

**State of Wisconsin
Court of Appeals
District 1
Appeal No. 2013AP000592**

State of Wisconsin,

Plaintiff-Respondent,

v.

Adrian J. Jackson,

Defendant-Appellant.

**On appeal from a judgment of the Milwaukee County
Circuit Court, the Honorable Clare L. Fiorenza, presiding**

Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The first issue presented by this appeal is an issue of first impression in the Wisconsin. Therefore, the appellant recommends both oral argument and publication.

Statement of the Issues

I. Whether the circuit court erred in denying Jackson's motion to compel the state to disclose how the police obtained information that Jackson could be located at the apartment of Nicole Tremaine, where the police thereafter conducted a warrantless search of the apartment for his person.

Answered by the circuit court: No. The circuit judge found that there was no Wisconsin law that requires the state to disclose how the police obtained information that the subject of an arrest warrant (Jackson) could be found at a certain location at a certain time.

II. Whether the circuit court erred in finding that Jackson did not have a legitimate expectation of privacy in Nicole Tremaine's apartment where the evidence established that Jackson was a guest, it was anticipated that he would stay at the apartment for at least several days, and where Tremaine

and Jackson closed and locked the door to the apartment.

Answered by the circuit court: No. The circuit judge found that although Jackson was a guest in the apartment, at the time he was eluding the police and he was possessing cocaine. He had been there for a short time before the police arrived, he was not on the lease, and he was not paying rent. Therefore, Jackson lacked standing to challenge the warrantless search of Tremaine's apartment.

Summary of the Argument

I. The circuit court possesses authority to order the state to disclose how the police knew that Jackson would be at Tremaine's apartment. Jackson filed a motion to suppress evidence on the grounds that the warrantless search of Nicole Tremaine's apartment was unreasonable. As a predicate to that motion, Jackson also filed a motion seeking an order compelling the state to disclose how the police officers knew that Jackson was at Tremaine's apartment. According to Jackson, that information is potentially relevant to Jackson's Fourth Amendment claims.

The circuit court denied that motion under the belief that the court had no legal authority to order what Jackson requested. This is not the case. The circuit court has the authority under Sec. 906.11, Stats., in conjunction with Sec.

901.04(3)(d), to order the state to disclose any potentially relevant evidence so that the court may make relevance determinations. Thus, the circuit court erred in denying Jackson's motion. The error is prejudicial because the sought-after information is relevant to Jackson's motion to suppress evidence. Jackson's motion to suppress evidence was denied because the circuit court found that he had insufficient evidence to establish standing.

II. Jackson had a legitimate expectation of privacy in Tremaine's apartment. The circuit court found that Jackson was a guest in Tremaine's apartment, and it was anticipated that he would be staying there for at least several days. Jackson had a subjective expectation of privacy in the apartment. Nonetheless, the court found that Jackson's expectation of privacy was not legitimate because he was using the apartment to hide from the police and to store drugs. The law, though, does not provide that by engaging in criminal activity within a private residence, one forfeits his Fourth Amendment protections. Rather, the court must consider whether the apartment was being put to a commercial use (as opposed to a private use) Thus, the circuit court erred in finding that Jackson did not have a legitimate expectation of privacy in Tremaine's apartment.

Statement of the Case

I. Procedural History

The defendant-appellant, Adrian J. Jackson (hereinafter “Jackson”), was charged in a criminal complaint with possession of cocaine with intent to deliver. (R:2) Following a preliminary hearing, the court bound Jackson over for trial. The state filed an information¹ alleging possession with intent to deliver cocaine, and Jackson entered a not guilty plea.

Jackson filed a motion seeking an order compelling the state to disclose how the police obtained information that Jackson was at the home of Nicole Tremaine on the date that he was arrested there. (R:6)² The motion alleged that this information was a necessary predicate to a motion to suppress evidence. The circuit court denied Jackson’s motion. (R:51-4) In a nutshell, the circuit judge found that there was no legal authority for the court to order the state to disclose such

¹ The information was later amended to allege an additional count of possession of marijuana with intent to deliver, a second or subsequent offense. Jackson was never convicted of that count, though.

