IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	**Tennessee Supreme Court**
	)	**Case Number ________**
	)	
Vs.	)	***Davidson County Criminal***
	)	
WILLIAM GLENN TALLEY	)	
	)	
Appellant.	)	
	)	

Rule 11 T.R.A.P. Application for Permission to Appeal
from the Court of Criminal Appeals of Tennessee

APPLICATION of APPELLANT, WILLIAM TALLEY

David L. Raybin

HOLLINS, WAGSTER,
WEATHERLY & RAYBIN, P.C.
424 Church Street
Fifth Third Center, Suite 2200
Nashville, Tennessee 37219

Attorney for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

DATE OF JUDGMENT BELOW 2

ISSUES PRESENTED FOR REVIEW 3

1. Whether Mr. Talley had a legitimate expectation of privacy in the jointly owned common area of his jointly owned condominium building which was protected by a locked front door complete with a burglar alarm so that the warrantless, non-consensual, non-exigent entry by the police into these common areas was in contravention of Article I, Section 7 of the Tennessee Constitution and the Fourth Amendment to the Constitution of the United States.

2. Whether (1) the searches of Mr. Talley's interior private residence, (2) the searches of Mr. Talley's business premises, (3) the searches of his effects and possessions, and (4) Mr. Talley's custodial interrogation by the authorities, were conducted in contravention of Article I, Section 7 of the Tennessee Constitution and the Fourth Amendment to the Constitution of the United States as the "fruit of the poisonous tree" of the earlier, initial unlawful intrusion into Mr. Talley's condominium building.

FACTS RELEVANT TO THE QUESTIONS PRESENTED 4

REASONS FOR GRANTING REVIEW 9

CONCLUSION 23

CERTIFICATE OF SERVICE 24

APPENDIX 25

Opinion of Court of Trial Court; *State v. Talley*

Opinion of Court of Criminal Appeals; *State v. Talley*

TABLE OF AUTHORITIES

FEDERAL CASES

Florida v. Bostick, 501 U.S. 429,434 (1991).. 18

United States v. Cormier, 220 F.3d 1103, 1109 (9th Cir.2000) 18

United States v. Walters, 529 F.Supp.2d 628 (E.D. Tex. 2007)....................................... 19

STATE CASES

Hughes v. State, 588 S.W.2d 296 (Tenn. 1979) 8

R. D. S. v State, 245 S.W.3d 356 (Tenn. 2008) 15

State v. Bartram, 925 S.W.2d 227 (Tenn. 1996)... 13

State v. Cothran, 115 S.W.3d 513 (Tenn. Crim. App. 2003).. 10

State v. Ellis, 1990 WL 198876, 4 (Tenn. Crim. App. 1990);... 19

State v. Garcia, 123 S.W. 3d 335 (Tenn. 2003) 16, 17

State v. Hayes, 188 S.W.3d 505, 518 (Tenn. 2006) 21

State v. Phillips, 30 S.W.3d 372 (Tenn. Crim. App. 2000).. 23

State v. Ross, 49 S.W.3d 833 (Tenn. 2001).. 15

State v. Seagull, 95 Wash.2d 898(1981)... 19

State v. Somfleth, 8 P.3d 221 (Or. App. 2000) 11

State v. Starks, 658 S.W.2d 544, 547 (Tenn. Crim. App. 1983) 20

State v. Troxell, 78 S.W.3d 866 (Tenn. 2002) 12

State v. Walton, 41 S.W.3d 75 (Tenn. 2001) 20

State v. Williams, 185 S.W.3d 311 (Tenn. 2005) 14, 21

TREATISES

Construction and Application of Rule Permitting Knock and Talk Visits Under Fourth Amendment and State Constitutions, 15 A.L.R.6th 515 10

INTRODUCTION

This case presents a narrow question of first impression in Tennessee: whether a police officer's unlawful entry into the primary entrance to a locked, private condominium building requires the suppression of evidence secured by means of a later plain view seizure when the occupant opened the door to the upstairs, interior residence as part of a police "knock and talk" investigation. Here, the trial judge found as a question of fact and law that the initial entry into Mr. Talley's locked, private condominium building was unlawful. This finding is amply supported by the record since Mr. Talley was co-owner of the condominium and had a legitimate expectation of privacy in the jointly owned, common area of the building which was protected by a locked front door complete with a burglar alarm. However, the trial judge did not extend this illegality to the search of Mr. Talley's interior, upstairs residence conducted but forty seconds later. It is the misapplication of the "fruit of the poisonous tree" doctrine which is central to Mr. Talley's appeal from the trial judge's order ultimately upholding the seizure of contraband from Mr. Talley's residence.

Although the trial judge found the initial entry into the condominium was unlawful the intermediate appellate court resolved the case in a different manner, holding – in the teeth of the trial judge's finding of fact and conclusion of law – that the officer's warrantless, surreptitious entry into the locked condominium building did not violate any expectation of privacy; there was, in short, no initial illegality. Thus, the tree was never "poisoned" and the later consensual entry into the upstairs dwelling forty seconds later

was uncontaminated, resulting in a lawful seizure of the contraband. It is the misapplication of settled notions of expectations of privacy into one's home and urban curtilage which is central to Mr. Talley's appeal form the intermediate court's order ultimately upholding the seizure of contraband from Mr. Talley's residence.

This Court should grant review and uphold the trial judge's ruling that the officer's initial intrusion into the private condominium was unlawful but find that the settled poisonous tree doctrine tainted the later consent entry into the interior dwelling and subsequent plain view seizure of drugs. The intermediate appellate court's opinion, if left undisturbed, will allow the police to enter locked, private condominiums without a search warrant or other recognized warrant exception. We do not yet live in a police state where our locked, private halls are open to the government to roam at will to see what turns up. This is an important issue worthy of this Court's review.

DATE OF JUDGMENT BELOW

On Rule 9, T.R.A.P. interlocutory appeal, the Court of Criminal Appeals affirmed on the merits on July 1, 2009. A copy of the Opinion is attached. No petition to rehear was filed by either side. Mr. Talley now seeks Rule 11, T.R.A.P Permission to Appeal and has filed a contemporaneous Brief on the Merits as permitted by Rule 11(b) T.R.A.P. The full record and briefs below are contained in a CD attached to the rear of the merit's brief.

ISSUES PRESENTED FOR REVIEW

1. Whether Mr. Talley had a legitimate expectation of privacy in the jointly owned common area of his jointly owned condominium building which was protected by a locked front door complete with a burglar alarm so that the warrantless, non-consensual, non-exigent entry by the police into these common areas was in contravention of Article I, Section 7 of the Tennessee Constitution and the Fourth Amendment to the Constitution of the United States.

2. Whether (1) the searches of Mr. Talley's interior private residence, (2) the searches of Mr. Talley's business premises, (3) the searches of Mr. Talley's effects and possessions, and (4) Mr. Talley's custodial interrogation by the authorities, were conducted in contravention of Article I, Section 7 of the Tennessee Constitution and the Fourth Amendment to the Constitution of the United States as the "fruit of the poisonous tree" of the earlier, initial unlawful intrusion into Mr. Talley's condominium building.

FACTS RELEVANT TO THE QUESTIONS PRESENTED

The facts recited by the intermediate appellate court are unfortunately inadequate and somewhat distorted. A far better rendition of the facts can be found in the trial judge's Order which also appears in the Appendix to this Application.

It is virtually undisputed that Mr. Talley is the joint property owner of a twenty-one unit condominium located in urban Nashville.

ALL photos part of Collective Exhibit 3

After dark, the police came to the front door of Mr. Talley's private condominium in response to an anonymous tip that Mr. Talley might be selling drugs from his residence inside the condominium.

The police were in possession of this anonymous information for some five days and, as all agreed at the suppression hearing, there was certainly no emergency justifying a warrantless entry into the building; nor was there probable cause for a search.

The primary entrance to the condominium is a windowless, stout wooden door. The door is always locked and is protected by a burglar alarm.

Collective Exhibit 3

When confronted by the locked front door of the condominium building the police contacted the police dispatcher to obtain the burglar alarm code so as to gain entry into the condominium building itself. This Code is reserved only for emergency entry such a fire.

The front door burglar alarm also had a speaker device which would allow an individual outside the door to communicate with the owners of the interior dwellings to seek legitimate entry.

However, because the police did not want to "alert" Mr. Talley, the police did not use the speaker device and instead sought the code reserved for emergencies. The purpose of this police tactic was to maintain the "element of surprise." While waiting for the dispatcher to provide the secret code, an unknown individual exited the building and the officers slipped into the building. The colloquy in general sessions court recites the facts succinctly:

Attorney: You didn't have permission from anybody?

Officer Simonik: *Umm...*

DA: I'll object, your Honor — .

Judge: Overruled. Did you have permission from anybody to go into the common areas of the building?

Simonik: *Did we have permission from anybody?*

Judge: Yeah.

Simonik: *Just the police authority to go up and investigate a complaint.*

After gaining entrance to the exterior door, it took the officers thirty to forty seconds to walk from the exterior door up to Mr. Talley's unit. Mr. Talley was not at home at the moment but his girlfriend was inside and opened the door and observed a number of armed police officers. The police asked to come inside and Mr. Talley's girlfriend consented to allow the officers in.

Once inside, the officers could see what appeared to be drug paraphernalia sitting on the coffee table "in plain view." The officers then questioned the girlfriend and another individual. They then "froze" the dwelling.

