

State of Minnesota
Stearns County

District Court
Seventh Judicial District

Court File Number: 73-CR-08-12985

Case Type: Crim/Traf Mandatory

Notice of Filing of Order

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State of Minnesota vs S [REDACTED] A [REDACTED] S [REDACTED]

You are notified that an Order & Memorandum was filed on this date.

Dated: May 12, 2009

sms
Court Administrator
Stearns County District Court
725 Courthouse Square Room 134
St. Cloud MN 56303
320-656-3620

cc: M [REDACTED] A [REDACTED] S [REDACTED]

STATE OF MINNESOTA
COUNTY OF STEARNS

IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

Court File Nos.: 73-CR-08-12985
73-CR-08-12892
73-CR-08-12888

vs.

S [REDACTED] A S [REDACTED],
[REDACTED]
[REDACTED],

ORDER

Defendants.

The above matters came before the undersigned Judge of District Court for a contested omnibus hearing on the 26th day of February, 2009, at the Stearns County Courthouse, St. Cloud, Minnesota. Assistant City Attorney [REDACTED] appeared on behalf of Plaintiff, State of Minnesota. Attorney Ryan P. Garry appeared on behalf of Defendant, S [REDACTED] A [REDACTED] S [REDACTED], attorney [REDACTED] appeared on behalf of Defendant, [REDACTED], and attorney [REDACTED] appeared on behalf of Defendant, [REDACTED].

These cases are consolidated in order to facilitate an efficient resolution of common questions of fact and law relating to a search warrant which was issued on September 5, 2008. The issue before the Court is whether certain facts offered in support of the search warrant application were obtained in violation of *State v. Carter*, 569 N.W.2d 169 (Minn. 1997) rev'd on other grounds, *Minn. v. Carter*, 525 U.S. 83, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998)). Specifically, Defendants seek an order striking the following sentences from the search warrant affidavit:

Your affiant looked through an open window on the south side of the house. Your affiant observed in plain view a large amoun <sic> of cans and glass bottles that

were partially full and empty containing beer and other various types of alcohol. Specific brands including Bud Light and Coors Light beer.

Additionally, Defendants move to suppress evidence obtained in connection with the execution of the search warrant and dismiss the charges for lack of probable cause. The Court has considered the testimony, exhibits and the post-hearing briefs submitted by the parties.

Now, based upon evidence presented, the argument of counsel and upon all the files, records, and proceedings, the Court makes the following:

ORDER

1. Defendant's motion to strike language from the search warrant application and supporting affidavit is **GRANTED**.
2. The charges of Failure to Leave a Loud Party in files 73-CR-08-12892 (Larson) and 73-CR-08-12985 (Schleicher) are **DISMISSED** for lack of probable cause.
3. The evidence of Underage Consumption in files 73-CR-08-12892 (Larson), 73-CR-08-12985 (Schleicher) and 73-CR-08-12888 (Bernens) is suppressed as having been obtained as a direct result of the illegal search and those charges are **DISMISSED**.
4. The motions to dismiss the balance of the charges are **DENIED**, pending further hearing and argument regarding the motions to suppress and dismiss.
5. The attached memorandum is incorporated by reference.

Dated this 11th day of May, 2009.

Fh
[Redacted]
Judge of District Court

FILED 5/10/09
Stearns County
District Court
By: Sue S.
Deputy

MEMORANDUM

I. Facts

During the early morning hours on September 5, 2008, St. Cloud Police Officer A [Redacted] S [Redacted] was working undercover on proactive patrol in the neighborhood of St. Cloud State University in the city of St. Cloud, Minnesota. While standing at the intersection of 8th Avenue and 6th Street South, Officer S [Redacted] heard loud, shouting voices coming from a group of about fifteen to twenty individuals standing on the front lawn of a residence at 517 8th Avenue South. Some of these individuals were drinking and they appeared to be in their "late teens to early twenties." The officer did not identify any particular member of the group as being in apparent violation of the underage drinking law.

Officer S [Redacted] reasonably concluded that the city noise ordinance was being violated. He notified his partner and called for the assistance of other peace officers as he approached the residence. The residence is a white, two-story house with an attached garage on the north side. The front door faces east. Adjacent to the south side of the house is a wooden fence and a row of bushes between the fence and the residence. As the officers approached approximately half of the group on the front lawn walked or ran from the scene; the others went inside the residence. The front door was shut, window shades were pulled down, lights were turned out and whatever noise was emanating from the residence ceased. It was apparent that the people inside the residence were taking precautions to keep their activities private and did not want anyone looking in the windows. They refused to answer the door and ignored attempts by the officers to

get their attention by knocking on windows. At some point law enforcement announced, via loud speakers, that the gathering was unlawful and ordered all persons, other than the tenants, to leave. No one left the residence.

Shortly after arriving on the scene, Officer S [REDACTED] and his partner Officer B [REDACTED] walked around the north side of the residence by the garage in order to reach the back of the residence. His continued attempts to make contact with the occupants were unsuccessful. Officer S [REDACTED] eventually made his way to the south side of the residence where he found an unobstructed window into the living room area of the residence. The officer stood two to three feet from the window for approximately one minute. He peered inside for fifteen to thirty seconds and saw people and an assortment of alcohol containers on tables. When the occupants saw the officer looking in the window someone made a derogatory comment about him and proceeded to close the blinds. At this point, despite the abatement of the loud party and the lack of any particularized suspicion of an underage drinking violation, Officer S [REDACTED] decided to seek a search warrant.

