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Criminal Law—Search and Seizures: Determining when an Individual May Have a Reasonable Expectation of Privacy in a Shared Residence State v. Taylor, 2015 ND 100, 862 N.W.2d 801

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CRIMINAL LAW—SEARCH AND SEIZURES: DETERMINING
WHEN AN INDIVIDUAL MAY HAVE A REASONABLE
EXPECTATION OF PRIVACY IN A SHARED RESIDENCE
State v. Taylor, 2015 ND 100, 862 N.W.2d 801

ABSTRACT

In *State v. Taylor*, the North Dakota Supreme Court held that law enforcement did not need a second, additional, search warrant to search a bedroom of a shared residence. Taylor alleged that, in addition to a warrant to search the shared residence, police officers needed a separate warrant in order to lawfully search his personal bedroom. The district court agreed and suppressed the evidence found from the search of his bedroom. On appeal, the North Dakota Supreme Court disagreed; it reversed and remanded the district court's suppression. In finding a valid search of the defendant's bedroom, the North Dakota Supreme Court altered the analysis of what constitutes a "reasonable expectation of privacy" in the state of North Dakota. In so doing, the court elaborates to which circumstances a person may reasonably have an expectation of privacy.

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I. FACTS

A law enforcement officer, with the Grand Forks Narcotics Task Force, applied and obtained a search warrant to search a residence.¹ The residence was a single family home and located in Grand Forks, North Dakota.² To support the warrant, the officer provided in his affidavit that he “received information from a University of North Dakota college student that Nathe and unknown counterparts” were affiliated with a drug trafficking organization in the Grand Forks area.³ Nathe and counterparts were reported to be distributing “marijuana, psilocybin mushrooms, LSD, ecstasy, MDMA, DMT, and other types of research chemicals.”⁴ The Task Force also conducted a garbage pull at Nathe’s residence.⁵ During the pull, the Task Force found a paystub containing Nathe’s information and items such as a “small zip lock baggie, two screens, and two large plastic bags,”

1. State v. Taylor, 2015 ND 100, ¶ 2, 862 N.W.2d 801, 803.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

which contained marijuana residue.⁶ Based on this information, the magistrate issued a search warrant.⁷

The search warrant provided:

You are hereby commanded to conduct this search of the residence of 1817 1st Ave North in Grand Forks, and that such search shall be for the purposes of looking for and seizing all controlled substances, drug paraphernalia, and any funds derived from the sale of controlled substances, fruits of the crime and cellphones utilized in the initiation and conduction of illegal activities.⁸

The Task Force executed the search warrant on October 24, 2013.⁹ The residence subject to the search was a single family home, containing common living areas, such as a kitchen and living room, and four separate bedrooms.¹⁰ Two of these bedrooms were Nathe's and Taylor's, with the bedrooms being located on the main level and basement level, respectfully.¹¹ Four individuals resided at the residence, three of which were present during the Task Force's search.¹² During its execution, the Task Force found marijuana and drug paraphernalia in both the common areas of the residences, as well as the individual bedrooms, including Taylor's bedroom.¹³ The Task Force executed the search pursuant to the warrant; at no time did Taylor grant the Task Force permission to search his bedroom.¹⁴

Taylor was arrested at the residence¹⁵ and subsequently charged with possession of more than one ounce of marijuana and possession of drug paraphernalia.¹⁶ Taylor moved to suppress the evidence found in his private bedroom arguing law enforcement had violated his Fourth Amendment right against unreasonable searches and seizures.¹⁷ Taylor argued that since he had a reasonable expectation of privacy in his private bedroom, law enforcement required a separate warrant to search his bedroom.¹⁸

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* ¶ 4.

11. *Id.*

12. *Id.*

13. *Id.* ¶ 2.

14. *Id.*

15. *Id.*

16. *Id.* ¶ 3.

17. *Id.*

18. *Id.*

The district court granted Taylor's motion and held that law enforcement needed to obtain a subsequent warrant for Taylor's bedroom because Taylor had a reasonable expectation of privacy in his private room.¹⁹ On appeal, the North Dakota Supreme Court reversed and remanded.²⁰

II. LEGAL BACKGROUND

The Fourth Amendment of the United States Constitution guarantees that all people have the right to be secure against unreasonable search and seizure. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²¹

The Fourth Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment.²² Additionally, North Dakota has adopted nearly identical language in its state constitution.²³

A. A HISTORY OF "REASONABLE EXPECTATION OF PRIVACY" IN THE UNITED STATES AND NORTH DAKOTA

Central to the Supreme Court of the United States' Fourth Amendment determinations is whether an individual had a "reasonable expectation of privacy" in the area being searched.²⁴ In *Katz*, the United States Supreme Court further explained that a reasonable expectation of privacy attaches to the individual, not places or things.²⁵ Because of this, if a person knowingly exposes something to the public, it is not protected by the Fourth Amendment; but the Fourth Amendment may attach when an individual seeks to preserve his privacy.²⁶ Using this reasoning, the Supreme Court

19. *Id.* ¶ 5, 862 N.W.2d at 804.

