

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1342**

State of Minnesota,
Appellant,

vs.

Alexander James Butcher,
Respondent.

**Filed March 21, 2022
Reversed and remanded
Gaïtas, Judge**

Becker County District Court
File No. 03-CR-21-1028

Keith Ellison, Attorney General, St. Paul, Minnesota; and

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Considered and decided by Connolly, Presiding Judge; Reilly, Judge; and Gaïtas,
Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

In this pretrial appeal from an order suppressing evidence of a robbery that police found in respondent Alexander James Butcher's apartment, appellant State of Minnesota argues that the district court erred in concluding that the officers' warrantless search

violated Butcher's constitutional rights. Because the police reasonably believed that Butcher had abandoned the apartment and that the landlord had authority to allow the search, we reverse and remand.

FACTS

A convenience store in Audubon was robbed on May 25, 2021. The robber entered the store with his head and face covered and claimed to have a gun. He gave the clerk a handwritten note that said "money" and "cigs." The clerk gave the robber over \$300 from the registers and two packs of Newport cigarettes. A customer asked the robber, "What [is] going on?" and the robber responded, "You know what's going on" and threatened to shoot him. Then, the robber fled from the store, heading north.

A week later, police spoke with an informant who claimed that he found a "dollar bill wrapper" in a sink in Butcher's apartment the day after the robbery. The apartment was just north of the convenience store.

On June 2, 2021, police contacted the landlord, who agreed to meet them at the apartment the next day. The landlord told the officers that Butcher had moved out, and that he was in the process of cleaning and repairing damage so that he could rent to a new tenant. He gave the police permission to search the apartment for evidence, and the officers searched without first obtaining a search warrant. Although there were still some furnishings in the apartment, including a tattered sofa and a broken television, it was largely empty.

During the search, the police found a black Sharpie marker and a notepad that matched the note that the robber had used. They also discovered crumpled paper with

handwriting that stated, “Be smart empty register this is not a joke.” And they found a money wrapper, an empty Newport cigarette pack, and a pair of tan cargo pants like those that the robber had worn.

Following the search, Butcher was charged with second-degree aggravated robbery, Minn. Stat. § 609.245, subd. 2 (2020), and threats of violence, Minn. Stat. § 609.713, subd. 1 (2020). Butcher moved to suppress the evidence found in his apartment, arguing that the landlord did not have authority to consent to the search and the warrantless search violated his constitutional rights.

The district court held an evidentiary hearing on Butcher’s motion. At that hearing, two witnesses testified for the state—the landlord and one of the investigating officers.

According to the landlord, Butcher had moved into the apartment in March 2021 and had paid rent for the months of March and April. At some point, Butcher shared his concern with the landlord that he would be unable to pay rent in May. The landlord went to the apartment around May 1 to speak with Butcher about obtaining rental assistance. Approximately one week later, the landlord again spoke with Butcher, who informed him that he was moving. No date or timeline for the move was discussed, but the landlord “took it as soon.”

The following week, possibly between May 14 and 17, the landlord returned to the apartment and found the door open and the apartment keys on the counter. According to the landlord, the apartment was “trashed.” He installed a new deadbolt lock and left a note on the door for Butcher to call him. Although the landlord was unsure about the exact timing of these events, he believed that the “note must have been on the door for a couple

of weeks.” After another week or two, the landlord returned to start cleaning the apartment. On June 3, an officer requested his consent for a search. Before he allowed the officers into the apartment, the landlord confirmed with the tenant below—who “could hear if anybody had been upstairs”—that Butcher had not been in the apartment “up until the point” when the police contacted him.

The investigating officer testified that, based on his investigation, he believed Butcher had vacated the apartment at least a week before the search. Another tenant who lived below Butcher’s apartment reported to him that Butcher had moved out the day after the robbery, on May 26, 2021. Additionally, the officer relied on the landlord’s representations. When he spoke with the landlord in June 2021—just before the search—the landlord said that Butcher had agreed to move out during a conversation on May 23 or 24. Moreover, the landlord told the officer that his son was actively working on the apartment to prepare it for new tenants. The condition of the apartment also suggested to the officer that it was vacant. When he arrived, the landlord and his son were there cleaning and making repairs. The landlord’s note was still on the door. There were rolls of plastic for covering the carpet, a piece of sheetrock, cleaning supplies, and a vacuum cleaner. A door was off its hinges. Although there was still some property in the apartment, the officer observed that it did not appear that anyone was living there.