After gaining entrance into the interior dwelling the officers made their plain view searches and seizures. As to the reasons for these tactics, Officer Simonik testified:

> "[O]ur main objective is try to get inside that residence, and gain consent to search that residence. (Volume III, page 71). …Because I wanted to come inside and talk, to see if there was anything in plain view, where I could obtain a search warrant. (Volume III, page 72).

By this time Mr. Talley arrived at his unit and the police asked him to consent to a search. He refused after conferring with an attorney. Mr. Talley was allowed to leave while the police officers then obtained what was to be the first of several search warrants for the now "frozen" dwelling.

After finding pills and some ostensibly pornographic pictures, the police learned that Mr. Talley had a business located in Nashville. Within a few hours the police arrived at Mr. Talley's business armed with a second search warrant. The officers executed the

second warrant and found additional contraband. Mr. Talley was inside his business; he was taken into custody and advised of his *Miranda* warnings. He made certain semi-incriminating statements to the police when they confronted him with evidence secured in the search.

As part of the searches of the dwelling and the business the officers found computers and software. Several additional warrants were issued to inspect these items. The affidavits for these final search warrants relate the facts beginning with (1) the consensual entry into the interior dwelling, (2) the plain view observations leading to, (3) the search warrant for the dwelling which led to, (4) the warrant for the business which was followed by, (5) the custodial interrogation of Mr. Talley following his arrest. In short, there was an unbroken series of searches and interrogations each building on the preceding search or interrogation all of which was *first* triggered by the initial intrusion into the building itself. See, *Hughes v. State*, 588 S.W.2d 296 (Tenn. 1979) (initial illegal stop "tainted the entire episode culminating in the confrontation with Hughes and the search of the automobile").

The trial judge found, as a question of fact and law, that the initial entry into Mr. Talley's locked, private condominium building <u>was</u> unlawful but did not extend this illegality to the search of Mr. Talley's interior, upstairs residence conducted but forty seconds later. On interlocutory appeal the intermediate appellate court held that the officer's warrantless, surreptitious entry into the locked condominium building did not violate any expectation of privacy. There was, in short, no initial illegality.

REASONS FOR GRANTING REVIEW

1. This Court should grant review to determine an issue of first impression as to whether a homeowner has a legitimate expectation of privacy in the jointly owned common area of a jointly owned condominium building which was protected by a locked front door complete with a burglar alarm so that the warrantless, non-consensual, non-exigent entry by the police into these common areas was in contravention of Article I, Section 7 of the Tennessee Constitution and the Fourth Amendment to the Constitution of the United States.

2. This Court should grant review to apply its settled precedent to determine whether (1) the searches of Mr. Talley's interior private residence, (2) the searches of Mr. Talley's business premises, (3) the searches of Mr. Talley's effects and possessions, and (4) Mr. Talley's custodial interrogation by the authorities, were conducted in contravention of Article I, Section 7 of the Tennessee Constitution and the Fourth Amendment to the Constitution of the United States as the "fruit of the poisonous tree" of the earlier, initial unlawful intrusion into Mr. Talley's condominium building.

As noted, the trial judge found that the initial intrusion into the condominium building *was unlawful* (the trial judge's order appears in the Appendix) but that the consent of the girlfriend was valid to permit entry into the interior residence from which the police could make their "plain view" seizure. The trial court also upheld the subsequent search of the dwelling as well as the search of Mr. Talley's business conducted a few hours later by means of a second search warrant. Lastly, the judge upheld the admissibility of Mr. Talley's statements.

Certainly the Government has the better argument that the "plain view" consent search and the search warrants for the dwelling and the business as well as Mr. Talley's statement to the authorities might be lawful *if* each is viewed in isolation. However, like

a set of dominos, each of these searches and "confessions" are the product of the initial unlawful entry into the private condominium building. The issue here, of course, is whether the initial entry into the condominium building was unlawful, thus contaminating the remaining searches and "confessions" under the "fruit of the poisonous tree" doctrine.

Recall that the trial judge held that the initial intrusion into the condominium building itself was unlawful. This is certainly supported by the facts and the law. As this Court will observe in the extensive brief on the merits, the case law suggests that the police may enter the common area of an apartment building "open" to the public at large. However, because an owner has a heightened expectation of privacy in a condominium building (in our case, secured by a locked front door complete with a burglar alarm) the constitutional rules are very different: the police may not roam the halls at will.

Cases from a multitude of jurisdictions condemn the entry into private common areas. *Construction and Application of Rule Permitting Knock and Talk Visits Under Fourth Amendment and State Constitutions*, 15 A.L.R.6th 515. This Court has yet to address this precise issue which is the primary reason this Court should grant review.

A.

The proof at the suppression hearing established that police officers went to the front entrance of Mr. Talley's condominium as part of a "knock and talk" procedure. Neither probable cause nor reasonable suspicion is needed to conduct a "knock and talk." *State v. Cothran,* 115 S.W.3d 513 (Tenn. Crim. App. 2003) (it is not improper for a

police officer to call a particular house and seek admission for the purpose of investigating the complaint or conducting other official business). Naturally, it is highly significant as to **where** the police are standing when they do their "knocking." See, *State v. Somfleth*, 8 P.3d 221 (Or. App. 2000):

> Neither the warrant nor their status as peace officers gave them any greater right to intrude onto defendant's property than any other stranger would have. Going to the front door and knocking was not a trespass. Drivers who run out of gas, Girl Scouts selling cookies, and political candidates all go to front doors of residences on a more or less regular basis. Doing so is so common in this society that, unless there are posted warnings, a fence, a moat filled with crocodiles, or other evidence of a desire to exclude casual visitors, the person living in the house has impliedly consented to the intrusion. Going to the back of the house is a different matter. Such an action is both less common and less acceptable in our society. There is no implied consent for a stranger to do so. '[W]e do not place things of a private nature on our front porches that we may very well entrust to the seclusion of a backyard, patio or deck.' The facts of this case do not show either an express or an implied consent for strangers to go to the back of defendant's house.

There is not a shred of proof that the owners of this condominium agreed that the police could enter uninvited absent some emergency. The intermediate appellate court churned the record to suggest that the owners of the condominium somehow forfeited their right to privacy because there was some "communal" consent to allow anyone into the building at will. The government similarly claimed that the initial intrusion was proper because, so the argument goes, the homeowners "consented" to the police entering the building. None of this is borne out by the record and is clearly contrary to the trial judge's findings of fact.

Mr. Reasor, who is an attorney and a well as a homeowner in the condominium, testified that the police have the entry code which was to be used only for "an emergency." Further, Mr. Reasor testified that he was not aware of any emergency that existed on August 17, 2005 that would have permitted the use of the code on that day. Specifically, Mr. Reasor said that absent an emergency the police are not allowed free access to come into the building. (Volume III, page 10).

The intermediate appellate court cited several passages in Mr. Reasor's testimony that the police could access the building if there were an emergency or if they were investigating some criminal activity. This obviously misstates the testimony because the question asked was "and if you called the police would you expect the police to come and investigate?" (Volume III, page 19). This so called "investigative complaint," by definition, is one made by a resident or owner of the condominium. Here, there was no showing that any resident or owner made any complaint about Mr. Talley but that, in fact, the complaint was completely anonymous. It could have been anyone.

The intermediate appellate court's "communal consent" notion is inconsistent with the facts and the constitution. Consent to enter or search cannot be lightly inferred. Moreover, there may be express or implied limitations as to the permissible scope of the search in terms of time, duration, area or intensity. See, *State v. Troxell*, 78 S.W.3d 866 (Tenn. 2002) (it was not objectively reasonable for state trooper to interpret exchange with motorist, in which trooper asked if motorist had any weapons 'in' the vehicle and motorist consented to allowing trooper to "take a look," as consent for trooper to prolong

detention of motorist after searching vehicle's interior, so that trooper could search undercarriage of vehicle and vehicle's gas tank).

The argument that the homeowners somehow consented to the police coming into the condominium and "abandoned" their expectation of privacy by living in a multi-dwelling building is baseless. It is only where the police are summoned by the owners themselves could there be any legitimate argument that the police had some right to use the code and enter the building.

This is all academic in any event since the police did not use the code to gain access but, as noted, the authorities simply slipped into the building when some unknown person exited the locked front door.

The government below relied on some third-party consent doctrine to support the theory that the police could "assume" that the unknown individual opening the door for them had some authority to let the officers in. Again, the proof is simply to the contrary. There is no evidence as to who this individual might have been or whether he had any legitimate connection with the property whatsoever.

In *State v. Bartram*, 925 S.W.2d 227 (Tenn. 1996) this Court held that "*persons having equal rights* to use or occupation of the premises may consent to a search of them and such search will be binding upon the co-occupants." Yet, in our case there is absolutely no showing that the unknown individual had any rights at all to use or occupation of the condominium building in any way.

To follow the government's theory here would permit officers to enter any dwelling based on the fact that some unknown person exited dwelling or allowed the officers to enter. There is simply no authority for such a proposition and this Court should reject this notion out of hand.

With respect to the unlawfulness of the entry itself, the trial judge found as a question of fact that the police had no authority to enter the condominium building. There was abundant proof to support the trial judge's factual findings on this critical preliminary issue. This appeal is governed by the settled proposition that:

> When evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, the Court on appeal must uphold the trial court's findings of fact unless the evidence preponderates otherwise. …In reviewing these factual findings questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. As such, the prevailing party in the trial court is afforded the strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.

