MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

State of Indiana,
Appellant-Plaintiff,

v.

Sarah A. Allen,
Appellee-Defendant.

April 8, 2022

Court of Appeals Case No. 21A-CR-2009

Appeal from the Lawrence Superior Court

The Honorable William G. Sleva, Senior Judge

Trial Court Cause No. 47D02-2010-F2-1630

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Plaintiff, the State of Indiana (State), appeals the trial court's Order granting Appellee-Defendant, Sarah Allen's (Allen), motion to suppress.

[2] We reverse.

ISSUES

[3] The State presents this court with two issues, which we restate as:

(1) Whether Allen lacked standing to challenge the search of her husband's person and his clothing; and

(2) Whether an officer's omission of certain statements from his search warrant affidavit for Allen's home invalidated the search warrant.

[4] In addition, Allen presents an argument for upholding the trial court's grant of her motion to suppress, which we restate as: Whether the search warrant for her home was supported by probable cause.

FACTS AND PROCEDURAL HISTORY

[5] On October 10, 2020, Officer Jarrett Tedrow (Officer Tedrow) and other officers of the Bedford Police Department (BPD) went to the Hillside Apartments in 1900 block of 14th Street in Bedford, Indiana, to investigate a report of a male who was publicly exposing his buttocks. Officer Tedrow, whose body camera recorded the investigation, spoke with the complainant, who identified her neighbor, David Allen (David), as the male who had

repeatedly exposed his buttocks to her. The complainant indicated to the officers which apartment in the complex was David's. The officers proceeded to the reported address, Apartment 14, where they knocked. When a woman answered the door, Officer Tedrow asked if David lived there, and the woman offered to get David for him.

[6] After a delay, David came to the door, stepped outside without being asked, and shut the door behind him. As Officer Tedrow explained that he was investigating a report of a male exposing himself, David swayed back and forth and remained in constant motion. Within a few moments of encountering David, Officer Tedrow asked David if he had "taken anything today as far as alcohol or drugs" because he seemed to be intoxicated. (Exh. A at 9:40). As David responded that he had only had cold and cough medicine, the lit cigarette he held in his mouth dropped to the ground. Officer Tedrow questioned David concerning the neighbor's report. David confirmed that he lived in Apartment 14 and that his niece, his niece's children, his niece's boyfriend, some friends, and his wife, Allen,[1] were inside. David denied exposing himself to his neighbor, after which Officer Tedrow noted out loud that David knew details of the report without having been told. Another officer knocked on the door of Apartment 14 again and asked all the adults to exit.

[1] David referred to his wife as "Ashley." There is no dispute between the parties that Allen is David's wife or that Allen was present in Apartment 14 when the officers arrived.

[7] Officer Tedrow asked David if he had any weapons, whereupon David raised his arms and Officer Tedrow patted down the pockets of David's shorts. No weapons or other contraband was found. Officer Tedrow observed out loud that, although he did not know how David usually acted, David appeared to him to be more "f**ked up" than a person would normally be having taken just cold and cough medicine. (Exh. A at 12:25). David then stated that he had taken two "full glasses" of Robitussin. (Exh. A at 13:09). As another officer spoke with the other adults who had exited the home, Officer Tedrow stood with David, who spoke at length without being prompted. After several minutes, another officer observed a bulge in David's sock, reached into David's sock, and found a baggie of suspected heroin.

[8] David was taken into custody, and without being prompted, David stated the following:

> David: You got me . . . I'm not resisting . . . I'm not fighting you in the least bit . . . If there's anything here is found, it's all mine.
>
> Unidentified Officer: It was in your sock.
>
> David: I know. I'm just saying if anything is found in this house, it belongs to me.
>
> Officer Tedrow: We are going to my car.
>
> Unidentified Officer: Is there anything else inside the house?

> David: Let them go . . . I don't know, I didn't even know that was there [expletive] but I'll take it . . . [to bystanders] Hey call mom and tell her what's up. [to officers] I didn't know that was there, I would have told you that was there. I've been asleep. I just woke up.

