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# IN THE
# COURT OF APPEALS OF INDIANA

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| NATASHA R. LAFAVE, | ) | |
| | ) | |
| Appellant- Defendant, | ) | |
| | ) | |
| vs. | ) | No. 16A01-1006-CR-271 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee- Plaintiff, | ) | |

APPEAL FROM THE DECATUR SUPERIOR COURT
The Honorable Matthew D. Bailey, Judge
Cause No. 16D01-1001-CM-015

**December 28, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary

Natasha Lafave ("Lafave") challenges her conviction for Illegal Possession of Alcoholic Beverages (Consuming), as a Class C Misdemeanor.[1]

We reverse and remand for further proceedings.

## Issue

Lafave presents two issues for our review, which we consolidate and restate as whether the trial court abused its discretion when it admitted evidence obtained from a warrantless entry into a home in which Lafave was a guest because:

A. She had a legitimate expectation of privacy as an overnight guest in the home; and

B. The circumstances failed to meet any of the exceptions to the warrant requirement for entry into a residence?

## Facts and Procedural History[2]

Shortly before midnight on January 8, 2010, Greensburg Police Officers Michael Hancock ("Officer Hancock") and Justin Wells ("Officer Wells") responded to a call regarding loud music from a residence rented by Michelle Lee ("Lee") and Shea Whitaker ("Whitaker"). Officer Wells's presence was specifically requested by the caller because Officer Wells owns the residence and rented it to Lee and Whitaker. Because of

[1] Ind. Code § 7.1-5-7-7(a).

[2] We heard oral argument at Rushville Consolidated High School on October 25, 2010. We thank Rushville Consolidated High School and the Rush County Bar Association for their hospitality, and we thank counsel for coming to Rushville and for their able advocacy.

Officer Wells's relationship to the property and the tenants, the shift supervisor determined that Officer Hancock would be the primary officer responding to the call.

Officer Hancock approached the house from the front as Officer Wells approached from the rear. When Officer Hancock knocked on the door, the music was turned down, and Lee answered and admitted that she had been drinking, though she was under the age of twenty-one. Officer Hancock noticed alcohol on Lee's breath. As Lee went to retrieve and provide Officer Hancock with identification, she left the door to the house open. Officer Hancock saw beer bottles and cans on a ping-pong table and a number of individuals who seemed to be under twenty-one playing a drinking game. As he was about to enter the house, someone other than Lee shut and locked the door. Officer Hancock then went to the back of the house.

In the meantime, Officer Wells had opened and stepped just inside a gate in the three- or four-foot high chain-link fence to the rear of the house to ensure no one ran out the back door. Three men came out the back door and into the back yard. When Officer Wells instructed them to stop, they ran back inside the house. Officer Wells then radioed to Officer Hancock that he was chasing the three men back into the house, and, finding the back door open, entered the house and found one man hiding behind a water heater. Soon after, Officer Hancock entered the house through the back door.

Officer Hancock made a sweep through the house, eventually assembling about twelve individuals in the living room. A few individuals were either older than twenty-one or were younger but had not been drinking; these were released. Among the eight individuals younger than twenty-one who had been drinking was Lafave. After bringing

Lafave and the others into the living room, Officer Hancock began administering portable breath tests to those at the scene when a party-goer escaped the house. After giving chase, Officer Hancock returned to find Lafave attempting to escape through a window and ordered her back inside.

Upon returning to the living room, Officer Hancock could not find Lafave; he later discovered her in a closet speaking with her attorney on a cell phone. On advice of counsel, Lafave refused a breath test on the scene, though she later consented while at the Decatur County Jail in order to avoid being placed in the "drunk tank."

On January 11, 2010, Lafave was charged with Illegal Possession of Alcoholic Beverages, specifically for consumption of alcoholic beverages while under the age of twenty-one, as a Class C Misdemeanor.[3]

On March 8, 2010, the trial court conducted a hearing on Lafave's motion to suppress evidence on the ground that Officer Wells improperly entered the residence without a warrant. On March 24, 2010, the trial court denied Lafave's motion.

