplex. Indeed, Clawson's description of the duplex as *Reece*'s duplex, Anderson's counsel's reference to *Reece*'s duplex, and all the court documents containing Anderson's Plano address establish that the Frisco duplex belonged to Reece and that Anderson resided elsewhere.[3] 2 RR 72, 74; CR 3, 7, 9, 11. And there was no evidence that Anderson bathed, ate, slept, or kept any clothes or other personal belongings at the duplex to indicate his continuing presence there. The trial court found that Anderson was watching television when police arrived at the duplex (*see* CR 35 (Finding of Fact 28)), but watching late-night television at a friend's house does not imbue a person with possessory rights to that house.

Anderson also failed to present any evidence that he had the ability to control access to the duplex. On the contrary, when the police arrived at the duplex, Anderson did not exhibit any ability to keep Beth from opening the door to them. 2 RR 13, 36, 39, 60, 66; CR 34 (Finding of Fact 14). Further, there is no evidence that Anderson took

[3] The trial court found that it "did not hear any credible evidence that showed John Anderson did not reside" at the Frisco duplex. CR 35 (Finding of Fact 26). But it was not the State's burden to *disprove* Anderson's connection to the duplex; it was Anderson's burden to *prove* a connection. *Villarreal,* 935 S.W.2d at 138; *Calloway,* 743 S.W.2d at 650; *Smith,* 176 S.W.3d at 913.

precautions to guard his privacy while inside the duplex, since the police were able to see him through a window from outside the door. 2 RR 12-13, 32-35, 65; CR 34 (Finding of Fact 11).

Finally, Anderson did not adduce any evidence that he was an overnight guest in Reece's duplex. He did not present any evidence that he intended to stay the night at the duplex or that he brought clothes or other personal items that would normally accompany an overnight stay. The fact that police ultimately found Anderson in an upstairs bedroom does not establish that he was an overnight guest.[4] 2 RR 62-63; CR 35 (Finding of Fact 29). When the police announced their presence at the duplex, Anderson fled the first floor—with its marijuana-smoke–filled living room and marijuana in plain view in the kitchen—and ended up with Clawson in an upstairs bedroom where the men continued in their attempt to evade detection by darkening the room when police again announced their presence while climbing the stairs. 2 RR 12-16, 18-19, 22, 23, 33, 39-40, 46, 54-55, 60-63, 66, 68, 70, 74-75; CR 34 (Findings of Fact 14, 29). His retreat to the bedroom was not the casual act of an overnight guest retiring for the night but the act of someone attempting to avoid an arrest for a drug-related offense.

In sum, Anderson failed to meet his burden of proving that he had a legitimate expectation of privacy in Reece's duplex. He did not adduce any evidence to establish that he was anything more than a late-night transitory visitor at the duplex with no

[4] The trial court found that "[n]o evidence at the hearing indicated that John Anderson was not an overnight guest at the residence." CR 35 (Finding of Fact 27). But again, the court wrongly placed the burden of proof on the State to *disprove* Anderson's expectation of privacy. *Villarreal,* 935 S.W.2d at 138; *Calloway,* 743 S.W.2d at 650; *Smith,* 176 S.W.3d at 913.

expectation of privacy. The trial court erred in granting his motion to suppress, and the trial court's order should be reversed.

CONCLUSION AND PRAYER

The trial court erred in granting Anderson's motion to suppress. The State prays that the decision and order of the trial court be reversed and that the case be remanded to the trial court for further proceedings.

Respectfully submitted,

John R. Roach
Criminal District Attorney
Collin County, Texas

John R. Rolater, Jr.
Assistant Criminal District Attorney
Chief of the Appellate Division

_____
Katharine K. Decker
Assistant Criminal District Attorney
2100 Bloomdale Road, Suite 20004
McKinney, Texas 75071
State Bar No. 05630480
(972) 548-4323
FAX (214) 491-4860

CERTIFICATE OF SERVICE

A true copy of the State's brief has been mailed to counsel for Appellee, Gary L. Redman, II, Milner, Finn & Price, 2828 N. Harwood Street, Suite 1950, Dallas, Texas 75201, on this, the ___ day of July, 2010.

_____

Katharine K. Decker