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IN THE COURT OF APPEALS OF INDIANA

MICHELLE DAUB,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 85A02-1003-CR-325
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen III, Judge
Cause No. 85C01-0908-FB-108

December 13, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Michelle Daub ("Daub") has filed an interlocutory appeal challenging the Wabash Circuit Court's denial of her motion to suppress arguing that the search warrant authorizing the search of a residence was not supported by probable cause. Evidence obtained during the search of the residence then led to the search of Daub's vehicle. Concluding that Daub does not have standing to challenge the search of the residence, we affirm the trial court's denial of her motion to suppress.

Facts and Procedural History

On August 7, 2009, Detective George Short of the Wabash City Police Department executed an affidavit for a search warrant, which stated:

> 1. That he has reason to believe that on the premises of Wabash County, Indiana described as follows: . . . Light colored 2 story house with a closed in front porch 947 Cottage Ave Wabash In 46992
> 2. There is being concealed certain property, to wit: heroin
> 3. Which is Controlled Substance/narcotic drug
> 4, The facts tending to establish the foregoing grounds for issuances of a search warrant are based on personal knowledge of the affiant; and
> 5. Affiant has good cause to believe the items above described are at the premises above described for the following reasons:
> The Wabash City [Drug Task Force] was working with a citizen informant who had told them that Nathan Patton is at 947 Cottage Ave. Nathan Patton was talking to Michelle Daub via telephone discussing her driving to Chicago to pick up Heroin and bring it back to 947 Cottage Ave. Michelle Daub arrived in the time frame that it would have taken to go to Chicago and back to Wabash.

Ex. Vol., State's Ex. 4. Detective Short's affidavit was submitted to Wabash Superior Court Judge Christopher Goff, and Judge Goff issued the warrant at 3:12 a.m.

During the search of 947 Cottage Avenue, the executing officers found numerous zip-lock bags with a white powder residue that field tested positive for heroin. The officers also discovered a lock box safe containing plant material residue and paraphernalia. Ex. Vol., State's Ex. 6.

While executing the search warrant, Officer Nick Brubaker, a member of the Wabash County Drug Task Force, had further conversation with the citizen informant, who was present during the search. Based on that conversation, Officer Brubaker applied for a search warrant to search Daub's vehicle, which was described as, "a 1993 black in color Jeep with VIN # 1J4GZ78Y7PC546983, owned by one Michelle L. Daub." The accompanying affidavit stated that Daub's vehicle was located in the driveway at 550 Clark St., Wabash, Indiana. The affidavit also states:

> During a search of 947 Cottage Ave, Sgt. Rebholz spoke with a female informant, who provided earlier information to obtain a search warrant for this residence, in which a suspect powder substance was located and believed at this time to be heroin, this informant was in the residence at the time of the search. During his conversation, the informant stated that the heroin was put in the jeep by Michelle Daub, this jeep is owned by Ms. Daub and is kept at her mothers [sic] residence on Clark Street, the informant described the jeep as black in color. Officer Prater and I went to 550 Clark Street and did observe this jeep. --- See attached affidavit by Captain R. Short, pertaining to first search warrant issued by Judge Goff.

Ex. Vol., State's Ex. 1. Wabash Circuit Court Judge Robert McCallen issued the search warrant at 5:55 a.m. on August 7, 2009.

During the search of Daub's vehicle, the executing officers found "33 small zip-lock bags containing an off-white powder which field tested with a presumptive positive

result for heroin." Ex. Vol., State's Ex. 3. The officers also found a burnt metal spoon and a hypodermic needle.

On August 12, 2009, Daub was charged with Class B felony dealing in a narcotic drug. On February 2, 2010, Daub filed a motion to suppress the evidence seized during the searches of 947 Cottage Avenue and her vehicle. Shortly thereafter, a hearing was held on the motion, and the trial court denied Daub's motion on February 9, 2010. Daub then filed a motion to certify the interlocutory order, which the trial court granted. On April 30, 2010, our court granted Daub's motion to accept jurisdiction of the interlocutory appeal.

Discussion and Decision

Daub argues that the trial court abused its discretion when it denied her motion to suppress. We review the trial court's denial of a motion to suppress evidence for an abuse of discretion. Montgomery v. State, 904 N.E.2d 374, 377 (Ind. Ct. App. 2009), trans. denied. A trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances before it. Id. In conducting our review, we do not reweigh the evidence, and we consider conflicting evidence in a light most favorable to the trial court's ruling. Webster v. State, 908 N.E.2d 289, 291 (Ind. Ct. App. 2009), trans. denied. However, we also consider uncontested evidence favorable to the defendant. Id.

Initially, we observe that a defendant may not challenge a search as unreasonable unless he or she has standing to do so. Willis v. State, 780 N.E.2d 423, 427 (Ind. Ct. App. 2002). The State is required to raise a defendant's lack of standing to the trial court

to preserve the issue for appeal. Id. In this case, the State argues that Daub does not have standing to challenge the first search, i.e. the search at 947 Cottage Avenue. Daub claims that the State has waived the issue on appeal.