² The motion alleges-- and this will be set forth in more detail in the following section of the brief-- that the police possessed a valid arrest warrant for Jackson; however, they did not possess a search warrant for the home of Nicole Tremaine. Nonetheless, the police went to Tremaine’s home, and they got inside and found Jackson there. The police arrested Jackson, and then they searched the apartment and found the drugs that are at issue in this case. At the time that Jackson was arrested at the home Nicole Tremaine, Tremaine had been residing in the apartment for less than twenty-four hours, and at the time the police arrived, Jackson had been in the apartment for less than an hour. Thus, according to the motion, the police must have illegally used a cellular telephone tracking device to determine Jackson’s location in the apartment.

information.

Thereafter, Jackson filed a motion to suppress the evidence seized from Tremaine's apartment³ during the warrantless search of the apartment following his arrest. (R:5) Jackson alleged in the motion that, as an overnight guest, he had standing to challenge the warrantless search of the apartment.

The court conducted a hearing on the motion, and found that Jackson did not have standing. (R:57-53) Specifically, the judge found that although Jackson was, in fact, a guest; he was eluding the police and he was possessing cocaine. He did not pay rent, and he had been there for a short period. *Ibid* p. 51-52)

The case then proceeded to a jury trial. The court declared a mistrial, though, when the jury was deadlocked. (R:78-132)

Ultimately, Jackson reached a plea agreement with the state. In exchange for a guilty plea to count one (possession of cocaine with intent to deliver), the state agreed to dismiss count two (possession of marijuana with intent to deliver); and the state would recommend twelve years in prison, bifurcated at eight years of initial confinement, and four years of extended supervision. (R:82-6) Jackson pleaded guilty to count one, and the court sentenced him to eight years of initial confinement

³ That is, the cocaine seized during the warrantless arrest of Tremaine's apartment; not any evidence derived from Jackson's arrest on the arrest warrant.

and four years of extended supervision. (R:83-34; R:33)

Jackson filed a notice of intent to pursue postconviction relief, and then he filed notice of appeal. There were no postconviction motions.

II. Factual Background

A. Generally

The Milwaukee police possessed a warrant to arrest Jackson for an incident that is wholly unrelated to this case. By some means, the police developed “information” that Jackson could be located at a certain apartment in Milwaukee. The police went to that apartment, and they learned that it was the apartment of Nicole Tremaine. Without a warrant, the police entered the apartment, found Jackson, and arrested him. After Jackson was in custody, the police searched Tremaine’s apartment and located a quantity of cocaine. This cocaine is the subject of the present case.

B. The motion to compel disclosure

The circuit court did not conduct an evidentiary hearing on Jackson’s motion to compel disclosure of how the police knew that Jackson was at Tremaine’s apartment. Jackson’s motion, though, alleged that on December 9, 2010, the police possessed a warrant for Jackson’s arrest. (R:6) The motion further alleged that, according to testimony at the preliminary

hearing and in the police reports, the officers had “information” that Jackson could be found at the apartment (later determined to be Tremaine’s apartment). Jackson alleged that he had reason to believe that the police went to Tremaine’s apartment because officers had used electronic devices to track and locate the signal emitted by Jackson’s cellular telephone. Jackson alleged that this was a constitutionally protected search because one’s cell phone signal is not readily observable by the public, and the police used the signal to locate Jackson within a private residence (as opposed to tracking his movements on a public roadway).

C. The motion to suppress evidence

Nicole Tremaine moved into apartment number 102 at 2101 W. Atkinson Avenue in Milwaukee on December 9, 2009. (R:57-10) At the time she moved in, she had known Jackson for approximately one month, and she had given him permission to move in with her temporarily. *Id.* According to Tremaine, Jackson did move in on either December 9th or 10th. (R:57-11) They did not tell the landlord, though, that Jackson would be staying there. (R:57-18) When he moved in, he brought clothes and hygiene items. The prior tenant had left a second key at the apartment, and this was the key that Jackson used. *Id.* There was no agreement as to how much, if any, rent that Jackson would pay. (R:57-12) Similarly, it had

not yet been determined which room Jackson would stay in so, while she was out running errands, he had set up some of his things in the back bedroom (R:57-13)

Ultimately, the police arrived at the apartment before Jackson had ever spent the night there. (R:57-21) He had arrived at the apartment in the early afternoon, and he was arrested by the police at 2:30 a.m. (R;57-24)

When the police searched the apartment, they found male clothing in the dresser. (R:57-34) Jackson's wallet was in the bedroom. *Id.* They also found the cocaine that is the subject of this case.