20. *Id.* ¶ 21, 862 N.W.2d at 809.

21. U.S. CONST. amend. IV.

22. U.S. CONST. amend. XIV; *see* *Mapp v. Ohio*, 367 U.S. 643, 660 (1961)

23. N.D. CONST. art. I, § 8 ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.").

24. *See* *Florida v. Riley*, 488 U.S. 445, 449-50 (1989).

25. *Katz v. United States*, 389 U.S. 347, 351 (1967).

26. *Id.*

has determined that going through garbage,²⁷ flying airplanes and helicopters over houses,²⁸ and subpoenaing bank records²⁹ does not violate an individual's right against unreasonable search and seizure.

As the cases above indicate, the Supreme Court relies heavily upon the facts of each case in its effort of fleshing out the meaning of "reasonable expectation of privacy." Justice Harlan, in his concurrence in *Katz*, was the first to outline the two-prong test for reasonable expectation of privacy. "First, that a person [has] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"³⁰ The Supreme Court would later formally adopt Justice Harlan's two-prong test for its analysis of "reasonable expectation of privacy."³¹

Similar to federal law, North Dakota requires two elements when proving a person has a reasonable expectation of privacy: (1) the individual must have an actual, subjective expectation of privacy; and (2) that expectation must be one that society recognizes as reasonable.³² North Dakota cases have laid out several factors which contribute to the court's determination of whether there is a legitimate expectation of privacy. Those factors include "[w]hether the party has a possessory interest in the things seized or the place searched; whether the party can exclude others from that place; whether the party took precautions to maintain the privacy; and whether the party had a key to the premises."³³

B. THE REASONABLE EXPECTATION OF PRIVACY IN A HOME IN NORTH DAKOTA

Both the United States Supreme Court and North Dakota have consistently held that individuals have a reasonable expectation of privacy in one's home.³⁴ The Supreme Court has labeled the government's entry

27. *California v. Greenwood*, 486 U.S. 35, 40-41 (1988).

28. *Florida v. Riley*, 488 U.S. 445, 450 (1989) (helicopter); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986) (airplane).

29. *United States v. Miller*, 425 U.S. 435, 442-43 (1976).

30. *Katz*, 389 U.S. at 361.

31. *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) (Justice Rehnquist wrote: "legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."); *see generally* *United States v. Katzin*, 769 F.3d 163 (3d Cir. 2014) *cert. denied* 135 S. Ct. 1448 (U.S. Feb. 23, 2015) (No. 14-7818); *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

32. *State v. Nguyen*, 2013 ND 252, ¶ 8, 841 N.W.2d 676, 680.

33. *Id.* ¶ 9 (quoting *United States v. Mendoza*, 281 F.3d 712, 715 (8th Cir. 2002)).

34. *Compare Jardines*, 133 S. Ct. at 1414 ("At the [Fourth] Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961))) *with* *State v. Kochel*,

into someone's home the "chief evil" of which the Fourth Amendment is tasked to protect.³⁵ And as such, a warrantless search or seizure within a home is presumptively unreasonable.³⁶

Although one's home is unchallenged as a place in which an individual has a reasonable expectation of privacy, what is considered part of the "home" is constantly changing and evolving. There is little doubt that anything beyond the home's front door is protected by the Fourth Amendment; but what about the front stoop, the garage, or backyard? Do these areas require the same protection as the kitchen and bedrooms located inside the home? The answer to this question, and most legal questions, is "it depends."

The area surrounding the structure of a home is considered the home's curtilage. North Dakota defines the home's curtilage as the "area near a dwelling, not necessarily enclosed, that generally includes buildings or other adjuncts used for domestic purposes."³⁷ North Dakota has adopted the factors outlined in *United States v. Dunn*,³⁸ to aid in its determination of curtilage.³⁹ The factors are: (1) "the proximity of the home to the area claimed to be curtilage," (2) "whether the area is within an enclosure surrounding the home," (3) "the nature of the uses to which the area is put," and (4) "the steps taken to protect the area from observation by individuals passing by."⁴⁰

The courts do not apply these factors mechanically; they are merely analytical tools used to determine whether the area is so intimately tied to the home that it should be afforded the same protection under the Fourth Amendment.⁴¹ Most often, areas such as attached garages⁴² and enclosed porches⁴³ are considered protected areas requiring a warrant before law enforcement's entry. In these areas, people keep personal items, hold private conversations, and most importantly, have a right to exclude others.