State v. Williams 185 S.W.3d 311 (Tenn. 2006).

Our case is an important one that will establish whether there really is an expectation of privacy in a privately owned condominium building protected by a locked front door, complete with a burglar alarm and a coded entry device. Indeed, Mr. Talley himself owned an undivided interest in the common areas themselves, a fact which distinguishes this case from those who rent apartments and have no direct property interest in common hall areas.

It is difficult to conceive what more the owners living in this condominium could have done to further protect their rights to privacy. To suggest that the police can enter such a condominium building when an unknown person opens the door and that the owners have no expectation of privacy in the hallways leading to their individual dwellings renders the Fourth Amendment a mere illusion.

In *R. D. S. v. State,* 245 S.W.3d 356 (Tenn. 2008) this Court said that the basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. The reasonableness of a search centers around the context within which it takes place: "Reviewing courts should balance the need to search against the invasion which the search entails, thereby weighing an individual's legitimate expectations of privacy and personal security on one hand and the government's need for effective methods to deal with breaches of public order on the other." It is not difficult to strike the balance in this case since we are dealing with the home.

Another way of analyzing the case is to determine whether the subjective expectation of privacy in this case is "one that society's prepared to recognize as reasonable." *State v. Ross*, 49 S.W.3d 833 (Tenn. 2001). The State and, apparently, the intermediate appellate court are prepared to advance the theory that those who live in locked condominiums in our urban society have no expectation of privacy and that the police may roam their halls at will. Such a holding would be intolerable in a free society and renders useless the protections of the Fourth Amendment to those of us who choose

to live in shared accommodations with others. As our cities and communities become more crowded our privacy becomes more precious and should not be surrendered to the police activity we have here.

The lawfulness of the initial entry into the condominium building is dispositive of the entire case. Since that entry was indeed unlawful the resulting searches should be suppressed and this indictment dismissed.

B.

If the Court adopts the doctrine shared by a multitude of jurisdictions that common areas of closed, locked buildings are accorded constitutional privacy protection, then the second, narrower legal question is whether Mr. Talley's girlfriend's "voluntary" consent to allow the police to enter and conduct a search of Mr. Talley's interior apartment was sufficiently attenuated from the unlawful entry into the private building occurring forty seconds earlier so as to "purge" this earlier illegality. This Court's precedents dictate the answer to that question.

In *State v. Garcia*, 123 S.W.3d 335 (Tenn. 2003), this Court held that the otherwise voluntary consent to search a vehicle was not sufficiently attenuated from the unlawful stop and seizure of the vehicle itself and so the resulting consent was unlawful and the evidence secured by that consent search was suppressed. As in *Garcia*, the unlawful intrusion here occurred just moments before the ostensibly voluntary consent of the girlfriend to allow the officers into the interior dwelling. There was no time for any "intervening circumstances" since it took only forty seconds for the officers to make

their way upstairs to Mr. Talley's unit on the second floor after they unlawfully entered the private condominium building.

Unlike the traffic stop of a vehicle in *Garcia*, however, the intrusion here did not involve just a "mere" automobile but rather was an invasion of a person's home which is accorded the highest constitutional protection. Thus the "flagrancy of the official misconduct" was even more profound. Given the initial unlawful intrusion – and that the subsequent searches and custodial interrogations were not sufficiently attenuated from the initial unlawful entry – Mr. Talley asserts that these multiple searches and his statement to the authorities should be suppressed so as to comport with the state and federal constitutional exclusionary rules, which, at bottom, protect reasonable expectations of privacy in one's home.

C.

It is most important that this Court grant review here to provide bright lines for the authorities as to where their feet may tread. Where apartments have open and unsecured common areas the police should be able to use these walkways precisely as they may use the path to the front door of a single family residence. However, when the police come upon a locked, secured front door leading to a common area of a condominium then this is no different than the secured, fenced-in area of a residence or farm. Society is prepared to accept as reasonable the owner's expectation of privacy in the closed area whether it is a single family dwelling or a multiple family condominium protected by a locked,

secured door and, in our case, protected by a burglar alarm to guard against unauthorized entry.

The entry into the locked common area of Mr. Talley's condominium was unlawful and, in the words of the Fourth Amendment, clearly "unreasonable." As noted earlier it is virtually impossible to contest the judge's factual finding (in part, as follows) that the officers had no authority to enter the condominium building:

> The area between the entrance of the condominium building and the defendant's condominium door is within the curtilage of his home, and is protected from warrantless entry by the Fourth Amendment. This area was used in the daily operation of the premises. It is the entrance used by all the residents and delivery personnel. In order for any person other than a resident to gain entry, they must be buzzed in or in possession of an entry code and thus authorized to enter the building. The threshold of the defendant's door extends to the entrance of the condominium building. The pathway that leads from the sidewalk to the front of the condominium building is for use by the public when conducting legitimate business. The detectives lawfully used the pathway leading to the condominium building's entrance. When the officers arrived outside the building's front entrance, they should have attempted to gain consent to enter the condominium premises in order to conduct the "knock and talk". A "knock and talk" is a consensual encounter and the detectives could have been authorized or refused entry at the front door of the condominium. *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir. 2000); see also *Florida v. Bostick*, 501 U.S. 429,434 (1991).
>
> The defendant has a subjective expectation of privacy in the area between the entrance to the condominium building and the door to his condominium unit. Unlike an apartment tenant, a condominium owner has a property interest in the building. There is a security buzzer at the entrance to the building and persons other than residents need express authorization to enter. Express authorization is given by being buzzed in or by being given the access code. The security buzzer system allows residents to

> determine the amount of accessibility the general public has to individual condominium units. This expectation of privacy is reasonable for the security and privacy of condominium owners.
>
> The detectives did not have probable cause or exigent circumstances to enter the premises without a warrant. The detectives were on the premises to conduct a "knock and talk". The officers had something less than probable cause and reasonable suspicion to engage in this consensual encounter. There were not exigent circumstances at the time of the entry and officers did not claim exigent circumstances existed to justify the warrantless entry. The state argued the detectives' entrance was lawfully obtained by consent given by a person leaving the building as they were entering. It is unknown who held the door open for the officers to enter; the person may have been a resident, guest, or trespasser. This uncertainty is not the equivalent of express authorization. The detectives' entry was an unreasonable departure from an area where the public is impliedly invited and an intrusion upon a constitutionally protected expectation of privacy. *State v. Ellis*,1990 WL 198876, 4 (Tenn. Crim. App. 1990); see also *State v. Seagull*, 95 Wash.2d 898 (1981).

(Volume II, pages 188-189 and reproduced in the Appendix to this Application).

Counsel commends to this Court's attention *United States v. Walters*, 529 F.Supp.2d 628 (E.D. Tex. 2007) which contains a first-rate discussion of the history and use of the "knock and talk" doctrine in our country. After canvassing the many cases which uphold searches following legitimate police approach to a citizen's front door, the opinion also illustrates where the police may violate the constitution:

> Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of

> asking questions of the occupant thereof - whether the questioner be a pollster, a salesman, or an officer of the law.
>
> A "knock and talk" is not wholly immune from the exclusionary rule, however, since it can occur under circumstances that constitute a search or seizure subject to Fourth Amendment protection. For example, should an officer approach a home via a tactically-chosen route other than a walkway leading to the front or principal entrance, i.e., a route different than a typical visitor would choose, or should an officer enter an area clearly closed off to ordinary guests visiting the house, the officer likely will intrude on the dweller's reasonable expectation of privacy and thereby conduct an unlawful search.

Mr. Talley's case here should be governed by this accurate exposition of the law as well as the other cases presented in the accompanying merits brief. The trial judge's unassailable finding that the initial entry into Mr. Talley's building was unlawful, effectively doomed the remaining searches and custodial interrogations, since "once the officers are inside a house or other building that is to be searched, the privacy of the occupants has already been breached." *State v. Starks,* 658 S.W.2d 544, 547 (Tenn.Crim. App. 1983).

Given the gravity of the violations here, the only appropriate remedy is the suppression of all the evidence under the full weight of the exclusionary rule which was designed to enforce constitutional protections. *State v. Walton*, 41 S.W.3d 75 (Tenn. 2001): "We reiterate that where law enforcement officers act in actual violation of the federal or state constitutions, their actions will bring forth heavy consequences — all 'fruit' resulting from the violation, testimonial and non-testimonial together, will not be

permitted to be used as evidence. ... This is the price demanded for jealous protection of constitutional liberties."

The fact that Mr. Talley — and other citizens — choose to live in an urban environment does not detract from the notion that the curtilage to his living premises includes a common hallway shared with other owners of the building. That common hallway is secured by a locked door and a burglar alarm making it clear to all that the area beyond the door is private. Improper entry triggers the burglar alarm and summons the police. It is unreasonable to suppose that the police themselves should enter on their own before they are requested to do so by the residents of the condominium either actually or constructively in the event of some emergency.

The essence of the constitutional protection against unreasonable searches and seizures is to safeguard the privacy and security of individuals against arbitrary invasions of government officials. *State v. Williams*, 185 S.W.3d 311 (Tenn. 2005). We do not yet live in a police state where our locked, private halls are open to the government to roam at will to see what turns up. "In their zeal to preserve and protect, however, our police officers must respect the fundamental constitutional rights of those they are sworn to serve." *State v. Hayes*, 188 S.W.3d 505, 518 (Tenn. 2006) (identification checkpoint at entrance to public housing development violated driver's right to be free of unreasonable seizures under the Fourth Amendment, where goal of checkpoint was to reduce crime, exclude trespassers, to decrease crime and drug use).