The application states that the search warrant was sought in connection with the investigation of a violation of the St. Cloud noise ordinance, Section 1050:05, Subdivision 16. However, the property to be seized (alcoholic beverages, cooling equipment and "contraband"¹) did not relate to the noise violation. The application included the following information:

"Your affiant observed the people who went inside to appear underage, ranging in age from approximately 18 to 22 years of age... Your affiant attempted to make contact by knocking on the front door and announcing my presence several times, and no one responded. Your affiant looked through an open window on the south

¹ Neither the evidence presented at the hearing nor the warrant application offered any specific, factual basis for the belief that "contraband" was on the premises.

side of the house. Your affiant observed in plain view a large amount <sic> of cans and glass bottles that were partially full and empty containing beer and other various types of alcohol. Specific brands including Bud Light and Coors Light beer..."

The warrant was approved and the ensuing search resulted in the charges against the above named Defendants.

II. Legal Analysis

The State has stipulated that the Defendants, as guests on the premises subject to the search, have standing to challenge the search and seek suppression of the evidence obtained. A person claiming Fourth Amendment protection must have a "legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421 (1978). To establish a legitimate or reasonable expectation of privacy, a defendant must show that he exhibited an actual (subjective) expectation of privacy and that the expectation is one that society is prepared to recognize as reasonable or legitimate. *Minnesota v. Carter*, 525 U.S. 83, 119 S.Ct. 469 (1998).

The occupants of the dwelling in this case clearly exhibited an actual expectation of privacy. It was obvious to Officer S██████ that the occupants were not willing to answer the door and, by pulling shades and turning off lights, expected that the activities taking place within the home would remain private. This expectation of privacy, the right to be free from the gaze of a trespasser standing by a side yard window in the wee hours of the morning, is a societal norm and is recognized as such by the criminal code. Minn. Stat. 609.746 Subd. 1.

The fact that some of the offending behavior prompting police intervention occurred in plain view in the front yard of the residence does not render the expectation of privacy within the

home unreasonable. The location of the officer at the time of the viewing and the precise manner in which the vantage point was achieved clearly establish an intrusion upon the occupants' expectation of privacy. *State v. Carter*, 569 N.W.2d 169, 177 (Minn. 1997). A search occurs when law enforcement uses extraordinary measures to view the interior of a private structure. *Id.* There was no exigency justifying the warrantless visual search of the home through the south side window. *State v. Elam*, 2009 WL 234136 (Minn. App. 2009).

Prior to the unlawful visual search of the premises through the south window the police were dealing with an apparent noise ordinance violation. The violation ceased shortly after the officers arrived on the scene and before the occupants were ordered to leave the residence. As the Ordinance is written, the occupants did not have a duty to disperse since the directive to do so may only be given when "the violation *is* occurring." St. Cloud City Ordinance Section 1050, Subd. 16 (c)². Therefore, the charges against Defendants ██████ and S ██████ for failing to leave a loud party are dismissed. There is probable cause to proceed with the noise ordinance charge against Defendant ██████, based upon his participation in the gathering rather than his failure to leave, and the evidence of that violation was arguably obtained independently of the unlawful search.

While law enforcement had reason to suspect underage consumption of alcohol, there was no individualized suspicion of guilt as to any of the occupants or defendants prior to execution of the warrant. Some of the occupants appeared to be of legal age; none of those who appeared to be under the age of 21 were observed to be in possession of alcohol or under the

² Section 16 of the Ordinance is consistent in its use of the present tense. "(a) No person will . . . participate in any party . . . from which noise emanates . . . No person will knowingly remain at such a noisy party or gathering. (c) Duty to Disperse. When a police officer determines that a party . . . is in violation of this section, the officer may order all persons present at the premises where the violation is occurring . . . to disperse immediately. No person will knowingly remain at such a party or gathering." Even if an ordinance could constitutionally compel guests to leave a gathering where noise had been a problem in the recent past, as a preemptive response to a renewed disturbance, this one does not do so.

influence until the search was underway. The evidence of underage consumption was obtained as a direct result of the unlawful search. The exclusionary rule thus prevents the introduction of evidence of the underage consumption and the charges must therefore be dismissed. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407 (1963); *Haase v. Commissioner*, 679 N.W.2d 743,747 (Minn. App. 2004).

Under Minnesota law, there is a right to resist an unjustified bodily attack (i.e. excessive force) by an officer, but there is no right to resist an unlawful search or arrest. *State v. Kutchara*, 350 N.W.2d 924,927 (Minn. 1984); *State v. Wick*, 331 N.W.2d 769, 771 (Minn. 1983). The standard for determining whether to suppress evidence obtained as a result of an illegal search is not a 'but for' test. Instead, the question is "whether, granting establishment of the primary illegality, the evidence . . . has been come at by the exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407 (1963). The fact that the search was not supported by probable cause did not grant license to Defendant's S [REDACTED] or [REDACTED] to engage in disorderly conduct or obstruction of legal process. Those defendants were solely responsible for their own behavior after the officers entered the premises, thus the purging the evidence of their disorderly and obstructive conduct from the original taint.

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