

**COURT OF APPEALS
STATE OF COLORADO**

101 West Colfax Avenue, Suite 800
Denver, CO 80202

Larimer County District Court
Honorable Daniel J. Kaup, Judge
Case No. 06CR1962

**THE PEOPLE OF THE STATE OF
COLORADO,**

Plaintiff-Appellee,

v.

FRANK MARZANO,

Defendant-Appellant.

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PETITION FOR REHEARING

DIVISION VI

Opinion by Judge JUDGE

GRAHAM

Loeb and Criswell, JJ., concur,

Certification of Word Count: 7

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It contains 2,350 words.

Roger D. Bellotte

In *People v. Marzano*, (Colo. App. No. 08CA0206, August 5, 2010, this court reversed the judgment of conviction and remanded the case with directions to dismiss the charges against defendant. Pursuant to C.A.R. 40, the People respectfully petition for a rehearing. This court's opinion has overlooked or misapprehended certain points of law and fact.

At the motions hearing, Deputy United States Marshal Greg West testified that from October 2006 to April 2007 he was involved in a search for a fugitive on a federal arrest warrant named Randall Zandstra (CD, v. 5, 6/21/07, pp. 26-27). In the course of the investigation, West received information from authorities that Zandstra was living at 1621 Firerock Court in Loveland (CD, v. 5, 6/21/07, p. 27).

Assessor's office records showed that since 2003 the property was connected to Zandstra by way of companies associated with the fugitive and the use of the name Peter Downs, an alias used by Zandstra (CD, v. 5, 6/21/07, p. 28).

According to the assessor's office, after 2003, the property went from Lisa Spain, to Peter Downs, to Diamond Property Management (a company set up by Peter Downs), to Randall Zandstra, and then to

Carol Dugasz (CD, v. 5, 6/21/07, pp. 31-32). Carol Dugasz was listed as the owner beginning in August 2006 (CD, v. 5, 6/21/07, p. 32).

Federal Officers for the Southern District of New York Spoke with Carol Dugasz, who told them that Zandstra was a friend, that he asked her to put the property in her name because he was afraid it would be seized by federal authorities, no money changed hands, and he promised to pay all the bills (CD, v. 5, 6/21/07, pp. 29-30).

In February 2006, Zandstra was in contact with local police regarding some incidents at the residence and stated that he had a lease from Diamond Management Property to live there and that various items in the house belonged to him (CD, v. 5, 6/21/07, p. 33).

The police also spoke with Charles "Mike" Spain who said he had delivered groceries to Zandstra at the residence (CD, v. 5, 6/21/07, p. 34). West checked with a Loveland utilities company and found that the residence on Firerock Court was listed under the names of Harold and Carol Dugasz and there was a credit on the utilities account (CD, v. 5, 6/21/07, p. 36).

Carol Dugasz died and her son, Anthony Dugasz, became executor of the estate (CD, v. 5, 6/21/07, p. 37). Dugasz found the property title in his mother's papers and a business card from a marshal's deputy (*id.*). When Dugasz contacted the deputy, the officer told him that his mother owned the property, she had admitted to them that it was "basically a sham," and that Zandstra "was living there or had the property" (*id.*). Dugasz replied that if the property was his mother's, no one should be living there because he had no evidence of a lease or rent agreement (*id.*). Dugasz then provided the deputies in New York with a letter consenting to a search by law enforcement of the Colorado property (CD, v. 5, 6/21/07, p. 38). The letter was forwarded to Deputy Marshal West (*id.*) and stated the following:

Anthony W. Dugasz
115 Evergreen Avenue
Hopatcong, N.J. 07843
12-11-2006
Attn:
Dept. of Justice: U.S. Marshals Service
Deputy Marshal Bart M. Obuchowaski

To whom it may concern:

I, Anthony W. Dugasz acting on the behalf of my mother's estate do hereby give permission to Deputy Marshal Obuchowski and any other law enforcement agents to enter into the dwelling at: 1621 Firerock Court in the town of Loveland, CO. for the purpose of the search for an apprehension of one: Mr. Randall J. Zandstra.

Thank You and Good Luck,

[Personal Signature]

Anthony W. Dugasz

(People's Exhibit 3, v. 21).

