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SUPREME COURT OF ARKANSAS

No. CR 12-413

STATE OF ARKANSAS APPELLANT V. HAROLD MYERS APPELLEE	**Opinion Delivered** December 6, 2012 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, GREENWOOD DISTRICT [NO. CR-2011-159] HON. JAMES O. COX, JUDGE APPEAL DISMISSED.

DONALD L. CORBIN, Associate Justice

Pursuant to Rule 3(a)(1) of the Arkansas Rules of Appellate Procedure–Criminal (2012), the State of Arkansas has filed this interlocutory appeal from the order of the Sebastian County Circuit Court granting the motion of Appellee Harold Myers to suppress physical evidence seized during the course of a warrantless, probationary search of a bedroom where Appellee and a probationer, Kendi Halsey, were sleeping. For reversal, the State contends that the circuit court erred as a matter of law in determining that a probation search is unreasonable as to a non-probationer even though the non-probationer shares his living space with someone known to be on probation and the probationer has given written consent to search in advance. We conclude that resolution of this case turns on application of its unique facts to the law and therefore that "the correct and uniform administration of the criminal law" does not require our review. Ark. R. App. P.–Crim. 3(d) (2012). We therefore dismiss the appeal.

Appellee was charged by criminal information filed on August 25, 2011, with felony possession of drug paraphernalia and misdemeanor possession of a controlled substance. The charges stemmed from an August 13, 2011 search of the bedroom he rented and shared on occasion with Halsey, his girlfriend. As a condition of her release on supervised probation, Halsey had previously consented in writing to warrantless searches at any time of her person, place of residence, and vehicle. Halsey was present along with Appellee during the search of the bedroom. She was also charged with crimes following the search.

Appellee moved to suppress the evidence on the basis that the warrantless search of his bedroom was conducted without his consent, without probable cause that a felony was being committed, and without exigent circumstances. Appellee asserted that the search therefore violated his Fourth Amendment rights provided by the United States and Arkansas Constitutions and Rules 10 and 11 of the Arkansas Rules of Criminal Procedure.

The circuit court held a hearing on Appellee's motion to suppress on March 6, 2012. At the conclusion of the hearing, the circuit court took the motion under advisement. In a letter opinion, the circuit court made the following detailed findings of fact:

> The salient facts in this case are as follows:
>
> 1. Kendi Halsey was on parole and had executed a Condition of Release Form authorizing a search or seizure of her person, place of residence or motor vehicle at any time, day or night, whether with or without a search warrant, whenever requested to do so by any Department of Community Punishment officer.
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> 2. Ms. Halsey was living at a residence owned by a Mr. Cranford. Ms. Halsey's grandfather and uncle lived in the home. The exact ownership of the property was never established at the hearing, but the house belonged to the Cranfords and she was staying there with them.

3. Harold Myers, defendant in this case, was renting a bedroom for $300.00 a month from the Cranfords.

4. A warrantless search of the Cranford residence was conducted on August 13, 2011 with the probation and parole officer and some drug task force officers. Apparently the younger Cranford answered the door and was told that the officers were there for a compliance check on Kendi Halsey. The officers testified that they did not recall asking Terry Cranford for consent nor did they advise Terry Cranford of his right to refuse consent. Once inside, Detective Foley advised that Terry Cranford knocked on the door of the Defendant's bedroom and Kendi Halsey and Defendant were asleep in the bedroom. The officers searched Defendant's room. Detective Foley stated that no one objected to the search.

5. Some syringes, a spoon, rolling papers and pills were found in Defendant's room on a shelf at the end of the bed. Those apparently were found as a result of the search and were not in plain sight from any other area of the house. Detective Foley testified that when Cranford opened the door Defendant was not asked for consent to search and was not advised of his right to refuse a search. Detective Foley testified that when he investigated another incident involving Kendi Halsey that he had seen her in Defendant's room. He further testified that he did not ask Defendant if he lived in the room.

6. Steven Becker of the Barling Police Department testified that they did not ask Cranford for consent to search and did not advise anyone of their right to refuse.

7. Harold Myers testified that [he] has lived in the house for seven years and pays $300.00 [a] month rent. He has no felony convictions, is diabetic and uses syringes for injection of insulin. He had heard that Kendi Halsey was on parole but had no contact with any police officer about her.

8. When a knock came on his bedroom door he was told to leave the room and no one asked him for consent nor did they advise him of his right to refuse consent to a search of his room. Kendi Halsey was directed to stay in the bedroom.

9. Defendant testified that Ms. Halsey typically stayed on the couch in the living room but would occasionally share his bed with him.

10. Defendant never signed anything consenting to a search of his quarters. He further stated that he probably would have refused consent if he had known of his right to do so. He testified that the pills and syringe with methamphetamine in it were not his but could have been Ms. Halsey's. He had not seen her using a syringe.

The circuit court next stated in its letter opinion that the applicable law was Rule 11.1 of the Arkansas Rules of Criminal Procedure (2012), which had been amended to comport with *State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004). The circuit court also found *McFerrin v. State*, 344 Ark. 671, 42 S.W.3d 529 (2001) to be instructive, although distinguishable on the facts. Ultimately, the circuit court applied the law to the foregoing facts and ruled that the State failed to prove the reasonableness of the warrantless, probationary search as to Appellee, who was not the probationer but shared his living space with the probationer on occasion, because Appellee did not expressly consent to the search.