Detective Simonik said that in his "knock and talk" investigations he "normally" calls to get a code to get into an apartment or gate: "most apartment complexes, or condominiums, if they have gates or doors, that are locked on the outside, will give an emergency code, or a code for the police, or fire, or medical to come into that location." (Volume III, page 40). This is an astounding revelation. Apparently, this detective – and perhaps other Nashville police officers — routinely use the emergency codes to get "up close and personal" with citizens who live in gated communities or whose units are beyond locked doors. Detective Simonik desires the element of surprise so as to enhance the probability that he can "gain entry to that residence. …our main objective is try to get inside that residence, and gain consent to search that residence." (Volume III, page 71).

This case will decide if citizens can make their choice of allowing entry at the locked outer gate door or whether we will permit the police to scale the walls or gain entry into the building by guile or by use of codes reserved for emergencies so the officers may confront the citizen quite literally closer to home in a surprise tactic designed to coerce consent. The answer should be self-evident. Detective Simonik has poisoned one tree for certain. He and his fellow officers should not be allowed to infect the entire orchard. This Court should grant review here to resolve these issues.

CONCLUSION

The surreptitious entry by guile into Mr. Talley's locked, secured entrance to his condominium was clearly unreasonable and thus all of the searches and seizures in this case as well as his statements to the authorities should be deemed unlawful and the fruits thereof suppressed. Thus, this Court should grant review here, the trial judge's order to the contrary should be reversed, and the matter remanded with instructions to dismiss the indictment given the stipulation that the suppression issue is case-determinative. See Volume II, pages 225-226. *State v. Phillips*, 30 S.W.3d 372 (Tenn. Crim. App. 2000) ("Based upon the state's representation to the trial court and this Court that the state may not proceed with further prosecution absent the defendant's pretrial statement, the indictment is DISMISSED.").

Respectfully submitted, this the 26th day of August, 2009.

____
David L. Raybin, BPR #3385

Hollins, Wagster, Weatherly & Raybin, P.C.
Fifth Third Center, Suite 2200
424 Church Street
Nashville, Tennessee 37219
615/256-6666

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail to Mark Fulks, Assistant State Attorney General, Office of the Attorney General, 500 Charlotte Ave., P.O. Box 20207, Nashville, TN 37202-0207on this the 26th day of August , 2009.

____

David L. Raybin

APPENDIX

Filed 6/20/07
C. Edmondson

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE
DIVISION V

STATE OF TENNESSEE	]	
	]	
VS	]	CASE NO. 2006-A-559
	]	
WILLIAM G. TALLEY	]	

ORDER

This cause came to be heard on May 23, 2007, upon the motion of the defendant, William G. Talley, through counsel, requesting this Court to suppress any evidence seized and any statements made by him to officers of the Metro Police Department on August 16, 2005. The defendant is charged with two counts of Sexual Exploitation of Minor in violation of T.C.A. § 39-17-1003 and one count of Possession of Controlled Substances With Intent to Sell or Deliver - Schedule III in violation of T.C.A. § 39-17-417; two counts of Possession of Controlled Substances With Intent to Sell or Deliver - Schedule IV in violation of T.C.A. § 39-17-417; one count Possession of Controlled Substances With Intent to Sell or Deliver - Schedule V in violation of T.C.A. § 39-17-417.

The Court heard the arguments of respective counsel and listened to all the testimony presented. The defendant contends that the evidence seized and any statements made by the defendant were the fruit of an illegal seizure and in violation of his rights as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States and Article One Sections Seven and Nine of the Constitution of Tennessee.

FACTS

The Court finds that during August of 2005, the police received an anonymous telephone call about drug activity at the defendant's residence. On August 16, 2005,

Detective Joseph Simonik, Detective Fox, Detective Osborne, Detective Gonzales, and Detective Stokes went to the defendant's residence located at 116 31st Ave. unit #201 to investigate the complaints received. The defendant lived in a private condominium on the second floor and is also part owner in the condominium building. The entrance to the condominium building was guarded by a security system and any person without a key would have to be buzzed in by a tenant. While trying to obtain the code to enter the building from the Metropolitan Police Dispatch, a man leaving the condominium held the door open for the detectives to enter.

Mr. Talley's girlfriend, Kimberly Knight, answered the door to the apartment and consented to the detectives' entrance. Upon entrance, Detective Simonik observed a smoking pipe with copper mesh inside and a knife with white residue on it in the living room as well as another individual, Shane Cathy. Detectives asked Ms. Knight about the whereabouts of the defendant and Ms. Knight indicated that he was not home. Ms. Knight called the defendant on the phone and the defendant spoke with the detective. Ms. Knight explained that she had been staying at the apartment approximately three weeks, that Mr. Talley sold pills and cocaine, that he had illegal narcotics and a pistol at his business, and that they were kept under the sink in his office.

Detective Simonik obtained search warrants of the defendant's residence and business based on information given by Ms. Knight. Pursuant to the search of the defendant's residence, detectives recovered drugs, drug paraphernalia, sexual images of children as well as other electronic items were found in Mr. Talley's residence. The defendant was arrested and given his *Miranda* warnings during the execution of the search warrant of his business located at 535 Brick Church Park Drive. The detectives

also recovered drugs, drug paraphernalia, and images of child pornography from his business. During booking, Mr. Talley disclosed that he gave the pills to his friends and in return they would give him money, but he did not consider that selling.

Based on the items recovered from the execution of the search warrants of the defendant's residence and business, the detectives obtained additional warrants on March 14, 2006 and September 19, 2006 to search the defendant's desktop computers, notebook computer, and computer discs in the possession of the Metropolitan Nashville Police Department's Property and Evidence. A search of the defendant's computers and computer discs revealed several sexual images of children.

Legal Analysis

The defendant contends that any evidence obtained from the search of his residence should not be admissible in the trial in this cause and that, specifically, a condominium owner has a reasonable expectation of privacy in the common area of the condominium building and officers unlawfully entered the curtilage of his home when they entered the premises through the locked condominium door without a warrant, consent, or exigent circumstances. The defendant moves to suppress the evidence because he asserts it was unlawfully secured in violation of the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution. Mr. Talley contends he has a reasonable expectation of privacy that society would deem objectively reasonable in the curtilage of his home, which includes the entrance of his locked condominium premises.

The defendant further challenges the entry into the condominium building on the basis of an anonymous tip. The defendant contends officers waited four days before

conducting a "knock and talk" investigation indicating that there were no emergency or other exigent circumstances justifying the entry into the building.

Additionally, the defendant challenges the plain view seizure of evidence within his home. The defendant contends in order to constitute plain view seizure of evidence the officers must not have violated the Fourth Amendment in arriving at the place from which evidence could be plainly viewed. The defendant further challenges the validity of the search warrant of the residence because it did not establish probable cause to search his condominium.

The defendant also moves to suppress his statements made to the police contemporaneous with his arrest at his business located at 535 Brick Church Park Drive. The defendant asserts that the statements were taken in violation of his Fourth, Fifth, and Sixth Amendment rights guaranteed to him by the Constitution of the United States and Article I, Sections 7 and 9 of the Tennessee Constitution. The defendant contends that the State has not provided the defense with any written Miranda waiver and that any statements given by him were taken in violation of Miranda and his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel. The defendant contends that his statements were the result of an unlawful Fourth Amendment violation.

Initial Entry into the Locked Condominium Premises

The threshold issue the Court must decide is whether the initial entry into the locked condominium entrance was a Fourth Amendment violation; specifically whether Defendant Talley had a reasonable expectation of privacy in the area within the locked condominium building but outside of his actual condominium residence. A person has a reasonable expectation of privacy if one has an actual, subjective expectation of privacy

000185

and that expectation of privacy is one that society would deem objectively reasonable. *Katz v. United States*, 389 U.S. 347, 360 (1967).

The Fourth Amendment of the United States Constitution and Article I, Section 7 of the Tennessee Constitution protect the citizens of Tennessee against unreasonable searches and seizures of a dwelling and the curtilage which adjoins the dwelling. *State v. Ellis*, 1990 WL 198876, 3 (Tenn.Crim.App.1990). Curtilage is the space of ground adjoining the dwelling house, used in connection therewith in the conduct of family affairs and for carrying on domestic purposes, thus the dwelling house embraces the curtilage. *State v. Welch*, 289 S.W. 510, 511 (Tenn.1926) (citing 17 Corpus Juris 437). The Courts have extended Fourth Amendment protection of the home to the curtilage. *State v. Prier*, 725 S.W.2d 667 (Tenn.1987); see also *Boyd v. United States*, 116 U.S. 616 (1886).

The Court in Tennessee held that the curtilage is entitled to the same constitutional protection against ground entry and seizure as is the home. *State v. Prier*, 725 S.W.2d 667 (Tenn.1987). Although the Fourth Amendment and Article I, Section 7 of the Tennessee Constitution protects places where persons exhibit a subjective expectation of privacy that society would deem objectively reasonable; this protection is not absolute. A person does not have an expectation of privacy in personal property or premises he exposes to the public. *State v. Ellis*, 1990 WL 198876 (Tenn.Crim.App.1990). "A sidewalk, pathway or similar passageway leading from a public sidewalk or roadway to the front door of a dwelling constitutes an implied invitation to the general public to use the walkway for the purpose of pursuing legitimate social or business interest with the individuals residing inside the dwelling. *Id.* at 3. This invitation inside the curtilage of

000183

a dwelling extends to police officers who are conducting an investigation. *Id.* For most homes the boundaries of the curtilage will be clearly marked, and the conception defining the curtilage as the area around the home to which the activity of home-life extends is a familiar one easily understood from our daily experience. *State v. Prier*, 725 S.W.2d 667, 670-671 (Tenn.1987).