Argument

I. The circuit court erred in denying Jackson's motion to compel the state to disclose how the police knew Jackson was at Tremaine's apartment.

Jackson filed a motion to suppress evidence on the grounds that the warrantless search of Nicole Tremaine's apartment was unreasonable. As a predicate to that motion, Jackson also filed a motion seeking an order compelling the state to disclose how the police officers knew that Jackson was at Tremaine's apartment. According to Jackson, that information is potentially relevant to his Fourth Amendment claims.

The circuit court denied that motion finding that the court had no legal authority to order what Jackson requested. This is not the case, though. The circuit court has the authority under Sec. 906.11, Stats., in conjunction with Sec. 901.04(3)(d), to order the state to disclose prior to trial any potentially relevant evidence so that the court may make relevance determinations. Thus, circuit court erred in denying Jackson's motion. The error is prejudicial because the sought-after information is relevant to Jackson's motion to suppress evidence. Jackson's motion to suppress evidence was denied because he had insufficient evidence to establish standing.

A. Despite Jackson's guilty plea, the issue is preserved for appeal.

Normally, the "voluntary entry of a guilty plea waives the right to raise on appeal any nonjurisdictional issues. *Mack v. State*, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980). The exception, of course, is that despite a guilty plea, a defendant may appeal the denial of a pretrial motion seeking suppression of evidence. Sec. 971.10, Stats.

Here, Jackson filed two motions, the first of which was captioned as a "Motion to Compel Discovery"; however, the language of the motion indicated that it was brought pursuant to the "Fourth and Fourteenth Amendments to the United States Constitution." (R:6) Jackson further alleged that the conduct

of the Milwaukee police may have violated his right against unreasonable searches and seizures. *Id.* The request that the state be compelled to disclose the information as to how the police knew Jackson was at Tremaine's apartment was merely a predicate to the request for suppression.

Jackson's second motion was, in fact, a motion to suppress evidence on the grounds that the police conducted a warrantless search of Tremaine's apartment and discovered the cocaine that is the basis for this case.

Because what is at issue here is a motion to suppress evidence, Jackson's guilty plea did not waive his right to appeal the order denying his motion to compel disclosure of information relevant to the motion to suppress. This was an integral part of the motion.

B. Standard of appellate review

The issue presented by this appeal involves questions of judicial authority, statutory interpretation, and constitutional issues, all of which are reviewed de novo. *State v. McClaren*, 2009 WI 69, P14 (Wis. 2009)

C. The circuit court has the legal authority to issue the order sought by Jackson

The circuit court denied Jackson's motion for disclosure

because the court believed that there was no legal authority to grant the motion. The circuit judge said:

There is not one Wisconsin case that stands for the proposition that the defendant has the right to know the means by which the state obtained evidence against him. That's because that right does not exist in the case law, nor do I find or conclude that it derives from any constitutional principle . . .

(R:51-3). This is not true, though.

Generally, discovery in a criminal case is governed by Sec. 971.23, Stats. The discovery statute requires only that, upon demand, the state is obligated to turn over to the defendant, “Any *relevant* written or recorded statements of a witness named on” the state’s witness list. Sec. 971.23(1)(e), Stats.

Here, the prosecutor argued that the evidence sought by Jackson was irrelevant to any of the issues at the motion hearing (and, by implication, that the state had no obligation to turn this information over to Jackson). Thus, the state argued, the criminal discovery statute does not provide the court with legal authority to grant Jackson’s motion⁴.

There are other statutes, though, that provide the circuit court with authority to make the order requested by Jackson. The circuit court has the authority under Sec. 906.11, Stats⁵, in

⁴ Although the parties did not specifically argue this, preliminary questions of relevance must be determined by the court, not by the party. See, Sec. 901.04, Stats.

⁵ 906.11 Mode and order of interrogation and presentation.

(1) Control by judge. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to do all of the following:

conjunction with Sec. 901.04(3)(d), to order the state to disclose prior to trial any potentially relevant evidence so that admissibility determinations can be made prior to a proceeding. *See, also, McClaren*, 2009 WI 69, P28 (Wis. 2009).