Based on the investigation, West had concluded that Zandstra was living in the residence (CD, v. 5, 6/21/07, p. 41). After receiving this information from the officers in New York and the letter, West, in cooperation with law enforcement in Larimer County, set up a surveillance of the Loveland residence (CD, v. 5, 6/21/07, pp. 40-41). After watching the residence for a number of hours, and seeing no one come in our out of the house, about five officers went to the residence, announced that they were police officers and to open the door (CD, v. 5, 6/21/07, pp. 41-43). There was no response, but West heard noise consistent with someone walking on stairs (CD, v. 5, 6/21/07, p. 43).

After finding a way into the house, the officers announced who they were and that they were coming into the residence (CD, v. 5, 6/21/07, pp. 43-45).

After a search of the downstairs area failed to turn up anyone, there was a belief that the fugitive might be upstairs, and it was decided to bring in a search dog (CD, v. 5, 6/21/07, pp. 45-47). While waiting for the search dog to arrive, the defendant walked down the stairs (CD, v. 5, 6/21/07, p. 47). The defendant indicated he had some medical problems, and the officers directed him to have a seat in the dining room (CD, v. 5, 6/21/07, pp. 47-48).

When West showed defendant a photo of Zandstra and asked him who it was, defendant replied, "You know" (CD, v. 5, 6/21/07, pp. 49-50).

When asked where Zandstra was, defendant was "very vague or nonresponsive" (CD, v. 5, 6/21/07, p. 50). Asked what he was doing in the house, defendant stated that he had permission from Carol Dugas to live there (*id.*). Defendant said he had moved in around October 2006 (CD, v. 5, 6/21/07, p. 86). Defendant responded in the affirmative when asked if he had an arrangement with Carol Dugas, if he way

paying rent, and if he occasionally contacted her, but refused to elaborate (*id.*). Defendant provided no documentation of a lease or rental agreement (*id.*).

West testified that defendant was not asked for permission to search the residence, and that he did not make statement objecting or consenting to a search (CD, v. 5, 6/21/07, pp. 59-60).

Before defendant was taken away by police, West indicated to defendant that, based on the marijuana found upstairs he could go to prison and very well die there before his term was completed (CD, v. 5, 6/21/07, pp. 74-75). West said if defendant could give him information to find Zandstra, he would make that cooperation known to the local district attorney (*id.*). West said he did not make defendant any other specific promises (*id.*).

Before the search dog arrived, defendant stated that he had some medical marijuana upstairs (CD, v. 5, 6/21/07, p. 51). After the search dog arrived and went upstairs to search for Zandstra, an officer stated that that there was a large marijuana grow up stairs (CD, v. 5, 6/21/07, pp. 52-53). As a result of this discovery, the Larimer County Drug Task

Force was contacted and a search warrant obtained (CD, v. 5, 6/21/07, p. 53).

While waiting for the search dog, Larimer County Sheriff's Office Al Eihausen, was concerned about officer safety and asked defendant if there was anyone else in the residence and if there was anything upstairs that he should be concerned about when the officers went upstairs (CD, v. 5, 6/21/07, p. 95). Defendant responded that there was no else there, and that he had "a couple of marijuana plants" for medical purposes (CD, v. 5, 6/21/07, p. 96). He also indicated that there were also propane burners to provide CO2, but that they would not pose a danger to the search dog (*id.*).

Officer Eihausen testified that he had no recollection of defendant telling the police to leave the house nor did defendant make a statement giving consent to search (CD, v. 5, 6/21/07, pp. 102, 113-14).

Fort Collins Police Officer Paul Pierick, who was assigned to the Larimer County Drug Task Force, was contacted by officers that a large marijuana grow had been discovered while searching for a criminal fugitive (CD, v. 5, 6/21/07, pp. 117-19). Based on the information he

received, Pierick obtained a search warrant from a judge (CD, v. 5, 6/21/07, pp. 119-21).

The trial court denied the motion to suppress (CD, v. 5, 6/21/07, 154-59). After the hearing, the defendant filed a supplement suppression motion citing additional case law and attaching an affidavit stating that he had stated an objection to the police being in the house (CD, v. 1, Trial Record, pp. 95-99). At a hearing, the trial court affirmed its motion to suppress (CD, v. 7, 9/28/07, pp. 3-10).