(Exh. A at 22:15 to 23:13). A search of David's pockets prior his being transported yielded a pill which was suspected to be a Schedule II controlled substance.

[9] Subsequent to David's arrest, Officer Tedrow applied for a warrant to search Apartment 14 for evidence of heroin possession and dealing. In his affidavit filed in support of the search warrant, Officer Tedrow related that David's statement "'if there's anything here that's found, it's all mine'" had "led officers to believe that there are other controlled substances inside the residence." (Appellant's App. Vol. II, p. 102). Officer Tedrow did not include in his affidavit David's statement "I don't know, I didn't even know that was there [expletive] but I'll take it," made in response to an officer's enquiry if there was anything else in the home. (Exh. A at 22:15 to 23:13).

[10] Later that day the search warrant was approved and executed on Apartment 14. The probable cause affidavit filed with the charges in the instant case detailed that officers found in Apartment 14, among other things, what were suspected to be heroin, Buprenorphine, methamphetamine, Gabapentin, syringes, a glass pipe for ingesting methamphetamine, and, in a wallet containing what they suspected to be Allen's driver's license, two bindles of suspected heroin. Allen was taken into custody and transported to the BPD. According to the probable

cause affidavit, Allen advised that she had items inside her vaginal canal and eventually produced several plastic bags and a bindle containing suspected heroin from her person.

[11] On October 13, 2020, the State filed an Information, charging Allen with Level 2 felony dealing in a narcotic drug (heroin), Level 4 felony possession of a narcotic drug (heroin), Level 6 felony possession of a controlled substance (Buprenorphine), Level 6 felony possession of methamphetamine, Level 6 felony unlawful possession of a syringe, Level 6 felony legend drug possession (Gabapentin), and Class C misdemeanor possession of paraphernalia. On February 1, 2021, Allen filed a motion to suppress which she amended on April 27, 2021. Allen argued that any evidence procured against her must be suppressed because it was the fruit of the poisonous tree of an illegal search of David. Allen also argued that probable cause did not support the search warrant because Officer Tedrow had misled the search warrant judge by omitting from his search warrant affidavit any reference to David's statement that he did not know whether there were other drugs in the home. In its response, the State argued, among other things, that Allen did not have standing under either the federal or Indiana Constitutions to challenge the officer's search of David.

[12] On June 29, 2021, the trial court held a hearing on Allen's suppression motion. David was Allen's only witness. David provided limited testimony, essentially only establishing a foundation for the admission of Officer Tedrow's body camera footage, which was the only exhibit admitted at the hearing. Allen did

not argue during the hearing that she had standing to challenge the search of David's person due to being David's spouse. At the close of the hearing, the trial court made a preliminary ruling that Allen had standing to challenge the officer's search of David, but, after further argument by the parties, the trial court expressly took all issues under advisement. On August 17, 2021, the trial court issued a summary written order granting Allen's motion without entering findings of fact or conclusions thereon. On September 28, 2021, in response to a motion by the State, the trial court dismissed the charges against Allen without prejudice.

[13] The State now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[14] The State appeals pursuant to Indiana Code section 35-38-4-2(a)(5) following the trial court's grant of Allen's motion to suppress which effectively precluded any further prosecution of the State's case. In reviewing a trial court's grant of a motion to suppress, we must determine whether the record contains substantial evidence of probative value supporting the trial court's decision. *State v. Renzulli*, 958 N.E.2d 1143, 1146 (Ind. 2011). We will not reweigh the evidence and will consider any conflicting evidence most favorably to the trial court's ruling. *Id*. Where, as here, the State appeals from a negative judgment, to obtain reversal, it must show that the trial court's suppression ruling was contrary to law. *Id.* While we normally defer to the trial court's factual

findings made in support of the grant of a motion to suppress, here the trial court entered no findings of fact to which we must defer. *See State v. Wroe*, 16 N.E.3d 462, 470 (Ind. Ct. App. 2014) (also observing that, in reviewing a summary suppression order, this court must rely on the arguments of the parties and determine if there is substantial evidence of probative value to support the trial court's ruling), *trans. denied*.