Here, it was the prosecutor-- not the judge-- who made the determination that the information sought by Jackson was not relevant. This is not what the law contemplates.

Moreover, requiring the state to disclose this information is likely to promote effective interrogation of the witnesses to ascertain the truth at the motion hearing, and it will also avoid needless consumption of time. For example, there was no claim here that the information sought by Jackson was confidential or privileged; rather, the state merely argued that it was not relevant. Since the information sought is not privileged, there was nothing to stop Jackson from questioning the officers at the motion hearing concerning how they knew that Jackson was at Tremaine's apartment. Undoubtedly, if

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- (a) Make the interrogation and presentation effective for the ascertainment of the truth.
 - (b) Avoid needless consumption of time.
 - (c) Protect witnesses from harassment or undue embarrassment.
 - (2) Scope of cross-examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.
 - (3) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions should be permitted on cross-examination. In civil cases, a party is entitled to call an adverse party or witness identified with the adverse party and interrogate by leading questions.

such a question were asked, the state would object on the grounds of relevance. If the court overruled the objection, Jackson would be hearing the answer for the first time. If the court sustained the objection, in order to complete the record it would be necessary for the judge to permit Jackson to make an offer of proof as to how the officer would answer the question.⁶

The circuit court, then, does have legal authority to order what Jackson requested. Thus, the circuit court erred in denying Jackson's motion.

D. Prejudicial error

The remaining question is whether the circuit's error in denying Jackson's motion to compel disclosure of the information is prejudicial. The analysis of prejudice is complicated by the fact that Jackson pleaded guilty. Under most appeals from an order denying a motion to suppress evidence, the issue is whether the lower court erred in denying suppression. If so, the matter is remanded with orders to permit the defendant to withdraw his guilty plea, and to enter an order granting the motion to suppress.

Here, though, the question is whether Jackson should have had access to the information he requested, especially since it is a predicate to his motion to suppress. It is important

⁶ This was not done in this case, though.

to remember that the circuit court found that Jackson failed to prove standing. Depending upon what the missing information is, it may also have had a bearing on Jackson's standing to challenge the search of Tremaine's apartment. Thus, at the minimum, the court of appeals should remand this matter with instructions for the trial court to grant Jackson's motion for disclosure. Once the information is disclosed, the parties will be in a position to decide how to proceed.

II. The trial court erred in finding that Jackson lacked standing to challenge the search of Tremaine's apartment.

The circuit court found that Jackson was a guest in Tremaine's apartment, and that he and Tremaine anticipated that he would be staying there for some time. That is, that Jackson had a subjective expectation of privacy. Nonetheless, the court found that Jackson's expectation of privacy was not legitimate because he was using the apartment to hide from the police and to store drugs. The law, though, does not provide that by engaging in criminal activity within a private residence, the person forfeits his Fourth Amendment protections. Thus, the circuit court erred in finding that Jackson did not have a legitimate expectation of privacy in Tremaine's apartment.

A. Standard of appellate review

In reviewing an ordering a motion to suppress, the appellate court must accept findings of historical fact unless they are clearly erroneous. *State v. Trecroci*, 2001 WI App 126, P23, 246 Wis. 2d 261, 630 N.W.2d 555. The application of the constitutional law to those fact, though, is a question of law which the appellate court review de novo. *Id.* While sometimes framed in terms of "standing," the issue before the court in this case is whether "the disputed seizure infringed on an interest ... which the Fourth Amendment and art. I, sec. 11 [of the Wisconsin Constitution] were designed to protect." *State v. Harris*, 206 Wis. 2d 243, 251, 557 N.W.2d 245 (1996). The issue is thus a matter of substantive Fourth Amendment law. *State v. Dixon*, 177 Wis. 2d 461, 467, 501 N.W.2d 442 (1993).

B. A guest who is not involved in exclusively commercial conduct has a legitimate expectation of privacy in the premises.

The United States Supreme Court has provided guidance on the question of when a guest in another's home may claim a reasonable expectation of privacy in the premises. See *Minnesota v. Carter*, 525 U.S. 83, 142 L. Ed. 2d 373, 119

S. Ct. 469 (1998); *Minnesota v. Olson*, 495 U.S. 91, 109 L. Ed. 2d 85, 110 S. Ct. 1684 (1990). The cases point to six factors that must be considered in determining whether, in a given set of circumstances, society is willing to recognize as reasonable a person's subjective expectation of privacy.