On May 17, 2010, a bench trial was held. The parties agreed that the testimony offered at the hearing on the motion to suppress would constitute the entirety of the evidence for the trial. Lafave renewed her objection to the court's denial of the motion to suppress, and the court overruled the objection. The court then found Lafave guilty of the charged offense and sentenced her to sixty days imprisonment suspended to unsupervised probation.

This appeal followed.

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[3] See Ind. Code § 7.1-5-7-7(2).

## Discussion and Decision

### I. Standard of Review[4]

Because Lafave moved to suppress Officers Hancock's and Wells's testimony and renewed her objection at trial, which the trial court rejected in each instance, we review the trial court's admission of this evidence for an abuse of discretion. Packer v. State, 800 N.E.2d 574, 578 (Ind. Ct. App. 2003), trans. denied. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Id. We do not reweigh the evidence, and we consider conflicting evidence in the light most favorable to the trial court's ruling. Williams v. State, 891 N.E.2d 621, 629 (Ind. Ct. App. 2008). We may also consider any uncontested evidence that favors Lafave. Id.

Lafave challenges her conviction on the ground that the officers' testimony regarding her possession of alcoholic beverages should have been excluded by the trial court because that evidence was obtained upon a warrantless entry into a residence in which Lafave had a reasonable expectation of privacy. Thus Lafave's ability to challenge the police officers' warrantless entry of Lee's residence and the evidence derived therefrom depends upon a determination of whether she had a reasonable expectation of privacy under the Fourth Amendment.[5]

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[4] We remind counsel for Lafave that our appellate rules require appellants to identify the applicable standard of review for issues presented to this court. Ind. Appellate Rule 46(A)(8)(b).

[5] LaFave expresses this by claiming she has "standing to sue." (Appellant's Br. 6) Setting aside the question of standing "to sue," the Supreme Court held in Rakas v. Illinois that the analysis at issue is not one of "standing," 439 U.S. 128, 139-40 (1978), but rather of Fourth Amendment protections which arise in part from a source "outside of the Fourth Amendment." Id. at 143 n. 12.

Lafave claims that her status as an overnight guest entitles her to such protection. "[T]he Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967). Fourth Amendment rights arise wherever the individual has a legitimate expectation of privacy, that is, a subjective expectation of privacy, as manifested through the individual's actions, which expectation society recognizes as reasonable. Id. at 361. The burden of proof for establishing a reasonable expectation of privacy lies with the defendant claiming it. Peterson v. State, 674 N.E.2d 528, 532 (Ind. 1996), cert. denied, 522 U.S. 1078 (1998). Once this occurs, the burden then shifts to the State to demonstrate the existence of exigent circumstances that entitle the State to engage in warrantless entry, search, arrest, or seizure. McDermott v. State, 877 N.E.2d 467, 474 (Ind. Ct. App. 2007), trans. denied.

II. Whether Lafave had a Reasonable Expectation of Privacy as an Overnight Guest

The Supreme Court has held in a line of cases that "in some circumstances a person may have a legitimate expectation of privacy in the house of someone else." Minnesota v. Carter, 525 U.S. 83, 89 (1998). See, e.g., Minnesota v. Olson, 495 U.S. 91, 96 (1990) (holding that "status as an overnight guest is enough" to support a reasonable expectation of privacy); Jones v. United States, 362 U.S. 257, 259 (1960) (holding the defendant to be an overnight guest when in an apartment when a friend "had given him the use of it, and a key, with which [he] admitted himself on the day of the arrest…. He had a suit and shirt at the apartment" and he "had slept there 'maybe a night'"), overruled on other grounds, United States v. Salvucci, 448 U.S. 83 (1980). In reaching its holding in Olson, the Court noted that "an overnight guest has a legitimate expectation of privacy in his host's home" in recognition of "the every day expectations of privacy that we all

share," because the "overnight guest … seeks shelter in another's home precisely because it provides him with privacy." Olson, 495 U.S. at 98-99.

At the same time, mere presence at another's home with permission is not enough to entitle an individual to Fourth Amendment protections against warrantless entry. Carter, 525 U.S. at 90. Where another's residence is merely a "place of business" for a defendant, there is no reasonable expectation of privacy that derives from presence at another's home if one is "simply permitted on the premises" as anything other than a social or overnight guest. Id. at 90.