The state submitted several photos showing the condition of the apartment before the search. Those photos show (1) the note that the landlord left on the door for Butcher; (2) a room with a hole in one wall, a couch, pillows, a folding table, and other unidentifiable items such as bottles that the landlord deemed to be “garbage”; (3) a closet with various

items including some clothing, boxes, and possible bedding; (4) a bathroom with cleaning supplies in the sink; and (5) a room with a TV, an unhinged door, a walker, and some wall or ceiling repair supplies.

Finally, Butcher submitted a printout of a conversation that he allegedly had with his sister on May 19, 2021 via social media. In it, the sister asked, “You lose your place?” and he responded, “Not yet.”

The district court granted Butcher’s suppression motion, concluding that the landlord did not have authority to consent to the search and that the search violated the constitutional warrant requirement. But the district court denied Butcher’s motion to dismiss the charges for lack of probable cause because there is additional independent evidence connecting him to the robbery, including eyewitness testimony that the suspect ran in the direction of Butcher’s apartment after the robbery, a jail call with an individual who told Butcher that he recognized him in a surveillance photo of the robbery, and a note and shoe left at the convenience store that were still awaiting forensic analysis.¹

The state appeals the district court’s order suppressing the evidence.

DECISION

I. The district court’s suppression order critically impacts the prosecution.

The state “may appeal as of right” to this court “in any case, from any pretrial order.” Minn. R. Crim P. 28.04, subd. 1(1). When the state appeals from a pretrial order

¹ At the oral argument before this court, the attorney representing the state advised that Butcher’s DNA was found on the suppressed items, but the results of DNA testing on the items left at the gas station were still unavailable.

suppressing evidence, the state must “clearly and unequivocally demonstrate[] that the suppression ruling will have a critical impact on the outcome of the trial.” *In re Welfare of L.E.P.*, 594 N.W.2d 163, 168 (Minn. 1999). “Critical impact is a threshold showing that must be made in order for an appellate court to have jurisdiction.” *State v. Gradishar*, 765 N.W.2d 901, 902 (Minn. App. 2009). And “[c]ritical impact has been shown not only in those cases where the lack of the suppressed evidence completely destroys the state’s case, but also in those cases where the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution.” *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987).

Here, the state argues that the district court’s order suppressed the most compelling evidence connecting Butcher to the robbery, substantially reducing the likelihood of a successful prosecution. And although the district court determined that “probable cause sufficient to uphold the charges still exists,” Butcher does not challenge the state’s assertion that the suppressed evidence would have a critical impact on the prosecution. *See Kim*, 398 N.W.2d at 551 (discussing *State v. Lynard*, 294 N.W.2d 332 (Minn. 1980), where the Minnesota Supreme Court considered the merits of the district court’s pretrial suppression order despite the existence of non-suppressed evidence). Because the suppressed evidence is strong evidence of Butcher’s guilt, we conclude that the state has satisfied the critical-impact requirement and we address the merits of the appeal.

II. The search of the apartment did not violate the constitutional warrant requirement because the police reasonably relied on the landlord’s apparent authority to consent to a search.

The Fourth Amendment to the United States Constitution and the Minnesota Constitution protect individuals and their property from unreasonable searches by the

government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. “[T]he ultimate touchstone of the Fourth Amendment is ‘reasonableness’” *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (quoting *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999); *Katz v. United States*, 389 U.S. 347, 357 (1967)). Reasonableness generally requires law enforcement to obtain a search warrant before conducting a search to discover evidence of criminal wrongdoing. *Riley v. California*, 573 U.S. 373, 382 (2014).

