

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2481

September Term, 2015

DAVID JAMES MONTGOMERY

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Woodward,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: March 28, 2017

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case turns on whether, and for how long, David James Montgomery retained a legitimate expectation of privacy in a compact disc (“CD”) that he left in a laptop he pawned and failed to redeem. The CD, which contained child pornography, was discovered by a pawnshop employee preparing the laptop for resale. Mr. Montgomery was charged in the Circuit Court for Washington County with sexual abuse of a minor, filming a minor engaging in sexual conduct, and related offenses. He filed a pretrial motion to suppress the CD that the circuit court denied after finding that he had abandoned the CD. He went to trial on an agreed statement of facts, and the court found him guilty of sexual abuse of a minor and filming a minor engaging in sexual conduct.

On appeal, Mr. Montgomery contends that the circuit court erred in concluding that he abandoned the CD, and argues that he had retained a constitutionally protected privacy interest that the police violated by viewing the CD without consent or a warrant. The State counters that Mr. Montgomery abandoned the CD when he left it in the laptop and failed to reclaim it. We agree with the State and affirm.

I. BACKGROUND

On September 10, 2014, Mr. Montgomery pawned his laptop computer at Washington Street Pawnbrokers to “get some money.” According to the contract he entered with the pawnshop, he could redeem the laptop within thirty days (by October 10) by paying an agreed fee, else it would become the pawnshop’s property and available for the shop to sell to others. Mr. Montgomery did not pay the fee in time, and the shop

attempted twice to contact him to see if he planned to redeem it. He didn't respond, so a pawnshop employee began to prepare the laptop for resale.

As he worked on the laptop, the employee discovered a CD containing child pornography in the disc drive. The employee turned the CD over to police and gave consent to view it. After they watched the CD, the police obtained a warrant to search Mr. Montgomery's computer and, eventually, his house, where they found other incriminating evidence. Mr. Montgomery then was charged with sexual abuse of a minor, filming a minor engaging in sexual conduct, and related offenses.

Mr. Montgomery filed a pretrial motion to suppress evidence, specifically the CD, alleging a violation of his Fourth Amendment rights. The motions court held a hearing, during which Mr. Montgomery testified that he did not mean to leave the CD in the laptop. His counsel argued that the CD should be treated as mislaid property, not abandoned property, because Mr. Montgomery did not intend to leave the CD in the computer when he pawned it. He argued as well that, pursuant to Md. Code (2002, 2012 Repl. Vol., 2016 Supp.), § 7-104(d) of the Criminal Law Article (the "theft statute"),¹ Mr. Montgomery

¹ § 7-104(d) provides:

(d) A person may not obtain control over property knowing that the property was lost, mislaid, or was delivered under a mistake as to the identity of the recipient or nature or amount of the property, if the person:

(1) knows or learns the identity of the owner or knows, is aware of, or learns of a reasonable method of identifying the owner;

retained a property interest in the CD, and so the pawnshop employee’s consent to search the CD was invalid and the police were required to obtain a warrant before viewing it. The State countered that the search did not violate the Fourth Amendment because Mr. Montgomery had abandoned the CD (along with the laptop) when he failed to redeem it from the pawnshop, and thus he retained no constitutionally protected privacy interest in it. The court agreed with the State and issued a memorandum and order, which we discuss below, denying the motion. This timely appeal followed.

II. DISCUSSION

Mr. Montgomery argues on appeal that the circuit court erred in denying his motion to suppress.² He contends that the motions “court should have viewed the CD as property delivered by mistake rather than property abandoned or sold,” which, pursuant to the theft statute, would have imposed on the pawnshop a duty to return the CD to him and rendered the pawnshop’s consent to view the CD invalid. The State counters that the court correctly denied the motion to suppress because once “[Mr.] Montgomery abandoned the laptop and the CD that was in it, [he] had no expectation of privacy in the CD and thus the Fourth Amendment was not implicated.” We agree with the State.