II. *Standing*

[15] One of the bases for Allen's suppression motion was to challenge the constitutionality of the search of David that led to the search warrant for Apartment 14 and culminated in the discovery of contraband for which she was criminally charged. The State argues, as it did below, that Allen had no right under either the federal or Indiana Constitutions to challenge the legality of the search of David. We agree with the State.

[16] Both our federal and Indiana Constitutions protect the right of citizens to be free from unreasonable searches and seizures. *See* U.S. Const. Amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated[.]"); IN Const. Art. 1, § 11 (protecting "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure"). These rights are personal to an individual and may not be vicariously asserted. *Rakas v. Illinois*, 439 U.S. 128, 133-34, 99 S.Ct. 421, 425, 58 L.Ed.2d 387, 394 (1978) (Fourth Amendment); *Peterson v. State*, 674 N.E.2d 528, 533-34 (Ind. 1996) (holding that the rights conferred under Section 11 are the personal rights

of the individual whose person, house, paper, or effects are searched or seized). It is the burden of the defendant challenging the constitutionality of a search under either our federal or state Constitutions to establish his standing to do so. *See Peterson*, 674 N.E.2d at 532-34 (noting the defendant's burden under the Fourth Amendment and recognizing that Indiana law interpreting our state Constitution has also imposed the requirement of standing to challenge a search or seizure).

[17] Under the Fourth Amendment, in order to challenge the constitutionality of a search, a defendant must demonstrate that he or she has "'a legitimate expectation of privacy in that which is searched.'" *Id.* at 532 (quoting *Livingston v. State*, 542 N.E.2d 192, 194 (Ind. 1989)). To meet this burden, a defendant must show a subjective and objective expectation of privacy in the premises searched, which includes establishing "'ownership, control, possession, or interest'" in the premises searched. *Campos v. State*, 885 N.E.2d 590, 598 (Ind. 2008) (citing *Peterson*, 674 N.E.2d at 532-34). Whether a defendant has demonstrated that a legitimate expectation of privacy exists is a factual question to be determined on a case-by-case basis. *Lee v. State*, 545 N.E.2d 1085, 1091 (Ind. 1989). Significantly for our present purposes, "[a] defendant 'aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by the search of a third person's premises has not had any of his Fourth Amendment rights infringed.'" *Peterson*, 674 N.E.2d at 532 (quoting *Rakas*, 439 U.S. at 134).

[18] While standing analysis under the Fourth Amendment focuses for the most part on whether the defendant has a privacy expectation in the premises searched, a standing analysis under Article 1, Section 11 of our state Constitution places significant focus on both the premises searched and the defendant's interest in the property seized. *Id*. at 534. This difference was acknowledged by the *Campos* court, which observed that "the Indiana Constitution provides protection for claimed possessions irrespective of the defendant's interest in the place where the possession was found." *Campos*, 885 N.E.2d at 598. However, despite this analytical difference between Fourth Amendment and Article 1, Section 11 standing determinations, where the defendant does not assert any claim of privacy to a seized item, the result under both Constitutions will essentially be the same. *See Allen v. State*, 893 N.E.2d 1092, 1099 (Ind. Ct. App. 2008) (engaging in a Fourth Amendment analysis where Allen did not assert a privacy interest in any seized item), *trans. denied*.

[19] Here, Allen challenged the constitutionality of the search of David's person and his sock, arguing that she had standing to do so merely because the search of David led to the search warrant which ultimately yielded contraband for which she was criminally charged. However, as noted above, it is well-established Fourth Amendment jurisprudence that a criminal defendant's Fourth Amendment rights are not implicated simply because a search of a third party led to evidence which incriminates the defendant. *See Peterson*, 674 N.E.2d at 532; *Rakas*, 439 U.S. at 134. Even if it were possible for Allen to establish standing by establishing a privacy interest in David's person or clothing, Allen

made no attempt in the suppression proceedings to do so. We conclude, therefore, that Allen lacks standing to raise this challenge. *See Mabra v. Gray*, 518 F.2d 512, 513-14 (7th Cir. 1975) (holding that as "a matter of federal law, appellant may not assert an alleged violation of his wife's Fourth Amendment rights as a basis for suppressing the evidence taken from her person"); *see also Harris v. State*, 156 N.E.3d 728, 731-33 (Ind. Ct. App. 2020) (concluding that Harris lacked standing under the Indiana Constitution to challenge the search and seizure of a pair of jeans where there was no evidence he had an objective privacy interest in them and had disavowed ownership of them).