“[I]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.” *Id.* “The state bears the burden of establishing the applicability of an exception” to the warrant requirement. *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003). Any evidence obtained as a result of a warrantless search that is not justified by an exception to the warrant requirement must be suppressed. *State v. Horst*, 880 N.W.2d 24, 36 (Minn. 2016) (“[T]he remedy for an illegal search or seizure is generally limited to the suppression of illegally obtained evidence.”).

The warrant exception at issue here is consent. A search “conducted pursuant to consent” is an established exception to the warrant requirement. *State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985). Under certain circumstances, a third party—a person with “common authority” over a property—may also grant permission to the police to search. *United States v. Matlock*, 415 U.S. 164, 171 (1974).

Generally, a landlord cannot consent to a police search of a tenant’s property. *Chapman v. United States*, 365 U.S. 610, 616-17 (1961). When a tenant has abandoned the property, however, a landlord has “actual authority” to consent to a search. *State v. Richards*, 552 N.W.2d 197, 203 n.2 (Minn. 1996); *Licari*, 650 N.W.2d at 251.

Abandonment occurs when a defendant has “relinquished his expectation of privacy with respect to the property.” *State v. Oquist*, 327 N.W.2d 587 (Minn. 1982). But even when a landlord does not have actual authority to consent, police may rely on the landlord’s “apparent authority” to consent under some circumstances. *Licari*, 650 N.W.2d at 253-54. “Apparent authority” will justify a warrantless search when the police reasonably believed that the landlord had authority to allow a search. *See State v. Thompson*, 578 N.W.2d 734, 740 (Minn. 1998) (“Where common authority does not actually exist, consent to entry is still valid where, under an objective standard, an officer reasonably believes the third party has authority over the premises and could give consent to enter.”) “The issue [of actual authority] also has relevance to the issue of apparent authority because apparent authority exists only if the authority claimed by the third party would, if true, be sufficient to satisfy the legal test for actual authority.” *Licari*, 659 N.W.2d at 250 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990)).

Here, in granting Butcher’s suppression motion, the district court concluded that the landlord did not have actual or apparent authority to consent to the search. Although not raised by either party, the district court extensively discussed the eviction moratorium in effect at the time of the search² and found that the landlord did not have authority to evict Butcher from the apartment. The district court also found that Butcher had not abandoned the apartment. Even though the district court declined to make explicit findings regarding

² In July 2020, the governor signed an executive order that suspended most lease terminations and eviction actions during the COVID-19 pandemic except in limited circumstances. *See* Emerg. Exec. Order No. 20-79, *Modifying the Suspension of Evictions and Writs of Recovery During the COVID-19 Peacetime Emergency* (July 14, 2020).

the credibility of the two witnesses who testified at the evidentiary hearing,³ it expressed concern about the timeline that the landlord provided during his testimony. The district court observed that the landlord's testimony suggested that the lock was changed *before* the robbery, and that it was inconsistent with the neighbor's statement to police that Butcher abandoned the apartment immediately *after* the robbery. Additionally, the district court noted that Butcher never confirmed with the landlord when he planned to move out and that the items in the apartment indicated that he was still living there. Finally, the district court found that Butcher told his sister approximately one week before the robbery that he had not yet lost the apartment. Based on these findings, the district court concluded:

[U]nder a reasonable analysis, the officers knew or should have known, the landlord likely did not have the right to evict [Butcher], that there were contradictory statements as to when, if ever, [Butcher] had moved out, and there was evidence of his personal property in the apartment to suggest [Butcher] was still living in the property. Therefore, the Court finds that, under a reasonable analysis, the landlord did not have apparent authority to consent to a search of the premises and the officer's search was in violation of [Butcher]'s constitutional rights.

The state argues that the district court erred as a matter of law in determining that the landlord did not have actual or apparent authority to consent to the search. Butcher

³ The district court stated that it did "not wish to weigh the credibility of testimony at this stage of the proceedings." But assessing credibility is an important function of the district court at all stages of the proceedings. *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003) ("[T]he weight and believability of witness testimony is an issue for the district court"), *rev. denied* (Minn. July 15, 2003).

responds that the state failed to meet its burden of establishing the validity of the landlord's consent and therefore the district court properly suppressed the evidence.

