

IN THE SUPREME COURT OF THE STATE OF NEVADA

DERRICK ANTHONY ARMSTRONG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57741

FILED

SEP 13 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angersal*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an amended judgment of conviction, pursuant to a jury verdict, of two counts of trafficking in a controlled substance and one count of felon in possession of a firearm. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellant Derrick Anthony Armstrong's sole challenge on appeal is that the district court erroneously denied a motion to suppress evidence seized during a search of his residence.¹ Specifically, he argues that the district court erred in concluding that a third party, Heather Hardiman, had actual or apparent authority to consent to police officers' entry and search of his apartment. We "review[] the lawfulness of a search de novo because such a review requires consideration of both factual circumstances and legal issues," but in doing so, we give deference

¹Armstrong appealed his original judgment of conviction, challenging the district court's denial of the suppression motion. This court reversed and remanded the matter for the district court to conduct an evidentiary hearing. See Armstrong v. State, Docket No. 50615 (Order of Reversal and Remand, July 31, 2009).

to the district court's findings of fact during a suppression hearing. McMorran v. State, 118 Nev. 379, 383, 46 P.3d 81, 84 (2002); see also U.S. v. Almeida-Perez, 549 F.3d 1162, 1170 (8th Cir. 2008) (explaining that whether third party had common authority is question of fact reviewed for clear error but that reasonableness of officer's reliance on indicia of common authority presents question of law subject to de novo review).

The Fourth Amendment generally precludes the police from entering a person's home without a warrant. Georgia v. Randolph, 547 U.S. 103, 109 (2006). Consent exempts a search from the warrant requirement of the Fourth Amendment. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). As this court has recognized, it is the State's burden to prove consent. Howe v. State, 112 Nev. 458, 463, 916 P.2d 153, 157 (1996).

The police may enter and search a defendant's house with the voluntary consent of the defendant or a third party who has actual authority over the area to be searched. Randolph, 547 U.S. at 109; United States v. Matlock, 415 U.S. 164, 170 (1974). "Actual authority is proved (1) where defendant and a third party have mutual use of and joint access to or control over the property at issue, or (2) where defendant assumes the risk that the third party might consent to a search of the property." State v. Taylor, 114 Nev. 1071, 1079, 968 P.2d 315, 321 (1998). Actual authority does not require the third party to have an ownership interest in the property or the owner's presence at the time of the search. Id. But even when the police make a mistake of fact as to a third party's actual authority, a search is not unlawful if the police reasonably believed that the third party had actual authority—that is, the third party had apparent authority. Illinois v. Rodriguez, 497 U.S. 177, 184-86 (1990).

The reasonableness of an officer's belief that a third-party has common authority is viewed under an objective standard. Id.

The following evidence was developed at the hearing. As of December 4, 2006, Hardiman and Armstrong had been dating for approximately two years. That night, they got into an argument, and the police responded. Before being arrested and transported to jail, Armstrong denied knowing Hardiman. Hardiman explained to police officers that she lived with Armstrong and wanted to retrieve her belongings from the studio apartment because she was ending her relationship with him. Because she did not have a key to the apartment, police officers contacted the manager, who informed them that they could not use a key to access the apartment because Hardiman's name was not on the lease. Subsequently, a maintenance worker told Hardiman how to access the apartment through a window. At some point, before entering the apartment, Hardiman had informed police officers that Armstrong kept drugs and a gun in the apartment. Also before entering, a police officer spoke to a neighbor, who stated that Hardiman lived in the apartment and that he had seen her entering and exiting the apartment. The manager and maintenance worker had also informed the police that they had seen her around the apartment complex, and the maintenance worker related that he had observed her entering and exiting the apartment.²

²The apartment manager provided conflicting testimony as to whether she had authorized Hardiman's entry into the apartment and whether she believed that Hardiman lived there.

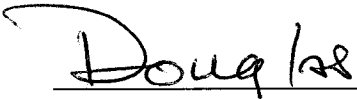
Once inside, Hardiman immediately opened the door to police officers, and she showed them her personal items, such as clothing kept behind the bed and toiletries located in a bathroom. Subsequently, Hardiman signed a consent-to-search card, after which she informed police officers that the drugs were located in a kitchen cabinet. A police officer opened the cabinet and found what appeared to be drugs. The search ceased, and a search warrant was secured.


The district court concluded that police officers acted reasonably under the totality of the circumstances based on the following evidence: (1) Hardiman's statements that she lived in the apartment; (2) her and Armstrong's presence in the apartment late at night; (3) Armstrong's statement that he did not know her, which quickly proved to be untrue; (4) statements from the manager, maintenance worker, and neighbor indicating that Hardiman lived in the apartment or that they had seen her entering and exiting the apartment; and (5) the presence of Hardiman's clothing and other personal items in the apartment. The district court noted that after Hardiman voluntarily showed the officers the location of the drugs, she signed a consent form and police officers secured a search warrant. Concluding that the police officers' testimony was believable and that they had acted properly, the district court denied the motion to suppress the evidence collected from the search of the apartment.

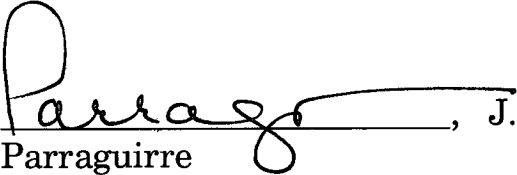
We conclude that the evidence supports a conclusion that Hardiman had actual authority to consent to a search. However, even if police officers mistakenly believed that she had actual authority, their belief was reasonable given her statements that she resided in the apartment, other testimony indicating that she lived in the apartment,

and the presence of her clothing and other personal items in the apartment. Because the district court did not err by denying Armstrong's motion to suppress, we

ORDER the amended judgment of conviction AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Chief Judge, Eighth Judicial District Court
Brent D. Percival
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk