STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1249

State of Minnesota,
Respondent,

vs.

Donald Joseph Schlichting,
Appellant.

Filed June 23, 2014
Affirmed
Johnson, Judge

Scott County District Court
File No. 70-CR-11-25718

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Patrick Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota; and

Liz Kramer, Evan C. Berquist, Special Assistant Public Defenders, Stinson Leonard Street LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

Donald Joseph Schlichting was found guilty of a controlled-substance crime based on evidence obtained by law-enforcement officers who entered his hotel room without a warrant and found methamphetamine. Schlichting moved to the suppress the evidence, but the district court denied the motion. We affirm.

FACTS

On November 26, 2011, Agent Dan Aszmann of the Southwest Metro Drug Task Force learned that a confidential reliable informant planned to purchase a pound of methamphetamine from Schlichting at a hotel in the city of Shakopee. The informant indicated that Schlichting owned a .45-caliber handgun and would be traveling with another person and a dog. The informant also identified the name of the hotel where he planned to meet Schlichting and said that Schlichting was staying in room 120. Agent Aszmann checked Schlichting's record and discovered that he had an active arrest warrant for felony third-degree sale of methamphetamine.

Agent Aszmann and two other agents went to the hotel and spoke with an employee at the front desk, who told them that a woman, J.L., had checked into room 120 with a man and a dog. Agent Aszmann showed the employee a photograph of Schlichting, and the employee agreed that Schlichting was the man with J.L. At Agent Aszmann's request, the employee called room 120 and asked Schlichting to come to the lobby to meet a person of the informant's name. After Schlichting entered the lobby, the agents walked up behind him and arrested him on the active warrant. Schlichting

confirmed that he was staying in room 120 and that his girlfriend, J.L., and dog were in the room.

Agent Aszmann took Schlichting back to his hotel room, despite Schlichting's insistence that he be taken to jail immediately. When they reached room 120, Agent Aszmann entered the hotel room, without knocking, using a keycard he found while frisking Schlichting. J.L. met them at the door, and Agent Aszmann told her that Schlichting was under arrest. Agent Aszmann asked Agent Doug Schmidtke to perform a protective sweep of the hotel room. Agent Schmidtke found a glass methamphetamine pipe in plain view on the bathroom counter.

While Agent Schmidtke was performing the protective sweep, Schlichting told J.L. to not cooperate with the agents. An officer from the Shakopee Police Department then removed Schlichting and took him to jail. After the protective sweep, Agent Aszmann talked with J.L. in an effort to obtain her consent to search the hotel room. While Agent Aszmann was talking with J.L., Agent Schmidtke was standing against a wall near a wall-mounted, flat-screen television. Agent Schmidtke observed that a plastic bag had been stuffed between the television and the wall, and he recognized the packaging material as being consistent with methamphetamine packaging that he had seen in the past. The agents removed the bag from behind the television, opened it, and found two smaller bags. One of the smaller bags contained 308.5 grams of methamphetamine; the other contained 30.3 grams of methamphetamine.

The state charged Schlichting with one count of first-degree controlled substance crime, in violation of Minn. Stat. § 152.021, subd. 2(a)(1) (2010). At an omnibus hearing

in September 2012, Agent Aszmann testified that he entered the hotel room because he was concerned that J.L. would destroy evidence if Schlichting did not promptly return. He agreed that "narcotics dealers . . . often have a plan to destroy evidence if a dealer does not return back in a reasonable amount of time," and that if a dealer does not return quickly, the "drugs either leave the room or they go down the toilet." He further testified that, in this case, "the lobby was 50 feet from the room," so J.L. would know "something's up" if Schlichting did not come back "within a minute or two."

In October 2012, Schlichting moved to suppress the evidence found in the hotel room. In November 2012, the district court denied the motion. The district court concluded that the agents' initial warrantless entry into the hotel room was justified by probable cause and exigent circumstances, specifically, the risk of the destruction of evidence. The district court also concluded that Agent Schmidtke observed the bag of methamphetamine in plain view.