Under the Tennessee Constitution, a warrant is required to conduct a search or seizure on private property, including the curtilage, absent an applicable exception to the warrant requirement. *State v. Smith*, 1992 WL 46840, 5 (Tenn.Crim.App.1992). If a seizure takes place within the curtilage of a home, the issue to be considered is whether it was necessary to obtain a search warrant before entering the premises or whether exigent circumstances existed which would have alleviated the officers from obtaining a warrant. *Id.* at 4-5. Probable cause and exigent circumstances must exist for an officer to lawfully enter into a private residence without a warrant. *State v. Carter*, 160 S.W.3d 526, (Tenn. 2005); 2003 WL 22213225, 4 (Tenn.Crim.App.2004); see also *Kirk v. Louisiana*, 536 U.S. 635, 638 (U.S.2002). Exigent circumstances may occur when officers are in 'hot pursuit' of a fleeing suspect, when the suspect presents an immediate threat to the arresting officers or the public, or when immediate police action is necessary to prevent the destruction of vital evidence or thwart the escape of known criminals. *State v. Carter*, 160 S.W.3d 526, (Tenn. 2005); 2003 WL 22213225, 4 (Tenn.Crim.App.2004) (citing *Jones v. Lewis*, 874 F.2d 1125, 1130 (6th Cir.1989). The State has the burden of demonstrating exigent circumstances to overcome the warrant requirement. *State v. Carter*, 2003 WL 22213225, 4 (Tenn.Crim.App.2004); see also *Welsh v. Wisconsin*, 466 U.S. 740, 750 (U.S.1984). When exigent circumstances are absent to justify the

000187

warrantless search of the premises, only the evidence obtained as a result of the warrantless entry into the premises by the officers may be lawfully suppressed. *State v. Prier*, 725, S.W.2d 667, 668 (Tenn.1987).

The area between the entrance of the condominium building and the defendant's condominium door is within the curtilage of his home, and is protected from warrantless entry by the Fourth Amendment. This area was used in the daily operation of the premises. It is the entrance used by all the residents and delivery personnel. In order for any person other than a resident to gain entry, they must be buzzed in or in possession of an entry code and thus authorized to enter the building. The threshold of the defendant's door extends to the entrance of the condominium building. The pathway that leads from the sidewalk to the front of the condominium building is for use by the public when conducting legitimate business. The detectives lawfully used the pathway leading to the condominium building's entrance. When the officers arrived outside the building's front entrance, they should have attempted to gain consent to enter the condominium premises in order to conduct the "knock and talk". A "knock and talk" is a consensual encounter and the detectives could have been authorized or refused entry at the front door of the condominium. *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir.2000); see also *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

The defendant has a subjective expectation of privacy in the area between the entrance to the condominium building and the door to his condominium unit. Unlike an apartment tenant, a condominium owner has a property interest in the building. There is a security buzzer at the entrance to the building and persons other than residents need express authorization to enter. Express authorization is given by being buzzed in or by

being given the access code. The security buzzer system allows residents to determine the amount of accessibility the general public has to individual condominium units. This expectation of privacy is reasonable for the security and privacy of condominium owners.

The detectives did not have probable cause or exigent circumstances to enter the premises without a warrant. The detectives were on the premises to conduct a "knock and talk". The officers had something less than probable cause and reasonable suspicion to engage in this consensual encounter. There were not exigent circumstances at the time of the entry and officers did not claim exigent circumstances existed to justify the warrantless entry. The state argued the detectives' entrance was lawfully obtained by consent given by a person leaving the building as they were entering. It is unknown who held the door open for the officers to enter; the person may have been a resident, guest, or trespasser. This uncertainty is not the equivalent of express authorization. The detectives' entry was an unreasonable departure from an area where the public is impliedly invited and an intrusion upon a constitutionally protected expectation of privacy. *State v. Ellis*, 1990 WL 198876, 4 (Tenn.Crim.App.1990); see also *State v. Seagull*, 95 Wash.2d 898 (1981).

However, no incriminating evidence was discovered or seized as a result of the unlawful entry. Actually, nothing was seized from this area. If evidence was discovered or seized from this curtilage area it would not be admissible. Nevertheless, the unlawful entry is not determinative of the propriety of the subsequent seizure of evidence.

Knock and Talk

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and "Article 1, Section 7 [of the Tennessee

Constitution] is identical in intent and purpose with the Fourth Amendment." *State v. Downey*, 945 S.W.2d 102, 106 (Tenn.1997) (citing *Sneed v. State*, 221 Tenn. 6, 423 S.W.2d 857, 860 (1968)). In order to comply with the Fourth Amendment, the state must seek the issuance of a search warrant based upon probable cause from a detached magistrate before a house is searched. *State v. Jacumin*, 778 S.W.2d 430, 432 (Tenn.1989) (citing *Johnson v. United States*, 33 U.S. 10, 13-14 (1948)). However, officers do not need a search warrant when conducting a knock and talk.

Tennessee courts have held that "knock and talk" is an investigative technique. *State v. Cothran*, 115 S.W.3d 513, 521 (Tenn.Crim.App.2003); see also *United States v. Jones*, 239 F.3d 716, 720 (5th Cir.). That it is a consensual encounter, as well as a means to request consent to search the residence. *State v. Cothran*, 115 S.W.3d 513, 521 (Tenn.Crim.App.2003) (citing *Latta v. State*, 350 Ark. 488, 497 (Ark.2002)). *United States v. Cormier* held that no suspicion needed to be shown in order to justify a "knock and talk"; neither probable cause nor reasonable suspicion is needed for the consensual investigative procedure. *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir.2000); see also *Florida v. Bostick*, 501 U.S. 429, 434 (1991). It is therefore not improper for an officer to go to a particular house and seek admission for the purpose of investigating a complaint. 1 LaFave, Search and Seizure § 2.3(b) (3d ed.1996). In addition, the Court in *Cothran* held while conducting a "knock and talk" there is no requirement that the officers announce their identity; this is because of the consensual nature of the encounter. *State v. Cothran*, 115 S.W.3d 513, 523 (Tenn.Crim.App.2003)

The present "knock and talk" was based on confidential phone calls to the drug hotline received by the detective. The "knock and talk" was an investigative technique to

000190

follow-up on the tips. The confidential tip was the basis of the "knock and talk". The phone call was made to a call center specially designed to handle information about criminal activity provided by citizens.

In Tennessee law there is a distinction between "citizen informants" and "criminal informants." *State v. Cauley*, 863 S.W.2d 411, 417 (Tenn.1993) (citing *State v. Melson*, 638 S.W.2d 342, 354 (Tenn.1983)). Information supplied by a citizen informant is presumed reliable. *State v. Luke*, 995 S.W.2d 630, 636 (Tenn.Crim.App.1999). Reliability is presumed because citizen informants have necessarily gained their information through first-hand experience and is acting in the interests of society or personal safety. *Id*; see also *Melson*, 638 S.W.2d at 354-356 (Tenn.1983); *State v. Smith*, 867 S.W.2d 343, 347 (Tenn.Crim.App.1993). When the citizen informant has obtained the information second-hand, the informant will be presumed reliable if the officer has no reason to doubt the credibility of the first-hand witness or the reliability of the information. *State v. Luke*, 995 S.W.2d 630, 637 (Tenn.Crim.App.199) (citing *State v. Russell*, 1997 WL 84661 (Tenn.Crim.App.1997).

In this case, the informant is known to the detective but his name was not disclosed. The informant told the detective that the defendant sold pills to his girlfriend. It is unknown whether the informant saw the exchange of money for pills or whether he was informed of the fact. Whether the informant had first or second-hand knowledge, he would be presumed reliable if the officers had no reason to doubt the credibility of the first-hand witness or the reliability of the information. Therefore, he would qualify as a citizen informant for the presumption of reliability. There is no particular standard to justify a knock and talk, but it is something less than probable cause or reasonable

000191

suspicion. *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir.2000); see also *Florida v. Bostick*, 501 U.S. 429, 434 (1991).In the instant case, the tip provided by the citizen informant provided sufficient support to justify a knock and talk.

Entry into the Condominium Unit

The initial entry into the condominium building was unlawful but the entrance into the actual condominium unit was in fact lawful. In *McGee v. State,* Tennessee Courts applied the "common authority" test. *State v. Bartram*, 925 S.W.2d 227, 231 (Tenn.1996) (citing *McGee v. State*, 2 Tenn.Crim.App. 100, 105, 451 S.W.2d 709, 712 (Tenn.Crim.App.1969)). In *McGee,* the Court held that persons having equal rights to use or occupy the premises may consent to a search of the premises and the search will be binding upon co-occupants. *Id.*

Ms. Knight, can be deemed a co-occupant with equal right to use of the premises. Ms. Knight was the defendant's girlfriend who answered the apartment door when the detective arrived to conduct a "knock and talk". Ms. Knight consented to the detectives' entrance into the condominium unit voluntarily. Detective Simonik said Ms. Knight had a key to the condominium, clothes at the residence, she had been at the residence for three weeks, and she had her brother as a guest in the home at the time of the "knock and talk". Even if Ms. Knight did not have the authority to consent to the officers' entry, the Court in *Illinois v. Rodriguez* held that a warrantless entry based on the consent of a third party is valid if at the time of the entry the police officers reasonably believed she had the authority to allow entrance. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). It was reasonable to believe that she had authority to allow the police to enter because at the door she told them that Mr. Talley was not home and that she was his girlfriend.