(2) fails to take reasonable measures to restore the property to the owner; and

(3) intends to deprive the owner permanently of the use or benefit of the property when the person obtains the property or at a later time.

² In his brief, Mr. Montgomery phrased the Question Presented as follows: Did the hearing court err by denying Appellant’s motion to suppress evidence?

In reviewing a circuit court’s decision on a motion to suppress evidence, we consider only the facts developed at the suppression hearing. *Lee v. State*, 418 Md. 136, 148 (2011) (citation omitted). We view the evidence in the light most favorable to the prevailing party—here, the State—and defer to the suppression court’s factual findings unless clearly erroneous. *Briscoe v. State*, 422 Md. 384, 396 (2011). “We, however, make an independent appraisal of the constitutionality of a search, applying the law to the facts found in each particular case.” *Id.* (citation and internal quotations omitted).

The Fourth Amendment to the United States Constitution, which applies to the States through the Fourteenth Amendment, provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *Paulino v. State*, 399 Md. 341, 349 (2007). The Fourth Amendment does not prohibit all governmental searches and seizures, but protects against “unreasonable and arbitrary governmental intrusions.” *Powell v. State*, 139 Md. App 582, 598-99 (2001) (citations omitted). “[A]pplication of the Fourth Amendment depends on whether the person invoking its protections can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy’ that has been invaded by government action.” *Smith v. Maryland*, 442 U.S. 735, 740 (1979). The person invoking Fourth Amendment protections has the burden to prove his or her legitimate expectation of privacy in the place searched or the item seized. *Id.* at 740 (1979) (citations omitted). A two-part test determines whether Fourth Amendment protection applies to a particular search:

First, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that “he [sought] to preserve [something] as private.” . . . Second, we inquire whether the individual’s expectation of privacy is “one that society is prepared to recognize as reasonable.”

Powell, 139 Md. App. at 600 (quoting *Bond v. United States*, 529 U.S. 334, 338 (2000)).

Fourth Amendment protections do *not* extend to property that is abandoned or voluntarily discarded because, by definition, the abandoning party has relinquished any expectation of privacy in it. *Williamson v. State*, 413 Md. 521, 535 (2010) (citations omitted). The test for determining whether property is abandoned focuses on whether the owner—not a reasonable person, but this particular one—retained a reasonable expectation of privacy in the item. *Id.* (citations omitted). For purposes of the Fourth Amendment, “[a] person demonstrates a subjective expectation of privacy by showing that he or she sought to preserve something as private.” *Id.* (citation and internal quotations omitted).

The question in this case is whether Mr. Montgomery retained a legitimate expectation of privacy in the CD after he pawned the laptop with the CD in it. If he abandoned the CD, he retained no legitimate expectation of privacy in it, and Fourth Amendment protections do not apply.³ *Id.* Mr. Montgomery argues, and the record

³ Conversely, if Mr. Montgomery retained no legitimate expectation of privacy in the CD, the motions court’s conclusion that he abandoned it is likewise correct. As we pointed out in *Powell*, “[g]enerally speaking, in Fourth Amendment analysis, the concepts of abandonment and lack of expectation of privacy go hand in hand, as the proverbial two sides of the same coin. Indeed, in Fourth Amendment parlance, the term ‘abandonment’ is often shorthand reference for the concept of lack of expectation of privacy.” 139 Md. App. at 600-01.

supports him, that he did not intend to leave the CD in the laptop, and that it was not part of the transaction with the pawnshop. Nevertheless, the motions court concluded that the CD was abandoned for purposes of the Fourth Amendment, and we agree.

Mr. Montgomery claims that the motions court should have treated the CD as “property delivered by mistake rather than property abandoned or sold,” and that under the theft statute, the pawnbroker had “no authority to keep [the CD]” and instead had “a duty to take reasonable measures to restore the property to [him].” This theory might make sense as a matter of property law, but the Fourth Amendment analysis focuses on whether he retained a reasonable expectation of privacy in the CD, not his ownership interest. *Powell*, 139 Md. App. at 601. And although Mr. Montgomery’s intent may be relevant in determining whether he retained a legitimate expectation of privacy in it, his “subjective intent alone is not dispositive.” *Stanberry v. State*, 343 Md. 720, 737 (1996). That is, “[w]hether property has been abandoned is generally a question of fact based upon evidence of a combination of act and intent.” *Id.* at 732 (citation and internal quotations omitted).

