

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREW ROBERT ALLEN LASTINE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Mar 13 2018 04:01 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

No. 73239

**Appeal from a Judgment of Conviction in CR16-0718
The Second Judicial District Court of the State of Nevada
Honorable Patrick Flanagan, District Judge**

APPELLANT'S REPLY BRIEF

JEREMY T. BOSLER
Washoe County Public Defender
Nevada State Bar No. 4925
JOHN REESE PETTY
Chief Deputy Public Defender
Nevada State Bar No. 10
350 South Center Street, 5th Floor
P.O. Box 11130
Reno, Nevada 89520-0027
(775) 337-4827

Attorneys for Appellant

TABLE OF CONTENTS

TABLES OF CONTENTS	i.
TABLE OF AUTHORITIES	ii.
ARGUMENT IN REPLY	2
The district court erred in concluding that Mr. Lastine's uncle could consent to a search of Mr. Lastine's bedroom	2
CONCLUSION	6
CERTIFICATE OF COMPLIANCE	6
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

CASES

Chapman v. United States, 365 U.S. 610 (1961)	4
Illinois v. Rodriguez, 497 U.S. 177 (1990)	2
State v. Taylor, 114 Nev. 1071, 968 P.2d 315 (1998)	3, 4, 5
United States v. Elliott, 50 F.3d 180 (2nd Cir. 1995)	3
United States v. Matlock, 415 U.S. 164 (1974)	2

ARGUMENT IN REPLY

The district court erred in concluding that Mr. Lastine's uncle could consent to a search of Mr. Lastine's bedroom.

A third-party can consent to a search to the detriment of another's privacy interest if the third party has actual or apparent authority over the place to be searched. *United States v. Matlock*, 415 U.S. 164, 170 (1974); *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). The penultimate issue in this appeal is whether Mr. Lastine's uncle had the authority to consent to a search of his nephew's bedroom.¹ In that regard the salient facts are:

- Mr. Lastine paid his uncle rent for the use of the bedroom, and he kept small appliances in the room (1JA 37, 58-59);

¹ According to Deputy Francisco Gamboa, when he and another deputy came to Mr. Lastine's bedroom door "[i]t was closed except for maybe approximately an inch." And so he looked inside and saw Mr. Lastine "hiding under a blanket on the bed." 1JA 66-67. It does not appear however, that the district court credited this as a basis for the warrantless entry into Mr. Lastine's bedroom. See 1JA 124 (district court concluding only that "[b]ased on the information obtained by the officers, they sought consent to enter the home and speak with the defendant, who ultimately refused to cooperate. The officers made a decision to place the defendant under arrest based on the existence of probable cause and the defendant's refusal to cooperate. Therefore, the Court finds there was probable cause to support a warrantless arrest.") (Paragraph spacing omitted). The district court did not address the warrantless entry into the bedroom.

- Mr. Lastine’s uncle considered the bedroom to be Mr. Lastine’s “space” (and would knock on the door to enter) (1JA 37);
- The deputies never inquired of Mr. Lastine’s uncle regarding the living arrangements in the house (1JA 44) (“Q. Did they ask you if Andrew rented space from you? A. No.” (Paragraph spacing omitted)); and,
- The bedroom (“back room”) door is always closed (1JA 46).

In order for a third-party to have *actual* authority to consent to a search, the third-party and the defendant must have “mutual use of and joint access to or control over the property at issue, or ... where the 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) (citation omitted). The facts here make two things clear, first, that Mr. Lastine rented the bedroom from his uncle, and second, that Mr. Lastine’s uncle treated the bedroom as Mr. Lastine’s private “space,” and would not enter the bedroom without knocking. This “landlord-tenant” relationship forecloses the notion of “mutual use of ... and control over the property at issue.” See *United States v. Elliott*, 50 F.3d 180, 186 (2nd Cir. 1995) (“In general, a landlord does not have

common authority over an apartment or other dwelling unit leased to a tenant.”) (citing *Chapman v. United States*, 365 U.S. 610, 616-18 (1961)).² Nor do the facts establish that Mr. Lastine assumed any risk that his uncle would consent to a search of his private bedroom. Indeed, if these facts create an assumption of risk that a landlord might consent to a search of a private room or dwelling, then every tenant occupying a house, a hotel or motel room, or any other dwelling place would likewise automatically assume such “risk.” But that is not the law.³

Whether a third-party has the *apparent* authority to consent to a search is judged against an objective standard: “would the facts available to the officer at that moment warrant a person of reasonable caution to believe that the consenting party had authority over the property.” *State v. Taylor*, 114 Nev. at 1080, 968 P.2d at 322 (citation omitted). This entails a three-part analysis involving (1) the officer’s

² The State’s authorities—collected at Respondent’s Answering Brief (RAB) at 15-16—are inapposite. They deal with shared control over premises. Here the uncle recognized Mr. Lastine’s bedroom as his private space.

³ *State v. Taylor* captures the “risk” component nicely. There Taylor gave his suitcase to Gillis entrusting her “sufficient custody and control over his suitcase so as to assume the risk that Gillis might consent to a search of it.” 114 Nev. at 1079, 968 P.2d at 321. No such affirmative action exists in the landlord situation presented here.

belief in an untrue fact “that was used to assess the extent of the consent-giver’s use of and access to or control over the area search”; (2) whether that belief was objectively reasonable under the circumstances; and (3) if the untrue fact were true, would the consent-giver “have had actual authority?” *Id.* (citation omitted) Notably there is an active inquiry component here: Law enforcement officers have “*a duty* to seek further information in order to determine whether they may reasonably infer that the [consent-giver] has the necessary authority to consent to an entry or search of the [property7].” *Id.* (italics added, internal quotation marks and citation omitted, alterations in the original).

Here it is unclear what “untrue” fact the officers believed. The State suggests that it was the uncle’s grant of permission to “go get” Mr. Lastine. RAB at 14. But the facts suggest that the officers were intent on getting Mr. Lastine anyway. And so these veteran officers failed to “seek further information” on the scope of the uncle’s authority in order to determine if Mr. Lastine’s uncle had the authority to consent to a search of Mr. Lastine’s bedroom. As noted above, the uncle did not have actual authority, and it was objectively unreasonable to assume that he did without further inquiry. In sum, the officers’ failure to seek further

information dooms the State's defense of their actions under *State v. Taylor*.

CONCLUSION

This Court should reverse Mr. Lastine's conviction and remand for a new trial following the suppression of all of the evidence obtained after the officers' illegal entry into Mr. Lastine's bedroom.

Dated this 13th day of March 2018.

JEREMY T. BOSLER
WASHOE COUNTY PUBLIC DEFENDER

By: JOHN REESE PETTY
Chief Deputy, Nevada Bar No. 10
jpetty@washoecounty.us

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Century Schoolbook in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of

the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 1,202 words. NRAP 32(a)(7)(A)(i), (ii).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 13th day of March 2018.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 13th day of March 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Joseph R. Plater, Appellate Deputy
Washoe County District Attorney's Office

I further certify that on this date a copy of this document was mailed to:

Mr. Andrew Robert Allen Lastine (#1178211)
Stewart Conservation Camp
P.O. Box 5005
Carson City, Nevada 89702

John Reese Petty
Washoe County Public Defender's Office