Independent Source Doctrine

Under the independent source doctrine analysis, applied in *State v. Carter*, evidence previously excluded may be deemed admissible when sustained by an independent source. The exclusionary rule may bar the admissibility of evidence which was obtained from an unconstitutional search or seizure. *State v. Carter*, 2003 WL 22213225, 5(Tenn.Crim.App.2004); see also *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). The exclusionary rule does not apply when the evidence was obtained by means independent of the constitutional violation. *Id.*

In this case, the exclusionary rule would only apply to evidence seized as a result of the initial warrantless entry into the condominium building. The exclusionary rule would not apply to evidence subsequently seized pursuant to facts entirely independent and separate from the facts or evidence discovered as a result of the initial illegal entry. In the instant case, a smoking pipe with copper mesh inside and a knife with white residue on it was observed in plain view upon the detectives' consensual entry into the defendant's specific condominium unit.

Plain View

The plain view doctrine provides that the police may seize evidence in plain view without a warrant. *State v. Davis*, 2005 WL 2255968, 8 (Tenn.Crim.App.2005); see also *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (U.S.N.H.1971). Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. *United States v. Freeman*, 426 F.2d 1351, 1353 (9th Cir.1970); see also *Ker v. California*, 374 U.S. 23, 42-43 (1963); *United States v. Lee*, 274 U.S. 559 (1927); *Hester v. United States*, 265 U.S. 57 (1924). Prerequisites to

the application of the plain view doctrine include: 1) the officer did not violate constitutional mandates in arriving at the location from which the evidence could plainly be seen; 2) the officer had a lawful right of access to the evidence; and 3) the incriminating character of the evidence was "immediately apparent."

Here, the evidence should not be suppressed because the prerequisites to apply the plain view doctrine have been met. The officers arrived at the residence to conduct a "knock and talk." The initial entry into the condominium building was unlawful but the entry into the condominium unit itself was authorized by Kimberly Knight. The detectives were given consent to enter the location from which the evidence could be plainly seen. The officers had a lawful right of access to the evidence. Upon entry into the condominium, the officers did not search the premises but simply observed the contraband from inside the doorway. The incriminating character of the evidence was "immediately apparent." The detective's training and experience enabled him to immediately determine the illegal nature of the smoking pipe with copper mesh inside and a knife with white residue on it. The evidence seen in plain view was not the result of the unlawful initial entry but a result of the consensual entrance authorized by Ms. Knight. The evidence seized due to the plain view doctrine is admissible pursuant to the independent source doctrine.

Warrant

The independent source doctrine provides, "an unconstitutional entry does not compel exclusion of evidence found within a home if that evidence is subsequently discovered after execution of a valid warrant obtained on the basis of facts known entirely independent and separate from those discovered as a result of the illegal entry."

000194

State v. Carter, 160 S.W.3d 526, (Tenn. 2005); 2003 WL 22213225, (Tenn.Crim.App.2004) (citing *Segura v. United States*, 468 U.S. 796, 813-814 (1984); see also *State v. Clark*, 844 S.W.2d 597, 600 (Tenn.1992). In order for evidence obtained during the execution of the search warrant to be found independent of the prior unconstitutional entry, information discovered during the unlawful entry must not have been presented to the issuing magistrate. *State v. Carter*, 160 S.W.3d 526, (Tenn. 2005); 2003 WL 22213225, (Tenn.Crim.App.2004); see also *Clark*, 844 S.W.2d at 600.

In this case, the search warrant was obtained on the basis of information entirely independent from any information discovered during the initial warrantless entry. The officers did not observe any incriminating evidence during the initial warrantless entry. The information in the affidavit was obtained pursuant to the plain view doctrine and statements made by Ms. Knight. Thus, the evidence seized during the execution of the search warrant was admissible pursuant to the independent source doctrine.

This was initially a warrantless investigative knock and talk but Detective Simonik obtained search warrants based on information provided by Ms. Knight, defendant Talley's girlfriend. In the instant case, the search warrant in pertinent part

states:

> "You are therefore commanded to make and immediate search of the premises known as 116 31st Avenue North Apartment 201, Nashville, Davidson County, Tennessee, upon the persons of anyone using or occupying the subject location, which is more particularly described as follows; a multi-level, condo facility named Hedrick Place Condos. The Number 116 is in gold affixed to the right of the entrance way. Once inside the condo-building the condo to be searched is number 201. The door to the condo is white in color and the number 201 is in gold on the condo door; including all outbuildings, outhouses, garages, storage buildings, and vehicles found thereon or in close proximity, which have a nexus to the location or persons present at the location, for the

aforesaid evidence; and if you find the same or any part thereof, you shall seize the evidence, make a report to this Court of the seized evidence, and preserve the recovered evidence in Nashville, Tennessee, pending further orders of the Criminal Court, Davidson Country, Tennessee."

In pertinent part, the search warrant affidavit for Mr. Talley's residence states:

"Detectives received a drug complaint on 116 31st Avenue North Apartment 201. Detectives went to this location and knocked on the door and a Kimberly Knight (F/W dob 10-29-86) answered the door. Detective Fox explained to Kimberly Knight that we were there for a drug complaint. Your Affiant asked Kimberly Knight if we could come inside to talk with her and she gave detectives permission to come inside the residence. Once your affiant came into the living room of this location on the table in plain view your affiant saw a glass smoking pipe with copper mesh in it with residue. Next to this pipe there was a knife with white residue on it. Your affiant asked Kimberly Knight if she lived at the residence and Kimberly Knight states she had been staying there for about 3 weeks. Detective Fox asked Shane Cathey who was also at this residence if he had anything illegal on is person and Mr. Cathey replied not that I know of and then Detective Fox asked are you sure and Mr. Cathey replied well I have some pills and motioned to his right front pants pocket. Detective Fox recovered 43 Xanax Bars and 3 half bars of Xanax from Mr. Cathey's pocket which were packaged in 2 clear bags."

"Your affiant then called Mr. William Glenn Talley (M/W DOB 12-19-62) using Kimberly Knights phone. Your affiant asked Mr. Talley if 116 31st Ave North Apartment 201 was his residence and he replied yes and that he would be home in a few minutes. When Mr. Talley arrived at this location your affiant explained to Mr. Talley what was going on asked him if he would be willing to sign a consent to search form. Your Affiant read this form to Mr. Talley and Mr. Talley stated that he would like to call an attorney and asked there opinion on what he should do. After calling several different attorneys Mr. Talley was unable to get a hold of any of them. Your affiant then asked him if he would like to sign the consent form and Mr. Talley replied that he did not think that would be a good idea."

In the instant case, the search warrant for Mr. Talley's business in pertinent part states:

000193

"You are therefore commanded to make an immediate search of the premises known as 535 Brick Church Park Drive, Nashville, Davidson County, Tennessee, upon the persons of anyone using or occupying the subject location, which is more particularly described as follows: a business named THM Inc., that is constructed of grey block with white and grey siding. The number 535 is white in color and is affixed above the front door. The name of the business Tennessee Home Medical is also affixed to the front door; including all outbuildings, outhouses, garages, storage buildings, and vehicles found thereon or in close proximity, which have a nexus to the location or persons present at the location, for the aforesaid evidence; and if you find the same or any part thereof, you shall seize the evidence, make a report to this Court of the seized evidence, and preserve the recovered evidence in Nashville, Tennessee, pending further orders of the Criminal Court, Davidson Country, Tennessee."

In pertinent part, the search warrant affidavit states:

"During the conversation with Detective Simonik Mr. Talley stated that he owned a business named THM (Tennessee Home Medical). One 8/16/05 officers executed a narcotics warrant at 116 31st Avenue North Apartment 201, which is the residence of William Talley. Detectives recovered at this residence thousands of pills that are schedule narcotics, marijuana, and drug paraphernalia as well as several images of child pornography that were downloaded from different internet sites. While under Miranda, Kimberly Knight, Mr. Talley's girlfriend, states that Mr. Talley commonly stores illegal narcotics at his place of business which is Tennessee Home Medical (THM inc.). Ms. Knight also states that she has seem illegal narcotics at the location at 535 Brick Church Park Drive. Ms. Knight stated that she had seen illegal narcotics stored in a hidden compartment located under a sink located in Mr. Talley's office."

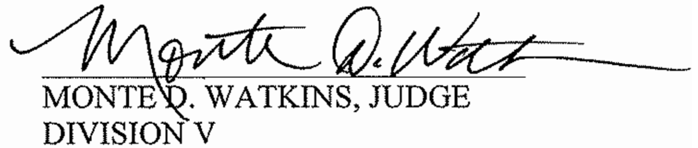
Therefore, the Court finds the officers had a valid basis to lawfully conduct a "knock and talk" based on the information provided by the citizen informant. Further, the Court finds that although the initial entry into the condominium building was unlawful, the officers gained entry into Mr. Talley's condominium unit lawfully. The search warrants were issued based on affidavits, which contained evidence of a crime found in plain view and statements made by Kimberly Knight. Therefore, the motion to suppress

000197

physical evidence is respectfully DENIED. Additionally, there was uncontroverted testimony that Miranda warnings were given upon arrest and the defendant Talley waived his right to speak without an attorney and made statements. Therefore, the Court finds that the motion to suppress the statements made by defendant Talley is respectfully DENIED.

