

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD BERNARD JACKSON,

Defendant-Appellant.

UNPUBLISHED

March 15, 2007

No. 265957

Kent Circuit Court

LC Nos. 05-000770-FH;

05-000514-FH

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver 50 to 449 grams of cocaine, MCL 333.7401(2)(a)(iii), and maintaining a drug house, MCL 333.7405(1)(d). The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to three to forty years' imprisonment for possession with intent to deliver less than 50 grams of cocaine, eleven to forty years' imprisonment for possession with intent to deliver 50 to 449 grams of cocaine, and two to four years' imprisonment for maintaining a drug house. We affirm.

On November 4, 2004, police officers executed a search of a Burke Avenue apartment. Drugs were found and defendant was later arrested and searched. Police found a key to the Burke Avenue apartment and another key as well. During the search, they obtained information that defendant had a York Creek apartment, which was leased to a person named Robert Hendrickson. Later, Hendrickson reported that he and defendant planned to live as roommates in the York Creek apartment. Hendrickson had signed the lease, but defendant paid the rent. Defendant had the only key. Hendrickson had not yet moved into the apartment, believed it was empty, and gave the police written consent to search it.

On the morning of November 5, 2004, detectives confirmed that Hendrickson leased a York Creek apartment on Alpenhorn Drive, and that his was the only name on the lease. They subsequently entered the apartment using one of the keys they had found in defendant's possession. In one of the bedrooms, inside a closet, the detectives found a duffle bag secured with a padlock. The bag contained over 300 grams of cocaine and drug packaging paraphernalia.

On appeal, defendant argues that the trial court abused its discretion when it denied defendant's motion for new trial, which asserted that trial counsel rendered ineffective assistance of counsel in regard to his motion to suppress the evidence seized from the Alpenhorn apartment. We review a trial court's decision to deny a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). The abuse of discretion standard acknowledges that there are circumstances in which there is no one correct outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Id.* The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's factual findings for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and prejudiced him to the extent that it denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Further, defendant must show that there is a reasonable probability that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id.* at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id.*

In order to evaluate defense counsel's performance, we must analyze the admissibility of the challenged evidence. Defendant first argues that the trial court erred when it stated that he lacked standing to challenge the search of the Alpenhorn apartment. We agree. The defendant bears the burden of establishing standing. *People v Lombardo*, 216 Mich App 500, 505; 549 NW2d 596 (1996). The test is whether the defendant had a reasonable expectation of privacy in the object or area searched. *People v Smith*, 420 Mich 1, 21; 360 NW2d 841 (1984). The expectation must have been actual and subjective and recognized by society as reasonable. *Id.* at 27. Whether the expectation exists depends on all the circumstances surrounding the alleged intrusion. *Id.* at 27-28.

Here, defendant was not named on the apartment's lease, he received mail at a different address, there is no evidence that he spent significant time in the apartment, and he denied any connection to the apartment after his arrest. However, the trial court believed Hendrickson's testimony that defendant paid the rent for the apartment and that both he and defendant intended to reside in the apartment. Moreover, defendant possessed the only key to the apartment and the police found the door locked. Evidence that defendant secured the apartment and that he stored personal items, drugs, and drug paraphernalia there, supports that he believed the premises were safe from public intrusion. Based on the totality of the circumstances, we find that defendant had a reasonable expectation of privacy in the Alpenhorn apartment. *Id.*

In reaching our conclusion, we reject the argument that defendant abandoned the apartment by denying any connection to it after his arrest. See *People v Paul Taylor*, 253 Mich App 399, 406; 655 NW2d 291 (2002). Defendant's prior actions indicated that he did not intend to abandon the apartment. He kept the key and had possessions there. Clearly, he disavowed connection to the apartment only to avoid incriminating himself. See *United States v Perea*, 848 F Supp 1101, 1103 (ED NY, 1994), quoting 4 LaFave, Search and Seizure (2d ed 1987) §

11.3(f), p 343. Moreover, we consider a variety of factors, not a single statement made to avoid self-incrimination, to determine whether a defendant has abandoned real property. See *Paul Taylor, supra* at 407.

Defendant additionally argues that Hendrickson lacked authority to consent to the search of the Alpenhorn apartment. Valid consent is a recognized exception to the warrant requirement. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999). The validity of the consent depends on the totality of the circumstances, *id.*, and the plaintiff bears the burden of proving that the person consenting did so freely and voluntarily, *People v Farrow*, 461 Mich 202, 208; 600 NW2d 634 (1999). A third party may consent to the search when he or she does so voluntarily and possesses common authority over the premises. *People v Goforth*, 222 Mich App 306, 311; 564 NW2d 526 (1997).

Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent . . . rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched. [*Id.* at 311-312.]

In this case, Hendrickson possessed more than a mere property interest in the premises. As the trial court indicated, this situation involved two intended roommates: “one whose name was on the lease, and one who paid the rent.” Hendrickson, whose name was on the lease, intended to move into the apartment within one week and could have obtained a key from the apartment manager without difficulty. Based on this evidence, we find that Hendrickson and defendant shared joint access to and control over the apartment. *Id.* Defendant assumed the risk that Hendrickson might permit it to be searched, *id.*, and Hendrickson had authority to authorize the search.

Defendant additionally argues that Hendrickson lacked common authority over the bedroom and duffle bag, and he could not consent to a search of those. In making his argument, defendant claims that the detectives should have assumed that the bedroom and bag belonged to defendant. We disagree. The detectives received information that the apartment was empty, not that defendant lived there or had property there. Further, it appeared that none of the rooms were reserved for defendant’s private or exclusive use. Therefore, Hendrickson had common authority over all of the rooms in the apartment at the time he consented to the search, and it was reasonable for the detectives to believe that he also possessed authority over all of the containers on the premises. *Goforth, supra* at 311-312.

Because the evidence seized from the Alpenhorn apartment was admissible at trial, we cannot conclude that defense counsel’s performance was ineffective. Although the challenged evidence was fatal to defendant’s case, he cannot establish that defense counsel’s performance was outcome determinative. *Henry, supra* at 145-146. As the trial court indicated, even if defense counsel had presented a timely and elaborate argument on this issue, the challenged evidence would still have been admissible at trial. Therefore, because defendant failed to overcome the presumption of effective assistance of counsel, we find that the trial court did not abuse its discretion in denying his motion for new trial.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Helene N. White

/s/ Stephen L. Borrello