

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP592-CR

Cir. Ct. No. 2009CF5753

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ADRIAN J. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Reversed and cause remanded.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Adrian J. Jackson appeals a judgment convicting him after a guilty plea of possession of cocaine with intent to deliver as a party to a crime, second or subsequent offense. Jackson argues: (1) that the circuit court erred in ruling that he did not have standing to bring a suppression motion; and

(2) that the circuit court should have ordered the State to disclose how the police tracked him to the apartment where he was arrested. We conclude that Jackson had standing to bring his suppression motion and that the police must disclose how they tracked Jackson to the apartment if the information is relevant to whether Jackson's rights under the Fourth Amendment were violated. We reverse the judgment of conviction and remand for further proceedings.

¶2 The police arrested Jackson pursuant to a warrant at Nicole Tremain's apartment. Jackson moved the circuit court to compel the State to disclose how the police knew where he was when they arrested him. The circuit court denied the motion, ruling that it had no authority to order the police to turn over the information as part of a discovery request. Jackson then moved to suppress drugs and other evidence the police found in the apartment. The circuit court denied the motion because it concluded that Jackson did not have standing to challenge the search. After a deadlocked jury trial, Jackson pled guilty to one count of possession of cocaine with intent to deliver pursuant to a plea bargain.

¶3 Jackson contends that the circuit court erred in ruling that he did not have standing to bring the suppression motion. A person challenging the reasonableness of a search and seizure under the Fourth Amendment must have standing. *State v. Fox*, 2008 WI App 136, ¶10, 314 Wis. 2d 84, 92, 758 N.W.2d 790, 794. "A person has standing under the Fourth Amendment when he or she 'has a legitimate expectation of privacy in the invaded place.'" *Id.*, 2008 WI App 136, ¶10, 314 Wis. 2d at 92–93, 753 N.W.2d at 794 (citation omitted). A person's expectation of privacy is legitimate if it is "one that society is willing to recognize as reasonable." *State v. Bruski*, 2007 WI 25, ¶23, 299 Wis. 2d 177, 188, 727 N.W.2d 503, 508. Whether a person has standing is a question of law

that we review *de novo*. *Fox*, 2008 WI App 136, ¶8, 314 Wis. 2d at 91, 758 N.W.2d at 794.

¶4 At the suppression hearing, Tremain testified that she gave Jackson permission to stay at her apartment and she gave him a key. She testified that Jackson moved his things into the apartment and he was free to come and go as he liked. Tremain also testified that Jackson had invited a friend to come over to the apartment the day of the arrest when she was not home, and that he had her permission to invite friends over when he liked. Based on this testimony, the circuit court found that Jackson was an overnight guest at Tremain's apartment.

¶5 An overnight guest has a legitimate expectation of privacy in the home where he or she is staying for purposes of the Fourth Amendment. *Minnesota v. Olson*, 495 U.S. 91, 96–97 (1990) (a person's "status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable.") Here, however, the circuit court ruled that Jackson's expectation of privacy was *not* legitimate because he was engaged in illegal activity in the apartment, relying on cases cited by the prosecution, namely, *Fox* and *Minnesota v. Carter*, 525 U.S. 83 (1998). The circuit court's reliance on these cases is misplaced.

¶6 In *Carter*, the United States Supreme Court held that two defendants had no legitimate expectation of privacy in an apartment where they were present solely to conduct a business transaction (packaging drugs), they had no previous relationship with the person who lived in the apartment, and they were there for only a few hours. *Id.*, 525 U.S. at 86, 90. *Carter* is inapposite because the defendants in that case were not overnight guests.

¶7 In *Fox*, the court explained that when a person challenging a search claims status as a guest on the property, whether the person has a legitimate expectation of privacy turns on the duration of the person's stay, the nature of the person's relationship to the host, and on whether the guest is using the premises for purely commercial purposes. *Id.*, 2008 WI App 136, ¶19, 314 Wis. 2d at 96, 758 N.W.2d at 796. The court held that Fox did not have a legitimate expectation of privacy in a trailer home in the woods where the police discovered a methamphetamine lab because Fox's relationship with the host was attenuated—he was a friend of her son—he used the trailer largely, if not exclusively, for the commercial purpose of producing methamphetamine and he spent only brief periods of time there over several days, but never was an overnight guest. *Id.*, 2008 WI App 136, ¶¶21-22, 314 Wis. 2d at 99, 758 N.W.2d at 797.

¶8 In concluding that Jackson did not have a legitimate expectation of privacy because he was engaged in illegal activity at Tremain's apartment, the circuit court read *Fox* too broadly. *Fox* does not stand for the proposition that a guest who engages in illegal commercial activity in a host's residence loses his or her protections under the Fourth Amendment simply because the guest is violating the law. If it did, a guest would never have standing to object to a police search if illegal activity had been taking place in the residence. Moreover, *Fox* is distinguishable from this case on the facts because Fox was not an overnight guest at the trailer and Fox was using the trailer for the sole purpose of conducting a commercial enterprise, producing methamphetamine. As an overnight guest with permission to stay at Tremain's apartment for an unspecified period of time, Jackson had standing to bring the suppression motion. The circuit court's ruling

that Jackson's legitimate expectation of privacy was vitiated by his illegal conduct was an error of law. Therefore, we reverse the judgment of conviction and remand for a new suppression hearing.

¶9 Jackson next contends that the police should be required to disclose how they knew he was inside Tremain's apartment when they came to arrest him. Jackson argues that he has reason to believe that the police used an electronic device to locate the signal emitted by his cell phone in order to track him to the inside of the private residence, which would be a violation of the Fourth Amendment. Jackson filed a pretrial motion to compel the State to disclose how the police knew he was at Tremain's apartment. The circuit court denied the motion on the grounds that Jackson had not shown that he had the right under case law, the statutes or under any constitutional principle to learn *the means by which* the State obtained evidence against him in the context of a motion to compel pretrial discovery. At the suppression hearing, Jackson renewed his request for the information, arguing that the police violated the Fourth Amendment by illegally tracking him to the inside of a residence if they did not have a warrant to do so. The circuit court did not reach the issue because it was focused on the standing question. On remand, however, if Jackson believes that this information is relevant to the motion to suppress, he may renew his request in the context of the motion to suppress. To the extent the information is relevant to the question of whether the police acted properly under the Fourth Amendment, the circuit court has the authority to compel the police to provide the information necessary to address the issues raised by the motion to suppress.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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