The United States Supreme Court has offered no other guidance on whether someone is an overnight guest. For example, it is not clear whether a visitor is an overnight guest only after having remained at a location the prior night or whether a visitor may be an overnight guest even before having gone to sleep.

Indiana case law has focused on the difference between casual and overnight guests, extending little or no protection to casual guests. Whether a defendant is a casual or overnight guest has frequently depended upon the nature of the relationship between defendant and host, the frequency with which the defendant has stayed overnight at the host's residence, the extent of control the defendant could expect to exert over the premises, and the length of time the defendant had been present on the premises before the law enforcement action claimed to have violated the defendant's Fourth Amendment rights.

We addressed several of these factors in Hanna v. State, 726 N.E.2d 384 (Ind. Ct. App. 2000). Hanna was an overnight guest of Hunt, and the two had been friends with

one another for five years. Id. at 387. Hanna had "stayed overnight … over twenty times within the few months before" the arrest. Id. at 388 n.4. The arresting officer was responding to a loud music complaint at Hunt's apartment and, attempting to investigate, knocked "forcefully" on the apartment door, eventually breaking trim around the door and the door's security chain. Seeing no one, he entered the apartment and reached the bedroom, where he discovered Hunt and Hanna with cocaine. Hanna sought to suppress the evidence obtained by the search, which the trial court denied. Id. at 387. We reversed the trial court, noting in part that Hanna, as an overnight guest in Hunt's apartment who was arrested during a warrantless entry unsupported by probable cause, had a reasonable expectation of privacy. Id. at 388 n.4.[6]

Frequency of stay and control over some aspect of the home also played a role in Harless v. State, 577 N.E.2d 245 (Ind. Ct. App. 1991). In that case, we noted that the defendant "stayed overnight at his girlfriend's home fairly often, and paid several of the household utility bills." Id. at 248. We noted that "the facts in this case are stronger than those that the [Olson] Court found dispositive," where the defendant in Olson had merely been allowed to sleep overnight in his relatives' home. Id. (citing Olson, supra).[7]

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[6] In Hanna, the State did not claim that the officers had probable cause on the basis of the municipal noise ordinance but rather on the basis of the state disorderly conduct statute. Hanna, 726 N.E.2d at 388-89. Because the condition triggering the statute—that the defendant had been asked to cease causing the disturbance—was not met, there could be no probable cause related to that offense, which went uncharged by the State. Id. at 389 n. 5.

[7] Our decisions in Hanna and Harless contrast with our decision in Livermore v. State, 777 N.E.2d 1154 (Ind. Ct. App. 2002). Livermore was arrested after a traffic stop. Id. at 1156-57. After his arrest, Livermore offered to show the police the location of some of the chemicals he used for methamphetamine production, including containers in his girlfriend's home. Id. at 1157. Livermore later sought to challenge the admission of the evidence obtained from the home, arguing that he had an expectation of privacy in his girlfriend's home. We held that because Livermore was not living in the home and there was no evidence regarding how often he stayed at the home or whether he had recently been an overnight guest, Livermore was not entitled to Fourth Amendment protections in his girlfriend's home. Id.

Here, Lafave asserts that she was an overnight guest. The State argues otherwise, stating that Lafave was "only a guest at an underage drinking party," (Appellee's Br. 4) and thus lacked any Fourth Amendment protections unless she maintained a degree of control over the premises, even if she had been an overnight guest on prior occasions.

We hold that Lafave was an overnight guest. The evidence most favorable to the trial court's decision indicates that Lafave's residence was in Shelbyville, she had only been a guest a few times before, had been at Lee's home for three hours, and was in a house full of people. Yet Lafave's uncontested testimony at the hearing on her motion to suppress was that she had been invited to stay the night and had brought a change of clothes with that purpose in mind. Moreover, Lafave and the other partygoers were arrested around midnight and were already, in some sense, present overnight. There is no testimony or other evidence disputing Lafave's status as an overnight guest, and we may take this into account in deciding whether Lafave was an overnight guest entitled to Fourth Amendment protection at Lee's residence. See Williams, 891 N.E.2d at 629.