When reviewing pretrial orders on motions to suppress evidence, appellate courts review a district court's legal conclusions de novo and factual findings for clear error. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009). The district court's findings of fact are clearly erroneous if an appellate court, after reviewing the record evidence, is "left with the definite and firm conviction that a mistake occurred." *State v. Diede*, 795 N.W.2d 836, 846-47 (Minn. 2011). "Whether actual or apparent authority to consent exists is a legal question subject to de novo review." *State v. Dotson*, 900 N.W.2d 445, 450 (Minn. App. 2017).

Applying our de novo standard of review, we conclude that the state established by a fair preponderance of the evidence that the officers reasonably believed the landlord had authority to consent to the search. *See State v. Houston*, 359 N.W.2d 336, 339 (Minn. App. 1984) (applying preponderance-of-the-evidence standard of proof to question of whether landlord had authority to consent). We reach this conclusion for several reasons.

First, the district court's focus on whether the landlord could lawfully evict Butcher during the eviction moratorium was misplaced. Neither party raised this argument below and neither party pursues it on appeal. Moreover, the record contains no information about an eviction. The state has consistently argued that Butcher relinquished his privacy in the apartment by abandoning it and not because he was evicted. Thus, the district court erred in determining that the landlord's consent was invalid because he did not have authority to evict Butcher.

Second, in addressing whether the police reasonably believed that the landlord had authority to consent to the search, the district court failed to consider the information that the police had at the time of the search. *See Thompson*, 578 N.W.2d at 740 (explaining that the proper inquiry for apparent authority is whether “a sufficient objective basis” grounded the officer’s belief that the person consenting to the search had the authority to do so); *see, e.g., Houston*, 359 N.W.2d at 338 (analyzing whether the officer had a sufficient objective basis for his belief that the landlord had authority to consent by considering the landlord’s statements to the officer before the search and the officer’s other observations and knowledge of the case). Without acknowledging the officer’s testimony about his communications with the landlord, the district court erroneously focused on the landlord’s recollection at the time of the evidentiary hearing about what he told the police months earlier. And based on the landlord’s recollection of events that occurred months earlier, the district court concluded that “there were contradictory statements as to when, if ever, [Butcher] had moved out.” But an apparent-authority analysis required the district court to focus on what the officer knew when he received the landlord’s consent to search, and whether that information made it objectively reasonable to believe that the landlord had authority to consent.

Third, applying that analysis, we conclude that it was objectively reasonable for the police to conclude that the landlord had authority to consent to the search. We largely base this conclusion on the officer’s testimony at the evidentiary hearing. The district court made no finding that the officer was not a credible witness. And based on the officer’s testimony, there was good reason for the police to believe that Butcher had abandoned the

apartment. A neighbor told the police that Butcher had moved out a week earlier, immediately following the robbery. The landlord told the officer that Butcher notified him that he was moving out on May 23 or 24. Additionally, the landlord conveyed that he was in the process of preparing the apartment for new tenants. When the officers arrived at the apartment, the landlord and his son were working there, repairing damage that Butcher caused, throwing away garbage, and cleaning. The officers saw the note that the landlord had left on the door for Butcher. Some property remained in the apartment, but the officer observed that “there wasn’t much there” and that it appeared that the landlord was “throwing garbage away.” The officer testified that, based on all this information, he believed Butcher was gone and the landlord had authority to consent to a search of the apartment. Applying de novo review, we determine that the officer’s belief was objectively reasonable.

Butcher argues that the property in the apartment was a clear indication that he was still living there. But given all the information known to the officers—the neighbor’s statement, the landlord’s information, and the overall condition of the apartment when the officers arrived—the minimal amount of property present did not make it unreasonable for the officers to believe that Butcher had abandoned the property and that the landlord had taken possession of it.

The state’s evidence established by a preponderance of the evidence that the officers reasonably believed the landlord had authority to consent to the search. Thus, the district court erred in determining that the search violated Butcher’s constitutional rights.

Reversed and remanded.