In February 2013, the state and Schlichting agreed to a stipulated-evidence court trial pursuant to Minn. R. Crim. P. 26.01, subd. 4. The state amended the complaint to allege one count of second-degree controlled substance crime, in violation of Minn. Stat. § 152.022, subds. 2, 3(b) (2010), and dismissed the original charge of first-degree controlled substance crime. The district court found Schlichting guilty of the amended charge. In April 2013, the district court sentenced Schlichting to 108 months of imprisonment. Schlichting appeals.

D E C I S I O N

Schlichting argues that the district court erred by denying his motion to suppress evidence with respect to the methamphetamine that was found behind the television. He contends that the agents violated his Fourth Amendment rights by entering the hotel room without a warrant.

The Fourth Amendment to the United States Constitution provides:

> 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.

U.S. Const. amend. IV; *see also* Minn. Const. art. I, § 10. A warrantless search of a hotel room is presumptively unreasonable under the Fourth Amendment. *See State v. Hatton*, 389 N.W.2d 229, 232 (Minn. App. 1986), *review denied* (Minn. Aug. 13, 1986). The presumption of unreasonableness may be rebutted only if a warrantless search is justified by an exception to the warrant requirement. *Id.* If a warrantless search is not justified by an exception to the warrant requirement, the evidence obtained in the warrantless search must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 415-16 (1963). The state has the burden to establish that exception to the warrant requirement. *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001). When reviewing a district court's denial of a motion to suppress evidence, this court applies a clearly erroneous standard of review to a district court's factual findings and a *de novo* standard

of review to a district court's legal conclusions. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

A. Standing

In its responsive brief, the state first argues that Schlichting does not have standing to challenge the warrantless entry of the hotel room because he was merely a guest of J.L. and, therefore, did not have a reasonable expectation of privacy in the hotel room. Because standing is a "threshold issue," we begin by considering the state's standing argument. *See Garza v. State*, 632 N.W.2d 633, 637 (Minn. 2001). In the district court, the state challenged Schlichting's standing only in a brief, conclusory manner, in a short footnote in its memorandum of law in opposition to Schlichting's motion to suppress. The district court did not analyze the issue in its order denying the motion. Regardless whether the state fully preserved the argument, the state is permitted by supreme court caselaw to raise the issue as a respondent on appeal. *See State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003) (applying Minn. R. Crim. P. 29.04, subd. 6).[1]

"[T]he Fourth Amendment is a personal right that must be invoked by an individual." *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S. Ct. 469, 473 (1998). To have

[1]At the time of *Grunig*, the rule of criminal procedure on which the supreme court relied stated, "The court may permit a *respondent*, without filing a cross-*appeal*, to defend a decision or judgment on any ground that the law and record permit that would not expand the relief that has been granted to the respondent." Minn. R. Crim. P. 29.04, subd. 6 (2002) (emphasis added); *see also Grunig*, 660 N.W.2d at 136. The text of that rule now reads, "The court may permit a *party*, without filing a cross-*petition*, to defend a decision or judgment on any ground that the law and record permit that would not expand the relief that has been granted to the party." Minn. R. Crim. P. 29.04, subd. 6 (emphasis added). The substitution of the word "petition" for the word "appeal" arguably indicates that the rule now is limited to proceedings in the supreme court. But we will not consider the issue because Schlichting has not challenged the state's invocation of *Grunig*.

standing to assert a Fourth Amendment right, an individual must allege that a search or seizure infringed on his "own legitimate expectation of privacy." *State v. Reynolds*, 578 N.W.2d 762, 764 (Minn. App. 1998). Accordingly, an individual must demonstrate that (1) he or she has a subjective expectation of privacy in the place searched, and (2) his or her expectation of privacy is objectively reasonable. *In re Welfare of B.R.K.*, 658 N.W.2d 565, 571 (Minn. 2003). The individual seeking suppression bears the burden of showing that his or her Fourth Amendment rights were violated. *State v. Robinson*, 458 N.W.2d 421, 423 (Minn. App. 1990), *review denied* (Minn. Sept. 14, 1990).