[20] On appeal, Allen implicitly acknowledges that there is no federal or state authority supporting her right to challenge the search of David's person or clothing, as she argues for an "extension of the law" based upon the fact that David is her spouse and the search warrant was used to search the marital home, including the marital bedroom. (Appellee's Br. p. 21). We cannot credit this argument for several reasons, the first being that Allen did not raise it below. Arguments raised for the first time on appeal, even ones based upon constitutional claims, are waived for appeal. *Endres v. Ind. State Police*, 809 N.E.2d 320, 322 (Ind. 2004); *Terpstra v. State*, 138 N.E.3d 278, 285-86 (Ind. Ct. App. 2019)*, trans. denied*. Allen did not argue in her written suppression filings or at the suppression hearing that her status as David's spouse gave her standing to challenge the search of his person or clothing. Therefore, this claim is waived for our consideration. *See id.*

[21] However, even if her claim were not waived, we would still not find in Allen's favor. Allen offers no support for her argument grounded in the text of either the Fourth Amendment or Article 1, Section 11. The legal authority she relies upon on appeal does not directly support her claim to standing: neither *Obergefell v. Hodges*, 576 U.S. 644, 675, 135 S.Ct. 2584, 2604-05, 192 L.Ed.2d 609 (2015) (holding that same-sex couples may exercise the fundamental right to marry), nor *Collins v. Virginia*, -- U.S. --, 138 S.Ct. 1663, 1672, 201 L.Ed.2d 9 (2018) (holding that the automobile exception to the Fourth Amendment does not permit a police officer to enter the curtilage of a home to search a vehicle parked there without consent or a search warrant), involved a claim of standing to challenge a search and seizure based on a spousal relationship. The Supreme Court has never held that the spousal relationship allows one spouse to vicariously assert the Fourth Amendment rights of the other spouse. *See* W. LaFave, 4 *Search and Seizure* § 11.3(i) (6th Ed.). Indeed, Allen presents no relevant authority from this or any other jurisdiction supporting her claim to spousal standing, and she fails to adequately explain why her rights are not sufficiently protected by the search warrant requirement. In addition, her argument that standing may essentially be automatically conferred through a spousal relationship also contradicts existing authority holding that whether a privacy interest exists sufficient to confer standing is a factual inquiry which must be determined on a case-by-case basis. *See Lee*, 545 N.E.2d at 1091. Without any support from the text of our state or federal Constitutions themselves or from the constitutional jurisprudence of our state or federal courts, we decline to endorse Allen's proposed extension to the law of standing.

Therefore, inasmuch as the trial court's grant of Allen's motion to suppress was premised on Allen's argument pertaining to the search of David's person or his clothing, we conclude that determination was contrary to law.[2] *See Renzulli*, 985 N.E.2d at 1146.

II. *Omission from Search Warrant Affidavit*

[22] The State also challenges Allen's suppression argument that Officer Tedrow's omission of David's statement that he did not know whether there were additional drugs in Apartment 14 fatally undermined the probable cause supporting the search warrant. Both the Fourth Amendment and Article 1, Section 11 require that a search warrant be supported by probable cause. *Darring v. State*, 101 N.E.3d 263, 268 (Ind. Ct. App. 2018). *Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S.Ct. 2674, 2684-85, 57 L.Ed.2d 667 (1978), established the rule that "when a warrant is supported in part by perjured statements or statements made with reckless disregard of the truth, the warrant will be invalid if the remainder of the supporting affidavit does not contain sufficient basis for probable cause." *Ware v. State*, 859 N.E.2d 708, 718 (Ind. Ct. App. 2007), *trans. denied*. Where a defendant claims that information has been wrongly omitted from the affidavit, as opposed to a claim that false information was included, the defendant must show that the affiant engaged in a "deliberate falsehood or reckless disregard for the truth in omitting the information and