At the hearing on the motion to suppress, the State argued, "I'm not really sure how the wall comes down on this standing issue as to [] that first search warrant. I mean the warrant is to somebody else's residence, it's not her house, it's not her [] you know building or anything like that. There may be a standing issue there –I don't know." Tr. pp. 41-42. Daub's counsel then responded to the State's standing argument. Tr. p. 43. The State's argument, while somewhat equivocal, is sufficient to preserve the standing issue for appeal.

Accordingly, we observe that

> Fourth Amendment rights are personal and may not be vicariously asserted. A defendant "aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by the search of a third person's premises has not had any of his Fourth Amendment rights infringed." "[I]n order to challenge a search as unconstitutional, a defendant must have a legitimate expectation of privacy in that which is searched." In reviewing whether a privacy expectation exists under a Fourth Amendment analysis, [the reviewing court] also looks to whether the defendant has control over or ownership in the premises searched. The burden is on the defendant challenging the constitutional validity of a search to demonstrate that he had a legitimate expectation in the premises searched.

Allen v. State, 893 N.E.2d 1092, 1096 (Ind. Ct. App. 2008) (quoting Peterson v. State, 674 N.E.2d 528, 534 (Ind. 1996) (internal citations omitted)).

In this case, Daub neither owned nor resided at the residence located at 947 Cottage Avenue. And there is simply no evidence in the record that would lead us to conclude that Daub had a legitimate expectation of privacy in the residence at 947 Cottage Avenue. Therefore, Daub cannot argue that her Fourth Amendment rights were violated when the officers executed the search warrant for the 947 Cottage Avenue residence.[1]

We now turn our attention to the search warrant authorizing the search of Daub's vehicle. The citizen whose information had served as the grounds for the search warrant for 947 Cottage Avenue was present while that warrant was executed. At that time, Officer Nick Brubaker, a member of the Wabash County Drug Task Force, had further conversation with the informant. Based on that conversation, Officer Brubaker applied for a search warrant to search Daub's vehicle, which was described as "a 1993 black in color Jeep with VIN # 1J4GZ78Y7PC546983, owned by one Michelle L. Daub." Appellant's App. p. 21.

The accompanying affidavit stated that Daub's vehicle was located in the driveway at 550 Clark St., Wabash, Indiana, and the officer had reason to believe that

[1] "'The Indiana Constitution provides protection for claimed possessions irrespective of the defendant's interest in the place where the possession was found.'" Allen, 893 N.E.2d at 1097 (quoting Campos v. State, 885 N.E.2d 590, 598 (Ind. 2008). Cases interpreting our state constitution place significant focus on both the premises searched *and* the defendant's interest in the property seized. Peterson, 674 N.E.2d at 534. Daub has not raised an Article I, Section 11 claim in this appeal, and although that constitutional provision was referenced in her motion to suppress, she did not make any separate argument. Therefore, we need not address whether Daub had standing to challenge the search under the Indiana Constitution. But we do observe that Daub does not claim any particular interest in the property seized during the search of 947 Cottage Avenue, and therefore, Daub cannot also challenge the search under the Indiana Constitution. See Allen, 893 N.E.2d at 1097 ("[A] review of our jurisprudence does not demonstrate much of a difference, if any, in result when a defendant's interest in seized property is not at issue.")

heroin and evidence of heroin dealing were concealed in Daub's vehicle. The affidavit also states:

> During a search of 947 Cottage Ave, Sgt. Rebholz spoke with a female informant, who provided earlier information to obtain a search warrant for this residence, in which a suspect powder substance was located and believed at this time to be heroin, this informant was in the residence at the time of the search. During his conversation, the informant stated that the heroin was put in the jeep by Michelle Daub, this jeep is owned by Ms. Daub and is kept at her mothers [sic] residence on Clark Street, the informant described the jeep as black in color. Officer Prater and I went to 550 Clark Street and did observe this jeep. --- See attached affidavit by Captain R. Short, pertaining to first search warrant issued by Judge Goff.

Ex. Vol., State's Ex. 1.

Daub argues only that the search warrant authorizing the search of her vehicle was not supported by probable cause because "[w]ithout the information derived in the first, and unlawful[] search [of 947 Cottage Avenue], there would be not [sic] basis for a probable cause finding in [Officer Brubaker's] affidavit." Appellant's Br. at. 9. But, as we concluded above, Daub does not have standing to challenge the first search at 947 Cottage Avenue. And it was not improper for the investigating officers and the issuing magistrate to rely on the evidence seized during the search of 947 Cottage Avenue to support a finding of probable cause to issue the second warrant to search Daub's vehicle. Daub does not independently challenge whether there was probable cause to support the warrant authorizing a search of her vehicle. We therefore conclude that the trial court did not abuse its discretion when it denied Daub's motion to suppress.

Affirmed.

BAKER, C.J., and NAJAM, J., concur.