These factors are:

1. Whether the person had a property interest in the premises;
2. Whether the person was legitimately on the premises;
3. Whether the person had complete dominion and control and the right to exclude others;
4. Whether the person took precautions customarily taken by those seeking privacy;
5. Whether the person put the property to some private use; and
6. Whether the claim of privacy is consistent with historical notions of privacy.

Trecroci, 2001 WI App 126 at P36.

But when . . . the person challenging the search claims status as a guest on the property, we apply an alternate analysis that examines the evidence in light of the following considerations: (1) whether the guest's use of the premises was for a purely commercial purpose; (2) the duration of the guest's stay; and, perhaps most significantly, (3) the nature of the guest's relationship to the host

State v. Fox, 2008 WI App 136, P19 (Wis. Ct. App. 2008)

C. Jackson had a legitimate expectation of privacy in Tremaine's apartment

The circuit court found that Jackson was a guest in Tremaine's home, and that he had moved in on a temporary basis. (R:57-51) The judge also mentioned several times that Jackson was not paying rent, and that he had no romantic relationship with Tremaine. The court found that Jackson had been in the apartment for only a short period. Finally, the court found that Jackson was attempting to elude the police, and that he was using the apartment to store cocaine. (R:57-52)

When one applies the law to these findings of historical fact, the only conclusion is that Jackson had a legitimate expectation of privacy in Tremaine's apartment. He was there with Tremaine's consent. It was anticipated that he would be staying for at least several days. The only reason the stay was short was because the police happened to arrive at the apartment not long after Jackson did. This coincidence, though, has no bearing on Jackson and Tremaine's expectation that Jackson would be staying at the apartment for some time. Although he was arguably engaged in criminal activity within the apartment by storing drugs there, there was no evidence that he used the premises to sell drugs; that is, there was no evidence Jackson put the premises to any commercial use.

There is no question that Jackson had a subjective expectation of privacy. The circuit court found as a matter of fact that Jackson was hiding from the police in the apartment.

What stronger indication could there be that Jackson wanted to be free from any governmental intrusion? The door to the apartment was closed and locked when the police arrived.

Really, the only question is whether Jackson's subjective expectation of privacy is legitimate. The circuit court thought it was not because, at the time the police arrived, Jackson was attempting to elude the police, and he was storing cocaine in the apartment. This misses the point, though, of the "commercial use" consideration. The cases do not stand for the proposition that someone who engages in criminal activity within a residence thereby automatically forfeits any claim to Fourth Amendment protections, regardless of his relationship to the premises. Adoption of the circuit court's position would mean that even a homeowner could not raise a Fourth Amendment challenge to a warrantless entry of his or her residence if drugs were being stored there. Rather, the "commercial use" consideration is important because such use is inconsistent with the idea of privacy. When one sells drugs out of an apartment, it is expected that persons with no real connection to the premises will be allowed in.

For these reasons, the trial court erred in finding that Jackson did not have a legitimate expectation of privacy in Tremaine's apartment.

Conclusion

It is respectfully requested that the court of appeals reverse the order of the circuit court denying Jackson's motion to compel disclosure of how the police learned that Jackson was at Tremaine's apartment. Additionally, it is requested that the court of appeals reverse the order of the circuit court finding that Jackson did not have standing to challenge the search of Tremaine's apartment; and to remand the matter for a hearing on Jackson's motion to suppress evidence.

Dated at Milwaukee, Wisconsin, this _____ day of July,
2013.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3722 words.

This brief was prepared using *Google Docs* word processing software. The length of the brief was obtained by use of the Word Count function of the software

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this _____ day of July, 2013:

Jeffrey W. Jensen

**State of Wisconsin
Court of Appeals
District 1
Appeal No. 2013AP000592**

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**On appeal from a judgment of the Milwaukee County
Circuit Court, The Honorable Clare L. Fiorenza,
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Defendant-Appellant's Brief and Appendix

- A. Record on Appeal
- B. Excerpt of transcript circuit judge's decision on motion to compel discovery
- C. Excerpt of transcript of circuit judge's decision on standing to challenge the search of Tremaine's apartment

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit

court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of July, 2013.

Jeffrey W. Jensen