Warrantless searches and seizures are presumptively invalid under the Fourth Amendment to the U.S. Constitution and article II, section § 7 of the Colorado Constitution unless justified by an established exception to the warrant requirement. *People v. Gothard*, 185 P.3d 180, 183 (Colo. 2008). The prohibition against warrantless searches does not apply when voluntary consent has been obtained, either from the individual whose property is searched or from a third party who possesses common authority over the property. *People v. Breidenbach*, 875 P.2d 879 (Colo. 1994). The discovery of evidence in plain view of an officer who is validly on the premises is not a

warrantless search implicating the Fourth Amendment. *See People v. Kluhsman*, 980 P.2d 529, 534 n. 5 (Colo. 1999).

In its opinion, this court found that the officers' reliance upon Mr. Dugasz's letter as consent to enter the home to search for Zandstra was reasonable and the police were justified in initially entering the premises. *Marzano*, slip op. at 6.

This court then found that:

However, upon entering the home, officers found defendant, who answered in the affirmative that he had a lease or other arrangement with Ms. Dugasz to be on the property. The existence of such an arrangement without Mr. Dugasz's knowledge was certainly possible, given his limited knowledge of the property. At this point, the police should have obtained consent from defendant to continue search the house or obtained a search warrant if refused.

...

Defendant confirmed to police officers that he had a lease or other arrangement with Ms. Dugasz to occupy the property, and it is undisputed that he never expressly gave authorities consent to search. The People, therefore, had the burden to show that he was an occupant without permission, a burden which they did not meet.

Marzano, slip op. at 6-7.

However, the record shows that defendant was an occupant without permission. The executor had no information of a rental or lease agreement with anyone, let alone the defendant. It is reasonable that if there was such an agreement, there would have been evidence of it in his mother's documents in the form of a written agreement or evidence of rent receipts. The defendant did not produce nor did police find during the search any evidence of a rental agreement and no such evidence was produced at the suppression hearing. In all the information law enforcement had received about the residence up to the time of the entry defendant's name had never appeared or been mentioned. The evidence therefore would support the finding that defendant was an occupant without permission, and his consent was not required.

Trespassers do not have privacy interests sufficient to invoke Fourth Amendment protection. *See United States v. Ruckman*, 806 F.2d 1471 (10th Cir. 1986) (defendant had no reasonable expectation of privacy in a cave on federal land when authorities could force him to leave at any time); *Amezquita v. Hernandez-Colon*, 518 F.2d 8 (1st

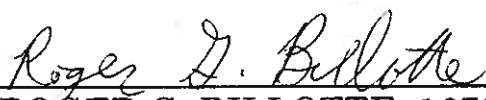
Cir.1975), *cert. denied*, 424 U.S. 916, 96 S.Ct. 1117, 47 L.Ed.2d 321 (1976) (Puerto Rican squatters' claim to a privacy interest in Commonwealth land was "ludicrous" because they had twice been asked to vacate the property); *G.R. v. State*, 638 P.2d 191 (Alaska. Ct. App. 1981) (occupants of a cabin who were there without the owner's consent had no expectation of privacy in the building); *State v. Cruz*, 15 Kan.App.2d 476, 809 P.2d 1233 (1991) (trespassers in a home had no expectation of privacy in the home); *People v. Sumlin*, 105 Misc.2d 134, 431 N.Y.S.2d 967 (N.Y.Sup.Ct. 1980) (defendant was wrongfully in an abandoned city building at the time of the search and could not protest); *State v. Turnbill*, 640 S.W.2d 40 (Tenn. Crim. App. 1982) (defendant, who had returned to a rescue mission after being ejected, had no legitimate expectation of privacy in the mission room); *Douglas v. State*, 695 S.W.2d 817, 820 (Tex. Ct. App. 1985) (burglar who hid in a vacant building without permission was "a trespasser [who] had no reasonable expectation of privacy in the premises"). Therefore, consent of defendant was not required to search the residence.

For the above stated reasons and authorities and the reasons and authorities stated in the People's Answer Brief, the People request that this court withdraw its opinion, grant a rehearing, and issue an opinion affirming the judgment of conviction.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PETITION FOR REHEARING** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 19 day of August 2010 addressed as follows:

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