We recognize that this is a close case and that these decisions are inherently fact-sensitive. Here, however, there is uncontested evidence that Lafave had stayed over with Lee and Whitaker before and that Lafave had planned, and her hosts intended, that Lafave stay overnight and not merely be present for a party. This is enough to establish her status as an overnight guest.

III. Whether Exigent Circumstances Existed Justifying Warrantless Entry

Because Lafave was an overnight guest, she was entitled to a reasonable expectation of privacy in Lee's home as if it were her own. Police were therefore

required to obtain a warrant before entering the residence or have some basis for a warrantless entry. Katz, 389 U.S. at 357.

Included within the scope of a residence for purposes of the Fourth Amendment is its curtilage, an area outside the residential structure itself that is "physically and psychologically linked to the intimacy of the home." Trimble v. State, 842 N.E.2d 798, 802 (Ind. 2006) (citing California v. Ciraolo, 476 U.S. 207, 213 (1986)). Whether a particular portion of a residential lot is within its curtilage "is defined on a case-by-case basis by reference to factors that determine whether a person's expectation of privacy in the area adjacent to the home is reasonable and analysis whether the area embraces the intimacy associated with the sanctity of the home and privacies of life." Holder v. State, 847 N.E.2d 930, 936 (Ind. 2006) (citing, inter alia, Oliver v. United States, 466 U.S. 170, 180 (1984)). The scope of permissible observation into the curtilage of a home includes those "things or activities within a residence that may be observed by persons using their natural senses from places impliedly open to a visitor's entry." Divello v. State, 782 N.E.2d 433, 437 (Ind. Ct. App. 2003) (citations omitted), trans. denied. These are "places that other visitors would be expected to go, such as walkways, driveways, or porches."[8] Id.

Here, Officers Hancock and Wells had responded to a noise complaint. Evidence in the form of Lee's admission to having engaged in underage drinking, the smell of

[8] Our supreme court in Trimble noted that items or activities "knowingly exposed to the public" within the curtilage of a home are not protected. Trimble, 842 N.E.2d at 802 (citing Katz, 389 U.S. at 351, and Ciraolo, 476 U.S. at 213). In that case, however, the item exposed—a dog in a doghouse—was within a few feet of a driveway and was not within a fenced area.

alcohol on her breath, and various alcoholic beverage containers visible to Officer Hancock all established probable cause to believe that underage drinking was ongoing.

While Officer Hancock was knocking on the door, Officer Wells entered the backyard of Lee's house through a gate in the fence. At this point, absent some knowledge that Lee or others were engaged in underage drinking, Officer Wells had probable cause related to a possible noise violation but not for underage drinking. He testified that he could hear the music several houses away as he was walking toward Lee's house upon his arrival. But there is nothing in the record to suggest that the gate was ordinarily used by visitors to the home or that any established path ran to the fence; that is, there is nothing to indicate that opening and walking through the gate to the back yard was going someplace "that other visitors would be expected to go, such as walkways, driveways, or porches." Divello, 782 N.E.2d 437. Thus Officer Wells's entry into the backyard was entry into the curtilage of the home.[9]

Though Officers Hancock and Wells had probable cause to believe a crime was being committed, probable cause is not enough. Absent permission from the residents to enter, either a warrant or exigent circumstances were required for the Officers to enter the home. Because Officer Wells entered the backyard without a warrant, and because the area of the backyard he entered was within the curtilage of the home and not visible from other publicly accessible areas of the home, Officer Wells's entry was impermissible under the Fourth Amendment absent exigent circumstances justifying warrantless entry.

[9] Neither Lafave nor the State claim that Officer Wells's status as owner and landlord of the home has a bearing on this issue.

Among the recognized exigent circumstances permitting warrantless entry are "risk of bodily harm or death, aiding a person in need of assistance, protecting private property, [and] actual or imminent destruction or removal of evidence before a search warrant may be obtained." Cudworth v. State, 818 N.E.2d 133, 137 (Ind. Ct. App. 2004), trans. denied. The Indiana Supreme Court held that a warrant is not necessary when "a suspect is fleeing or likely to take flight … to avoid arrest" or "in cases that involve hot pursuit or movable vehicles." Snellgrove v. State, 569 N.E.2d 337, 340 (Ind. 1991) (citing Pawloski v. State, 269 Ind. 350, 355, 380 N.E.2d 1230, 1233 (1978)). The "burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." Welsh v. Wisconsin, 466 U.S. 740, 750 (1984).