IT IS SO ORDERED.

Entered this the 20th day of June, 2007.



MONTE D. WATKINS, JUDGE
DIVISION V

CC: Ed Yarbrough
David Raybin
Deborah Housel

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 17, 2008 Session

STATE OF TENNESSEE v. WILLIAM GLENN TALLEY

Direct Appeal from the Criminal Court for Davidson County
No. 2006-A-559 Monte Watkins, Judge

No. M2007-01905-CCA-R9-CD - Filed July 1, 2009

The appellant, William Glenn Talley, was charged in the Davidson County Criminal Court with two counts of sexual exploitation of a minor and four counts of possessing a controlled substance with intent to sell or deliver. He filed pretrial motions to suppress the evidence linking him to the crimes and his statement to police, and the trial court denied the motions. From the trial court's order, the appellant brings this interlocutory appeal, arguing that the evidence and his statement were obtained in violation of his right to be free from unreasonable searches and seizures as provided by the Fourth Amendment of the United States Constitution and article I, section 7 of the Tennessee Constitution. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

David L. Raybin (at trial and on appeal) and Ed Yarbrough (at trial), Nashville, Tennessee, for the appellant, William Glenn Talley.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Deborah Housel, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The record reflects that in August 2005, the appellant lived in a condominium building on Thirty-First Avenue North in Nashville. The building's front door was always locked, and residents gained entry to the building by entering an access code into a keypad outside the main door. On August 16, 2005, detectives went to the building after receiving a tip that the appellant was selling

drugs from his condominium. When the detectives arrived and found the building's front door locked, they called their department to obtain the access code, which was on file. While waiting for the code, a man exited the building and let the detectives inside. The detectives went to the appellant's condominium on the second floor and knocked on the door. The appellant was not home, but Kimberly Knight answered the door. She told the officers she had been living in the condominium with the appellant for about three weeks, and she gave the officers permission to come inside. In plain view, the detectives saw a glass crack pipe and a knife with a white residue on it. They secured the scene and obtained a search warrant for the condominium and the appellant's place of business. Searches revealed controlled substances and child pornography at both locations. The appellant was arrested, and he stated that he was addicted to cocaine and that he exchanged pills with his friends for money. Subsequently, the appellant filed motions to suppress the evidence and his statement. In pertinent part, he claimed in the motions that the evidence and the statement resulted from an unlawful search because the detectives gained warrantless, unreasonable entry to the private condominium building.

At the hearing on the motions, Charles B. Reasor testified that he owned a condominium on the third floor and that the appellant owned a unit on the second floor. Twenty-one condominiums were in the building, and each owner owned their individual condominium and one twenty-first (1/21) of all the building's common areas such as the hallways, stairs, and the outside yard. Reasor stated that a person gained access into the building from the keypad at the locked front door. A guest could push the "pound sign" on the keypad to find a condominium owner's name. Once the guest found the owner's name, the guest could call the owner's condominium telephone. The owner could give the guest the access code to get into the front door or the owner could come to the front door and let the guest into the building.

Reasor testified that the fire department, the police department, the United Postal Service, FedEx, vendors, the cleaning service, and "people who need[ed] to have access" had the access code. He described the code as a "general number" but acknowledged that it was considered an "emergency code." He stated that absent an emergency, the police were not allowed to come into the building. He stated that once a person entered the front door, it would take one to two minutes for the person to get to the appellant's second-floor condominium.

On cross-examination, Reasor testified that once an owner's guest gained entry to the building, the guest had free access to the building's hallways. He acknowledged that he had seen deliverymen in the hallways and that there was a reduced expectation of privacy in the hallways. He also acknowledged that if he had thought someone was selling drugs from a condominium, he would have contacted the police and would have expected them to come into the building to investigate. He stated that he was unaware of any problems in the appellant's condominium until the police "raided" it. He acknowledged that if the police came to the building in response to an emergency or in order to investigate, the police could call dispatch to obtain the access code. He said it was his understanding the code had "just been registered with the police department, just like it has with the postal service, and it's [to be used] at their discretion." He acknowledged that there were no "no trespassing" signs posted around the building and that an owner or a guest had the authority to let

the detectives into the building. On redirect examination, Reasor testified that the building's homeowners association may have provided the police department with the access code "as a matter of courtesy." On recross-examination, Reasor testified that he would not let police officers into the building without a warrant.

Metropolitan Nashville Police Detective Joseph Simonik testified that on August 16, 2005, he went to the appellant's condominium building in response to an anonymous complaint that had been called in to "244-dope-line." According to the caller, the appellant was selling pills from his residence and place of business. Detective Simonik decided to do a "knock and talk" at the appellant's condominium and went to the building with Detectives Fox, Osborne, Stokes, and Gonzales. When they arrived, they encountered the building's locked front door. Detective Simonik called dispatch to obtain the door's access code. While waiting for the code, a man came out of the building, said hello to the officers, and opened the door for them. Detective Simonik said the man was in his late twenties or thirties, was dressed casually, and was possibly a resident. The officers went inside and went up to the appellant's condominium. Detectives Simonik, Fox, and Osborne went to the appellant's unit while Detectives Stokes and Gonzales waited down the hall.

Detective Simonik testified that although the detectives were not wearing police uniforms, they were wearing "raid jackets" marked with a police patch and a badge and were clearly identified as police officers. Detective Simonik knocked on the door, and Kimberly Knight opened it. The detective told her they were looking for the appellant, and Knight told them he was not there. Detective Simonik asked Knight if they could come inside and speak with her, and she said yes. Knight told Detective Simonik she had been living in the condominium for about three weeks; Detective Simonik later discovered she had clothes in the condominium and a key to the residence. In the living room, the officers saw a glass smoking pipe and a knife with a white residue on it. Knight asked if she could telephone the appellant, and she called him with her cellular telephone. Detective Simonik spoke with the appellant on the phone and explained to him why the detectives were there. Detective Simonik asked the appellant if he could come to the condominium, and the appellant said yes. When the appellant arrived, Detective Simonik asked to search the home. The appellant seemed nervous and refused to consent to the search. Detective Simonik had the scene "frozen" and left to get a search warrant. He obtained the warrant, returned to the condominium, and executed the warrant. During the search, officers found drugs, drug paraphernalia, pornographic images of children, and three pornographic compact discs.

Detective Simonik testified that Knight told him the appellant had drugs and a gun at his place of business. Officers obtained another search warrant and searched the business. There, they found more drugs, a gun, and a large number of pornographic images of children. The appellant was arrested and told Detective Simonik he had been using cocaine since September. He also told the detective that he exchanged the drugs with his friends for money but that he did not consider this to be "selling" drugs.

On cross-examination, Detective Simonik acknowledged that without a warrant, police had to have consent to enter a home. He stated that although he had described the tipster as

"anonymous" on direct examination, he spoke with the caller and got the caller's name. However, he did not "check out" the caller. He acknowledged that he waited five days after the tip to go to the appellant's condominium and that going to the condominium was not an emergency. He stated that after searching the appellant's home and business, he learned the appellant had a pharmacy license. He acknowledged that he did not use the speaker at the building's front door to call the appellant's condominium because he did not want to "tip off" anyone in the condominium that the police were there.

In a written order, the trial court noted that in order for a person, other than a resident, to gain entry to the condominium building, the person had to have express authorization to enter. The court determined that the area between the door of the building and the appellant's condominium door was "within the curtilage of his home, and is protected from warrantless entry by the Fourth Amendment." Therefore, the court concluded that the detectives should have obtained consent to enter the building because exigent circumstances did not exist to justify a warrantless entry. The trial court ruled that because the unidentified male who held open the door for the detectives could have been a resident, a guest, or a trespasser, the detectives did not obtain lawful consent to enter the building. Nevertheless, the trial court denied the appellant's motions because it determined that the detectives gained lawful entry to the appellant's condominium when Kimberly Knight, who lived in the condominium with the appellant, gave consent for the detectives to come inside. Through an interlocutory appeal to this court, the appellant challenges the denial of the motions.

II. Analysis

The appellant contends that the trial court correctly concluded the detectives' entry of the private condominium building was unlawful because it violated the appellant's reasonable expectation of privacy and, therefore, violated his constitutional right to be free from unreasonable searches and seizures. However, he argues that the trial court incorrectly concluded Knight's consent for the detectives to enter the condominium cured the taint because "like a set of dominoes, the searches of the [condominium], business and the custodial interrogation all fall pursuant to the 'fruit of the poisonous tree' doctrine [when] the initial intrusion into Mr. Talley's condominium was unlawful." The State contends that the detectives' entry to the building was lawful because the homeowner's association consented to the entry by providing the police department with the access code in order for police to investigate complaints. The State also contends that the detectives' entry was lawful because a man "with apparent authority" permitted it. In response, the appellant argues that according to Charles Reasor's testimony, the police were to use the access code only for an emergency, not merely an investigation. He also argues that the only time the police could lawfully use the access code for investigative purposes was if one of the condominium owners summoned them. Finally, he contends that the unidentified man could not consent to the entry because the State failed to show the man had any right to use or occupy the building.

In reviewing a trial court's determinations regarding a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18,

23 (Tenn. 1996). Thus, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." Id. Nevertheless, appellate courts will review the trial court's application of law to the facts purely de novo. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). Furthermore, the State, as the prevailing party, is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." Odom, 928 S.W.2d at 23.