[2] Due to our conclusion that Allen lacks standing to challenge the search of David, we do not address her argument that the search of David and his sock was illegal.

show that probable cause would no longer exist if such omitted information were considered by the issuing judge." *Darring*, 101 N.E.3d at 268. The defendant has this burden because the *Franks* rule only protects against omissions that are designed to mislead or that are made with reckless disregard about whether they would mislead the judge issuing the warrant. *Id*. The defendant's failure to show that the omission was deliberately or recklessly misleading is "fatal" to a *Franks* challenge. *Ware*, 859 N.E.2d at 719 (holding that Ware had failed to show the omission was deliberately or recklessly misleading and addressing the second, probable-cause prong only because it was an issue of first impression).

[23] The State argues that Allen failed to produce any evidence at the suppression hearing tending to show that Officer Tedrow's omission of David's statements was done deliberately or recklessly to mislead. Allen called David as her only witness at the hearing, and he did not provide any testimony bearing on this issue. The only other evidence admitted at the hearing was Officer Tedrow's body camera footage which shows David making the statements the omission of which Allen now argues constituted the *Franks* violation. Allen does not present us with any argument based on the facts and circumstances present in the body camera footage from which she contends the trial court drew a reasonable inference that Officer Tedrow intended to mislead by omitting David's statements. Rather, Allen argues that

> [i]f a trial court receives evidence during a suppression hearing which demonstrates that an officer seeking the warrant omitted

> an otherwise attributed declarant's direct disavowal of knowledge regarding the thing sought to be found, in the specific place requested to be searched, the suppression court should hold the power to evaluate whether the omission was designed to mislead or made in reckless disregard of the truth.

(Appellant's Br. p. 31). Thus, Allen essentially argues that, where a defendant alleges a *Franks* violation due to an omission, we should hold that the defendant may make the required showing of intent to mislead simply by showing the omission itself. This would, in effect, create a presumption of improper officer intent whenever a defendant could show an omission was made, relieving the defendant of the clear burden, as set forth in *Franks* and applied to the context of an omission in *Ware,* to demonstrate "deliberate falsehood or reckless disregard for the truth in omitting the information[.]" *Franks*, 438 U.S. at 156 (holding that defendant bears the burden of proof by a preponderance of the evidence); *see also Ware*, 859 N.E.2d at 718. We decline to do so. Contrary to Allen's assertion, our holding does not elevate form over substance, nor does it make "a mockery of both the Indiana and federal [C]onstitutions[,]" to follow precedent establishing that she had the burden of proof on her claim. (Appellant's Br. p. 31). Therefore, inasmuch as the trial court's suppression ruling was based on Allen's claim that Officer Tedrow acted improperly by

omitting David's statements from the search warrant affidavit, we conclude that the State has shown that the ruling was contrary to law.[3]

III. *Probable Cause Supporting the Search Warrant*

[24] Allen contends that an additional basis exists for upholding the trial court's grant of her motion to suppress in that Officer Tedrow's search warrant affidavit was facially devoid of probable cause. The State responds that Allen waived this claim by failing to raise it below. We agree with the State, as our review of Allen's written and oral suppression arguments failed to uncover any contention regarding the facial lack of probable cause supporting the search warrant. Challenges to the probable cause supporting a search warrant are waived if raised for the first time on appeal. *Goodner v. State*, 685 N.E.2d 1058, 1060 (Ind. 1997) (declining to address Goodner's waived contentions regarding the lack of probable cause supporting a search warrant raised for the first time on appeal).