Welsh notes that, in evaluating the circumstances of a warrantless entry, "the lower courts have looked to the nature of the underlying offense as an important factor to be considered in the exigent circumstances calculus." Id. at 751 (citing with approval the "leading federal case," Dorman v. United States, 435 F.2d 385, 392 (1970)). This court has engaged in this balancing in several cases addressing claimed exigent circumstances stemming from a need to preserve Blood Alcohol Content ("BAC")-related evidence. In State v. Straub, we held that "the threat of 'metabolic destruction of evidence' of a suspect's intoxication" could constitute exigent circumstances justifying a warrantless entry. 749 N.E.2d 593, 600 (Ind. Ct. App. 2001) (quoting Zimmerman v. State, 469 N.E.2d 11, 17 (Ind. Ct. App. 1984)) (reversing a trial court's suppression of evidence in a drunk driving case). We have also held that the need to preserve such evidence alone

without more (e.g., hot pursuit) is not necessarily sufficient. Sapen v. State, 869 N.E.2d 1273, 1277 (Ind. Ct. App. 2007), trans. denied.

Thus, the balancing required in evaluating the justification for warrantless entry into a home must take into account whether "public interest … demands greater flexibility than is offered by the warrant requirement" in light of what is known to law enforcement at the time of the entry. Alspach v. State, 755 N.E.2d 209, 212 (Ind. Ct. App. 2001) (finding exigent circumstances with a trail of blood leading into and screams coming from an apartment where no evidence of any violent crime was discovered after warrantless entry), trans. denied.

Officer Hancock and Wells did not testify that they were concerned with any possible flight of the partygoers before approaching the house. With the premises contained, the officers could have obtained a warrant without further risk of flight. The three partygoers who attempted to escape ran back into the house immediately upon Officer Wells confronting them. There is no testimony from Officer Wells that he would have been unable to see the three flee the home through the waist-high chain-link fence surrounding the back yard if he had not entered the curtilage. Moreover, while Lafave's BAC (and the BACs of the other partygoers) might have decreased over time, it is unlikely it would have decreased to nothing. Moreover, Officer Hancock's observations and the large number of alcoholic beverage containers that the partygoers could not have disposed of easily counter any claim that there was an exigent circumstance in the form of a need to preserve evidence.

Unlike Straub or Alspach, the circumstances as they existed at the time Wells entered the backyard—a house with loud, potentially underage drinkers who did not pose a risk of flight or loss of evidence because they had not yet been confronted by law enforcement officers—did not constitute an exigency sufficient to set aside the requirement that the officers obtain a warrant before entering the home. This is particularly so when taken in light of the relatively minor severity of the offense of underage drinking.[10] Cf. Alspach, 755 N.E.2d at 212. Indeed, Officer Wells testified that he could hear the loud music that led to their presence at Lee's home from several houses away—he had no need, given the subject of the probable cause for his presence at the home, to enter the curtilage to make any search at all.

Had Officer Wells not opened the gate or otherwise entered the curtilage and from a position outside the curtilage seen the three individuals attempting to flee the house, we might have arrived at a different conclusion. See Divello, 782 N.E.2d at 437. Given the nature of the underlying offense as known to the officers relative to any possible public interest in a warrantless entry, we cannot agree with the trial court's decision that no Fourth Amendment violation occurred. Under these circumstances, there was time and ability to obtain a warrant to enter the residence and the exclusionary rule operates to exclude evidence related to Lafave's arrest derived from the officers' warrantless entry into Lee's home.

[10] We do not wish to minimize the risks in underage drinking. We point out the lack of severity of the offense as a counterweight on the balance to any supposed need to enter the home without waiting for a search warrant.

## Conclusion

Lafave was entitled to the Fourth Amendment's protection from warrantless entry into Lee's home because she was an overnight guest in the home and therefore had a reasonable expectation of privacy therein. Because the nature of the offense did not give rise to a possible public necessity in making a warrantless entry, exigent circumstances did not exist to permit the officers to enter the home without a warrant.

Reversed and remanded.

BAKER, C.J., and BAILEY, J., concur.