In this case, the state focuses on the second requirement by contending that Schlichting did not have a reasonable expectation of privacy in the hotel room because he was not a registered guest of the hotel, he was on the premises for only a short period of time, and he intended to use the hotel room for purely commercial purposes. The state relies on only one opinion of a Minnesota court: *State v. Sletten*, 664 N.W.2d 870 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003). In that case, the appellant moved to suppress evidence found during a search of a hotel room, but the district court determined that he lacked standing to challenge the search because he was not a registered occupant of the hotel room, he did not intend to spend the night in the hotel room, the hotel room was rented to a person whom he did not know, he did not have a key to the hotel room, and he was using the hotel room only for the purpose of using and selling drugs. *Id.* at 876-77. This court affirmed. *Id.* at 877-78.

Sletten is readily distinguishable from this case. The hotel room in this case was registered to a person Schlichting knew well. Schlichting accompanied J.L. when she

checked in. Schlichting had a keycard to the hotel room. The record also contains evidence that Schlichting and J.L. had plans that evening to go out to eat, visit a nearby casino, and spend the night at the hotel. In light of the facts in the record of the omnibus hearing, Schlichting was not J.L.'s guest for only part of her stay at the hotel, and Schlichting was not at the hotel solely for commercial purposes. Under the circumstances, Schlichting's expectation of privacy in the hotel room he shared with J.L. was objectively reasonable. Thus, Schlichting has standing to assert a Fourth Amendment challenge to the warrantless entry of the hotel room.

B. Exigent Circumstances

Schlichting argues that the district court erred by concluding that the agents' warrantless entry into the hotel room was supported by exigent circumstances.

Despite the text of the Fourth Amendment, a warrant is unnecessary if "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (alteration in original) (quotation omitted). Courts have recognized a number of exigencies, including "hot pursuit," fire, emergency assistance, and the imminent destruction of evidence. *Missouri v. McNeely*, 133 S. Ct. 1552, 1558-59 (2013). The state has the burden to show the existence of an exigent circumstance. *State v. Robb*, 605 N.W.2d 96, 100 (Minn. 2000). This court applies a *de novo* standard of review to a district court's conclusion that exigent circumstances existed at the time of a warrantless search or entry. *State v. Johnson*, 689 N.W.2d 247, 252 (Minn. App. 2004), *review denied* (Minn. Jan. 20, 2005).

The district court relied primarily on *State v. Alayon*, 459 N.W.2d 325 (Minn. 1990), in concluding that exigent circumstances justified the agents' warrantless entry into the hotel room. In *Alayon*, an undercover officer entered a home without a warrant because he believed that a suspect had just entered the home to purchase cocaine. *Id.* at 327. The officer un-holstered his firearm and impounded the premises due to his concern that persons present in the home would destroy evidence. *Id.* After performing a sweep, the officer requested and received appellant's consent to search the home. *Id.* The supreme court concluded that the warrantless entry was valid because the primary purpose of the protective sweep was to round up persons inside the home who might attempt to destroy evidence while police obtained a search warrant, *id.* at 329, and because the officer had probable cause to believe that there was evidence in the home in imminent danger of destruction, *id.* at 330.

The reasoning of *Alayon* applies to this case. The purpose of the agents' warrantless entry into the hotel room and their protective sweep was to prevent J.L. from destroying evidence while the agents obtained a search warrant. The agents had credible information that Schlichting had methamphetamine in the hotel room that he was intending to sell. Upon being arrested, Schlichting told agents that another person was in the room. The agents' experience led them to believe that methamphetamine was in danger of being destroyed. These facts provided the agents with probable cause to believe that there was evidence in the hotel room in imminent danger of destruction. Our conclusion is consistent with the federal caselaw. *See, e.g.*, *United States v. Palumbo*, 735 F.2d 1095, 1097 (8th Cir. 1984) (holding that warrantless entry of occupied home

justified by exigency because occupants might become suspicious and destroy evidence if arrestee did not return); *United States v. Wentz*, 686 F.2d 653, 657 (8th Cir. 1982) (same).