Following entry of the circuit court's letter order granting the motion to suppress, the State filed a motion for reconsideration, arguing that Appellee's consent was not required because he elected to share his living space with a probationer who had consented in advance to a search of her residence. The State argued that Appellee had no reasonable expectation of privacy and had assumed the risk that officers would search not only common areas of the home, but also the bedroom that he sometimes shared with the probationer, his girlfriend Halsey. The circuit court did not find the State's argument persuasive and denied the motion for reconsideration. This appeal by the State followed.

The threshold issue in any State appeal is whether "the correct and uniform administration of the criminal law requires review by th[is] court." Ark. R. App. P.–Crim. 3(d); *State v. Brewster*, 2011 Ark. 530, at 2, ___ S.W.3d ___, ___. This court has said that the correct and uniform administration of justice is at issue when the question presented is solely a question of law independent of the facts in the case appealed. *State v. S.G.*, 373 Ark.

364, 284 S.W.3d 62 (2008). An appeal that turns on facts unique to the case or involves a mixed question of law and fact does not involve the correct and uniform administration of the criminal law, and is not a proper appeal. *State v. Short*, 2009 Ark. 630, 361 S.W.3d 257. Where an appeal involves the circuit court's application of the law rather than its interpretation, the appeal is not one that is important to the correct and uniform administration of the criminal law. *Id.*

As this court has consistently observed, there is a significant and inherent difference between appeals brought by criminal defendants and those brought on behalf of the State. *Brewster*, 2011 Ark. 530, ___ S.W.3d ___. The former is a matter of right, whereas the latter is not derived from the constitution, nor is it a matter of right, but is granted pursuant to Rule 3. *Id.* Under Rule 3, we accept appeals by the State when our holding would establish important precedent or would be important to the correct and uniform administration of the criminal law. *Id.* We only take appeals that are narrow in scope and involve the interpretation of the law. *Id.* Where the resolution of the issue on appeal turns on the facts unique to the case, the appeal is not one requiring interpretation of our criminal law with widespread ramification, and the matter is not appealable by the State. *Id.* This court will not even accept mixed questions of law and fact on appeal by the State. *Id.*

The State frames the issue in this appeal as a misinterpretation of Rule 11.1 and this court's precedent, namely *McFerrin* and *Brown*. The State contends that *Brown* is inapposite because it involved a "knock-and-talk" search rather than a probation search. The State

contends further that while *McFerrin* did involve a parole search,[1] the circuit court misinterpreted its holding because this court upheld the search in *McFerrin* even though neither the parolee-defendant nor his sister with whom he lived was present during the search, due to the fact that both the parolee-defendant and his sister had consented in advance to the search of their shared home.

Despite the State's attempt at framing the issue here as one involving solely an error of law, the issue is one of third-party consent, which this court has previously identified as a factual question. *See Bruce v. State*, 367 Ark. 497, 502, 241 S.W.3d 728, 731 (2006) (stating that the determination of third-party consent, like other factual determinations relating to searches and seizures, must be judged against this objective standard: "[W]ould the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?") (citing *Hillard v. State*, 321 Ark. 39, 44, 900 S.W.2d 167, 169 (1995) (quoting *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990)).

In addition to this case presenting a factual question, or at least a mixed question of fact and law, our review of the testimony presented at the hearing reveals that much of the material facts were disputed. Consider, for example, the contested fact of whether Halsey had common authority over Appellee's bedroom such that her consent would suffice to justify the search as to Appellee. *See* Ark. R. Crim. P. 11.2 (2012); *see also United States v. Matlock*, 415 U.S. 164 (1974) (holding that for third-party consent to be valid, the party giving the consent

[1]As the State notes in its brief, Arkansas courts analyze the reasonableness of parole and probation searches identically. *See Cherry v. State*, 302 Ark. 462, 791 S.W.2d 354 (1990) (a parole-search case) (citing *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (a probation-search case)).

must have "common authority" over the premises). Appellee testified that he had lived in the room for almost seven years and had rented the room from Halsey's uncle for $300 a month. According to Appellee, although Halsey slept in his bed once or twice a week, she did not keep personal items such as clothing or toiletries in the room. Consider also the contested factual question, which overlaps to some degree with the former factual question just discussed, of whether Appellee had notice of Halsey's status as a probationer and her prior consent to the search of her residence such that Appellee would have a reduced expectation of privacy in his bedroom because he shared his bed with her once or twice a week. Appellee conceded in his testimony that he knew Halsey was on probation. The officers testified that they had been to the house on two or three prior occasions looking for Halsey and found her in the same bedroom. Appellee disputed this, stating that he had never seen the officers in his room before.

With this kind of dispute over the material facts necessary to determine whether Appellee's consent to search his bedroom was required given Halsey's consent to search the residence where she lived, it is clear that the circuit court was required to weigh the evidence and to judge the credibility of the witnesses and that this case therefore involves an application of our rules and case law to the unique facts of the case. *See State v. Jones*, 369 Ark. 195, 252 S.W.3d 119 (2007) (indicating that a circuit court's credibility assessment does not implicate widespread ramifications on the interpretation of our criminal law). Thus, there is no doubt that the third-party consent and expectation-of-privacy questions at issue here turn on

credibility assessments and factual determinations. This case therefore presents questions of mixed law and fact, and is thus not a proper State appeal.

In sum, the circuit court's decision that we are asked to review turns on the unique facts of this case to such an extent that the correct and uniform administration of the law could not be said to be at issue. This appeal is therefore not a proper State appeal according to Rule 3, and the appeal is hereby dismissed.

Appeal dismissed.

Dustin McDaniel, Att'y Gen., by: *Kathryn Henry*, Ass't Att'y Gen., for appellant.

Joel W. Price, for appellee.