In assessing whether property is abandoned for purposes of the Fourth Amendment, Maryland courts consider a variety of factors:

the location of the property and whether the area was secured;
the length of time that the property remained in the location
prior to the search; the condition of the property when it was
searched; whether the owner asked a third party to watch or
protect the property; and whether the owner disclaimed or
failed to claim the property when questioned by police.

Powell, 139 Md. App. at 605 (quoting *Stanberry*, 343 Md. at 733). We agree with the motions court’s conclusion that “[Mr. Montgomery] simply was not paying sufficient attention or taking any action whatsoever to protect or maintain any expectation of privacy in the CD in the CD drive.” Indeed, he did nothing to protect his privacy interest in the CD: he left it at the pawnshop for over a month, past the time period in which he could redeem the laptop; he did not respond to the pawnshop’s efforts to reach him about redeeming the laptop; he knew the pawnshop would become the laptop’s rightful owner if he failed to redeem it; and he accepted payment for the laptop and never attempted to repurchase it. Some pawnshop transactions function as short-term loans, others as a straight sale. In this instance, Mr. Montgomery sold the laptop and evinced no sense of intention to redeem the laptop—he took the cash and left the property behind, including the CD.

Moreover, Mr. Montgomery did not have a privacy right in the CD that society would recognize as reasonable. Once you pawn something and fail to redeem it, it becomes the pawnshop’s property, and his contract with this pawnshop followed that model. Just as stashing drugs inside another person’s room does not give the stasher a reasonable expectation of privacy, *Simpson v. State*, 121 Md. App. 263, 282 (1998), leaving child pornography in the disc drive of a pawned computer did not give Mr. Montgomery a reasonable expectation of privacy in the disc. Once he had relinquished it to the

pawnshop⁴, to the contrary, Mr. Montgomery abandoned the CD, and the police did not need his consent, let alone a warrant, to view it. *See Powell*, 139 Md. App. at 607 (noting that, once a defendant abandoned a paper bag by leaving it in the curb area of a public street, “the police were entitled to look inside it”).

Nor are we persuaded by Mr. Montgomery’s argument that the CD should be treated differently than other allegedly abandoned items because it could contain personal data. *Cf. Riley v. California*, 134 S. Ct. 2473, 2485 (2014) (requiring a warrant before officers can search a smart phone); *United States v. Alabi*, 943 F. Supp. 2d 1201, 1270 (D.N.M. 2013) (distinguishing CDs from credit cards because the latter can store personal data). There might be more to this argument if Mr. Montgomery hadn’t abandoned the CD, but he did, and the police were free to search whatever he left behind. Put in paper terms, as the motions court found, the police are entitled to read the entire contents of an abandoned file folder, and thus all of the files on an abandoned CD:

While those cases discussing electronic devices that store various kinds of data do have applicability in some circumstances, in this case the first question in the analysis is still whether the property was abandoned for Fourth Amendment purposes, or not. If it was abandoned, and there is no reasonable expectation of privacy for Fourth Amendment purposes, it does not matter whether it is an electronic storage device, electronic media, or a piece of paper. With abandonment . . . there is no need for a warrant and the State has met its burden.

⁴ An interesting question might have arisen if the pawnshop employee had found the CD before the thirty-day redemption period had expired. That question, and its answer, must await another day.

The court did not err, therefore, in concluding that the police were entitled to review its contents in full after Mr. Montgomery abandoned it.

**JUDGMENTS OF THE CIRCUIT COURT
FOR WASHINGTON COUNTY
AFFIRMED. APPELLANT TO PAY
COSTS.**