Thus, the agents' warrantless entry into the hotel room was justified by exigent circumstances.

C. Plain View

Schlichting also argues that the district court erred by concluding that the agents properly seized the methamphetamine behind the television pursuant to the plain-view doctrine.

The plain-view doctrine is an exception to the Fourth Amendment's warrant requirement. *State v. Zimmer*, 642 N.W.2d 753, 755-56 (Minn. App. 2002). Under the plain-view doctrine, law-enforcement officers may, without a warrant, seize an object "as long as three criteria are met: (1) [the] police are legitimately in the position from which they view the object; (2) they have a lawful right of access to the object; and (3) the object's incriminating nature is immediately apparent." *State v. Milton*, 821 N.W.2d 789, 799 (Minn. 2012) (alteration in original) (quotation omitted). The doctrine prevents the suppression of evidence that was discovered without a greater violation of a person's privacy than the law already had authorized. *Zimmer*, 642 N.W.2d at 756.

Schlichting contends that the first and third requirements of the plain-view test are not satisfied. Because we have concluded above that the agents' warrantless entry into the hotel room is supported by exigent circumstances, the first requirement is satisfied. Thus, we need consider only whether the third requirement is satisfied.

To seize an object in plain view, the incriminating nature of the object must be immediately apparent. *Milton*, 821 N.W.2d at 801. The incriminating nature of an object is immediately apparent if law enforcement has probable cause to believe that an item is contraband. *Id.* Probable cause "exists where the facts available to the officer would warrant a [person] of reasonable caution in the belief that certain items may be contraband." *Id.* (alteration in original) (quotation omitted). For example, in *Texas v. Brown*, 460 U.S. 730, 103 S. Ct. 1535 (1983), a police officer conducting an investigatory stop of a vehicle observed inside the vehicle a green balloon that was knotted one-half inch from the top. *Id.* at 733, 103 S. Ct. at 1539 (plurality opinion). The officer then observed several small plastic vials, some white powder, and a bag of open balloons in the glove compartment. *Id.* at 734, 103 S. Ct. at 1539. The officer seized the green balloon, which contained heroin. *Id.* The Supreme Court concluded that the plain-view doctrine justified the officer's seizure of the balloon. *Id.* at 744, 103 S. Ct. at 1544. The opinion of the Court reasoned that the criminal nature of the balloon was immediately apparent, under the probable-cause standard, because the officer testified that narcotics often were packaged in balloons and because the contents of the glove compartment were consistent with "possession of illicit substances." *Id.* at 742-43, 103 S. Ct. at 1543-44.

In this case, the agents had a tip from a reliable informant that Schlichting planned to sell one pound of methamphetamine in the hotel room. The agents also knew that Schlichting had an active warrant for the sale of methamphetamine. The agents already had discovered a pipe that was consistent with the possession and use of controlled

substances. Agent Schmidtke testified that, based on his training and experience, the packaging material behind the television was consistent with methamphetamine packaging that he had seen in the past. This testimony is corroborated by a photograph that the state introduced at the omnibus hearing, which plainly shows a suspicious package stuffed between the television and the wall. In light of these facts, Agent Schmidtke had probable cause to believe that the bag contained methamphetamine. Thus, Agent Schmidtke's seizure of the bag was valid under the plain-view exception to the warrant requirement.

In sum, the district court did not err by denying Schlichting's motion to suppress evidence. The agents' warrantless entry was justified by exigent circumstances, and the seizure of the methamphetamine behind the television was justified by the plain-view doctrine. Because these reasons are a sufficient basis to affirm the district court, we need not consider Schlichting's argument that the district court erred in its application of the inevitable-discovery doctrine or the state's argument that J.L. consented to a search of the hotel room.

Affirmed.