[25] However, even if Allen had not waived this claim, we would still reverse the trial court's suppression order. To obtain a search warrant, the State must file an affidavit describing the place to be searched, what contraband is to be the focus of the search, and the facts that constitute probable cause for the search. Ind. Code § 35-33-5-2(a). The decision to issue the search warrant should be

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[3] Allen's failure to meet her burden to show Officer Tedrow's intent to deceive was fatal to her claim. *See Ware*, 859 N.E.2d at 719. Therefore, we do not address the parties' other arguments regarding whether probable cause would have existed had the search warrant judge considered the omitted statements, nor do we address the parties' contentions regarding whether the officers relied on the search warrant in good faith.

based on the facts provided in the search warrant affidavit and the "rational and reasonable inferences drawn therefrom." *Overstreet v. State*, 783 N.E.2d 1140, 1157 (Ind. 2003). Probable cause to search a premises is established where the affidavit permits a reasonably prudent person to believe that a search of the premises will uncover evidence of a crime. *Id.* This is a practical, commonsense determination that, given all the circumstances set out in the affidavit, there is a fair probability that contraband or evidence of a crime will be found. *McCollum v. State*, 63 N.E.3d 5, 9 (Ind. Ct. App. 2016). "The duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis' for concluding that probable cause existed." *Overstreet*, 783 N.E.2d at 1157 (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332, 76 L.E.2d 527 (1983)). The reviewing court is required, with significant deference to the magistrate's probable cause decision, to focus on whether reasonable inferences drawn from the totality of the evidence support that determination. *Id.*

[26] Officer Tedrow's search warrant affidavit provided, in relevant part, as follows:

> I knocked on the door of Apartment 14 and requested that David come speak with me. Several other adults and two young children were also in the apartment. David appeared to be heavily intoxicated. He advised that he took two glasses of "Robitussen." David showed an inability to remain still during the entirety of our conversation. Officer Bade observed a bulge from David's left sock. David was given an exterior pat down and Officer Bade felt what he knew to be a "baggie" in David's sock. This bag contained a white, powdery substance. This substance yielded a positive result for the presence of heroin. David was placed in handcuffs at the time. Without any questioning from police, David stated, "if there's anything here

> that's found, it's all mine." This statement led officers to believe that there are other controlled substances inside the residence. During the search of David's pockets, prior to transport, a round pill was located in David's pocket. The pill was identified as Oxymorphone Hydroxocholoride, a [S]chedule II controlled substance.

(Appellant's App. Vol. II, p. 102). Therefore, the pertinent facts before the search warrant judge were that, after having just exited Apartment 14 and been arrested for the heroin in his sock, without any prompting, David volunteered the information that if the officers found anything else "here" it belonged to him. (Appellant's App. Vol. II, p. 102). The totality of this evidence permits a reasonable inference that David knew that there was additional heroin in the home for which he wished to claim responsibility. It could also reasonably be inferred that David's equivocation was not based upon his lack of knowledge about whether there was actually additional heroin inside Apartment 14 but, especially given his unprompted offer of the information, was, rather, his attempt to hedge his bets that the officers would not discover it. Based on this evidence and the reasonable inferences it permits, we conclude that a substantial basis for probable cause existed to search Apartment 14 for evidence of heroin. *See Overstreet*, 783 N.E.2d at 1157.

[27] Allen attempts to ascribe other interpretations to these facts, including arguing that David's reference to "here" could have been to his clothing and that David's statement about other things being in the house was not particularly credible because he was highly intoxicated and had already apparently lied

about only taking cold medicine. (Appellant's App. Vol. II, p. 102). These arguments miss the mark, as the trial court's duty, and ours by extension, is not to determine if other explanations could be had for David's conduct and statements apart from signaling the probability of the presence of additional drugs in Apartment 14; rather, the reviewing court is to determine, giving significant deference to the warrant court, whether the evidence permitted reasonable inferences that supported the probable cause determination. *See id.* Because we conclude that a substantial basis existed for the search warrant court's probable cause determination, Allen's argument could not have been a valid basis for suppressing any evidence flowing from the search warrant.

CONCLUSION

[28] Based on the foregoing, we conclude that the trial court's grant of Allen's motion to suppress was contrary to law due to Allen's lack of standing and her failure to show that the search warrant lacked probable cause.

[29] Reversed.

[30] Robb, J. and Molter, J. concur