A. Reasonable Expectation of Privacy in the Condominium Building

The Fourth Amendment to the United States Constitution provides that every person has the right to be free from unreasonable searches and seizures. Article I, section 7 of the Tennessee Constitution similarly provides "[t]hat the people shall be secure . . . from unreasonable searches and seizures." The Tennessee Supreme Court has previously noted that, generally, "'article I, section 7 is identical in intent and purpose with the Fourth Amendment.'" State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997) (citation omitted). However, the court also noted that, in some cases, the Tennessee Constitution may afford greater protection. Id. When determining whether an unreasonable government intrusion has occurred, the first question is whether the defendant had a reasonable expectation of privacy. See Katz v. United States, 389 U.S. 347, 360, 88 S. Ct. 507, 516 (1967) (Harlan, J. concurring). In order to answer this question, we must determine "(1) whether the individual had an actual, subjective expectation of privacy and (2) whether society is willing to view the individual's subjective expectation of privacy as reasonable and justifiable under the circumstances." State v. Munn, 56 S.W.3d 486, 494 (Tenn. 2001) (citing Smith v. Maryland, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580 (1979)).

In support of his argument that a person has a reasonable expectation of privacy in the common areas of a locked apartment building, the appellant relies heavily on United States v. Carriger, 541 F.2d 545 (6th Cir. 1976). In Carriger, the Sixth Circuit Court of Appeals considered "whether a tenant in an apartment building has a reasonable expectation of privacy in the common areas of the building not open to the general public." 541 F.2d at 549. The court concluded that "when, as here, an officer enters a locked building, without authority or invitation, the evidence gained as a result of his presence in the common areas of the building must be suppressed." Id. at 552. As the court explained, "A tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not expect trespassers." Id. at 551. Citing Carriger, some state courts also have held that a reasonable expectation of privacy exists in the hallways of a multiple-unit apartment building. People v. Trull, 380 N.E.2d 1169, 1173 (Ill. App. Ct. 4th Dist. 1978); People v. Killebrew, 256 N.W.2d 581, 583 (Mich. Ct. App. 1977); see also State v. Di Bartolo, 276 So. 2d 291, 294 (La. 1973).

Just a year later, however, the Eighth Circuit specifically disagreed with Carriger in United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977), stating that the "locks on the doors to the entrances of the apartment complex were to provide security to the occupants, not privacy in common hallways." The appellate court held that "[a]n expectation of privacy necessarily implies an expectation that one will be free of any intrusion, not merely unwarranted intrusions." Id.

Because the hallways of the defendants' locked apartment building were available for use by the residents, their guests, the landlord and the landlord's agents, and any other person "having legitimate reasons to be on the premises," the court concluded that the defendants did not have a reasonable expectation of privacy in the building's hallways. Id. Various other federal and state jurisdictions also have found that privacy interests do not exist in the locked common areas of multi-unit apartment buildings. See United States v. Nohara, 3 F.3d 1239, 1241-42 (9th Cir. 1993); United States v. Concepcion, 942 F.2d 1170, 1171-72 (7th Cir. 1991); United States v. Holland, 755 F.2d 253 (2d Cir. 1985); State v. Davis, 711 N.W.2d 841, 845 (Minn. Ct. App. 2006); Commonwealth v. Reed, 851 A.2d 958, 962 (Pa. Super. Ct. 2004); Commonwealth v. Dora, 781 N.E.2d 62, 67 (Mass. App. Ct. 2003); People v. Lyles, 772 N.E.2d 962, 966 (Ill. App. Ct. 1st Dist. 2002).

In our view, access by third parties alone does not necessarily negate a reasonable expectation of privacy in a locked apartment building's common areas. See Cornelius v. State, 2004 Minn. App. LEXIS 149 (Minn. Ct. App. Feb. 10, 2004); State v. Trecroci, 630 N.W.2d 555, 566 (Wis. Ct. App. 2001); see also Killebrew, 256 N.W.2d at 583 (stating that, generally, tenants in an apartment building have a reasonable expectation of privacy in hallways that are shared by occupants and guests). On the other hand, we also disagree with the Sixth Circuit's bright line rule that a tenant has a reasonable expectation of privacy in the common areas of a locked apartment building. The Sixth Circuit's reasoning in Carriger, that a tenant expects other tenants and invited guests to enter a building's common areas but does not expect trespassers, is flawed because a person's being a trespasser is irrelevant if tenants do not have a reasonable expectation of privacy in those areas. See Eisler, 567 F.2d at 816.

The determination as to whether a tenant has a reasonable expectation in the common areas of a locked apartment building is a fact-driven issue. In the instant case, Charles Reasor testified that owners could give their guests the access code to get into the building and that various nonresidents such as delivery and cleaning people used the code. See State v. Breuer, 577 N.W.2d 41, 46-47 (Iowa 1998) (noting as one factor in its conclusion that the defendant had a reasonable expectation of privacy in the stairway of his locked apartment building was that guests usually waited at building door after ringing doorbell). Furthermore, twenty-one condominiums were in the building. Compare id. (noting that only two units were in the building). Given the numerous third parties that had unescorted access to the building's common areas, we conclude that the appellant in this case did not have an actual, subjective expectation of privacy in those areas.

Regarding the State's claim that the detectives obtained consent to enter the building from the person who held the door open for them, there is no proof that the person had authority to give consent. As to the State's claim that the detectives lawfully entered the building because the homeowner's association had provided the code to the police department, we find this argument unpersuasive because the detectives did not use the code to enter the building. Nevertheless, because the appellant did not have a reasonable expectation in the building's common areas, we conclude that the trial court erred by ruling the detectives entered the building unlawfully.

B. Fruit of the Poisonous Tree

Given the possibility of further appellate review, we will now determine whether the trial court properly concluded that Kimberly Knight's consent for the detectives to enter the condominium cured the taint of their illegal entry into the building. Again, we disagree with the trial court's conclusion.

In Wong Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 407, 416 (1963), the United States Supreme Court observed that the exclusionary rule bars the admissibility of evidence obtained both directly and derivatively from an unlawful invasion of an individual's privacy or personal security. However, the court declined to hold that "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." 371 U.S. at 487-88, 83 S. Ct. at 417. Instead, the court held that, in determining whether physical or verbal evidence is the fruit of a prior illegality, the "apt question . . . is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" 371 U.S. at 488, 83 S. Ct. at 417. Therefore, consent to search that is preceded by a Fourth Amendment violation may nevertheless validate the search if the consent is voluntary. State v. Simpson, 968 S.W.2d 776, 784 (Tenn. 1998); see Schneckloth v. Bustamonte, 412 U.S. 218, 248-49, 93 S. Ct. 2041, 2059 (1973). Moreover, the consent must be "sufficiently an act of free will to purge the primary taint of the unlawful invasion." Wong Sun, 371 U.S. at 486, 83 S. Ct. at 416-17. "The first prong focuses on coercion, the second on causal connection with the constitutional violation." United States v. Chavez-Villarreal, 3 F.3d 124, 127 (5th Cir. 1993). The trial court found, and the appellant does not dispute, that Knight's consent was voluntary. Therefore, we turn to the causal connection and whether Knight's consent was an exploitation of the prior unlawful entry. See State v. Garcia, 123 S.W.3d 335, 346 (Tenn. 2003).

To determine whether the causal connection between a Fourth Amendment violation and a consent to search has been broken, a court should consider the following three factors set forth by the United States Supreme Court in Brown v. Illinois, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 2261-62 (1975): (1) the temporal proximity of the illegal seizure and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. Although the trial court did not address the issue of attenuation, the question of attenuation is one that this court reviews de novo. State v. Ford, 30 S.W.3d 378, 380 (Tenn. Crim. App. 2000). The State carries the burden of establishing sufficient attenuation. Brown, 422 U.S. at 604, 95 S. Ct. at 2262.

The evidence at the suppression hearing established that after the detectives entered the building, they immediately went upstairs to the appellant's condominium and knocked on the door. According to Charles Reasor's testimony, this would have taken only one to two minutes. Therefore, factor one, the temporal proximity of the illegal seizure and the consent, weighs against attenuation. As to factor two, the presence of intervening circumstances, the detectives knocked on the door and Knight opened it. The detectives asked to speak with the appellant, and Knight told

them the appellant was not there. The detectives then asked to enter the condominium but did not verbally inform Knight that they were detectives investigating a crime. We conclude factor two also weighs against a finding of attenuation. Next, we consider the third factor, the purpose and flagrancy of the official misconduct. Detective Simonik gave contradictory testimony about the identity of the informant, testifying on direct examination that the informant was anonymous but testifying on cross-examination that he got the informant's name. Moreover, although the detectives had not received any information that Knight was involved in the appellant's alleged criminal activities, they asked to enter the condominium even though the appellant was not there. Finally, when asked at the suppression hearing why the detectives did not end the investigation when the detectives learned the appellant was not present, Detective Simonik said, "I wanted to come inside and talk, to see if there was anything in plain view, where I could obtain a search warrant. There happened to be stuff in plain view in order for me to obtain that search warrant." The third factor also weighs against a finding of attenuation. Therefore, had we determined that the officers entered the building unlawfully, the State's failure to show the consent was sufficiently attenuated from the entry into the building would have required suppressing the evidence.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the trial court's denial of the motions to suppress.

____
NORMA McGEE OGLE, JUDGE