However, some areas do not fall firmly into either category of curtilage or non-curtilage, such as the hallways in apartment complexes. These areas are often used to store personal items, such as shoes, bikes, and crafts signs,

2008 ND 28, ¶ 7, 744 N.W.2d 771, 773 ("[W]arrantless searches and seizures inside a home are presumptively unreasonable." (alteration in original) (quoting *State v. Kitchen*, 1997 ND 241, ¶ 13, 572 N.W.2d 106, 109)).

35. *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972).

36. *Payton v. New York*, 445 U.S. 573, 584 (1980); see also *Kochel*, ¶ 7, 744 N.W.2d at 773.

37. *State v. Mittleider*, 2011 ND 242, ¶ 15, 809 N.W.2d 303, 307 (quotation mark omitted).

38. 480 U.S. 294 (1987).

39. *State v. Williams*, 2015 ND 103, ¶¶ 9-10, 862 N.W.2d 831, 833-34.

40. *Id.* ¶ 9, 862 N.W.2d at 834.

41. *Id.*

42. *State v. Blumler*, 458 N.W.2d 300, 300 (N.D. 1990).

43. *State v. Kochel*, 2008 ND 28, ¶ 7, 744 N.W.2d 771, 773.

and in most situations a person can only gain access if they have a key or are “buzzed” in by a resident. Even though these characteristics point towards the hallway being curtilage, courts have consistently held that tenants of multifamily dwellings do not have a reasonable expectation of privacy in these common or shared areas.⁴⁴ The courts have reached this conclusion because, although secured with locks, the locks are present to provide security, not secrecy or privacy.⁴⁵ To have a reasonable expectation of privacy in an area, it is implied that a person “will be free of *any* intrusion, not merely unwarranted intrusions.”⁴⁶ Thus, the courts’ analyses depend upon an individual’s ability to bar others from the area.

III. COURT’S ANALYSIS

As discussed above, because a person has a reasonable expectation of privacy in their home, law enforcement officers are required to obtain a warrant before passing the threshold of the front door. However, this Fourth Amendment protection is not extended to common areas within a multi-family residence, such as an apartment building.⁴⁷ But what about residences that cannot be categorized as a private dwelling or an apartment, such as an individual living in a single-family home with non-relation roommates? Does that individual have his own independent protection of the Fourth Amendment for his private bedroom or is the protection solely for the residence as a whole? The North Dakota Supreme Court attempts to answer this question in *State v. Taylor*.

In *Taylor*, the defendant argued that a separate search warrant was required for law enforcement to search his own private bedroom in a shared residence.⁴⁸ Law enforcement had already applied for, and was granted, a search warrant to search the entire residence; but Taylor argued that he had a reasonable expectation of privacy in his bedroom, separate from the rest

44. See *United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976) (holding the defendant did not have a reasonable expectation of privacy in parking garage of condominium); *United States v. Acosta*, 965 F.2d 1248, 1252-53 (3rd Cir. 1992) (holding the defendant did not have a reasonable expectation of privacy in hallway of apartment building); *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991) (holding the defendant had no legitimate expectation of privacy in common area of apartment building); *United States v. McCaster*, 193 F.3d 930, 933 (8th Cir. 1999) (holding the defendant had no legitimate expectation of privacy in a duplex hallway’s closet). Currently, the Sixth Circuit is the only circuit that recognizes a reasonable expectation of privacy in common areas of a locked apartment building. See *United States v. Carriger*, 541 F.2d 545, 554 (6th Cir. 1976).

45. *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977).

46. *Id.*

47. *United States v. McCaster*, 193 F.3d 930, 933 (8th Cir. 1999).

48. *State v. Taylor*, 2015 ND 100, ¶ 3, 862 N.W.2d 801, 803.

of the common living areas of the house.⁴⁹ This issue of whether a separate search warrant is required to search the private bedroom of a shared residence was an area of first impression for the North Dakota Supreme Court.⁵⁰

The court started its analysis by discussing the scope of search warrants in general, noting that a search warrant is typically restricted to the places described in the warrant.⁵¹ However, the court acknowledged that “a search warrant may extend to the entire area covered by the warrant’s description.”⁵² This means that law enforcement can search the garage attached to a residence described in a warrant or look inside the closets and drawers inside of a home.⁵³ The burden lay with Taylor to show that law enforcement incorrectly relied on the face of the warrant or that the scope of the warrant was impermissibly extended when officers entered his bedroom.⁵⁴ The scope of the search warrant is impermissibly expanded when the area being searched has a separate “reasonable expectation of privacy” other than the general area covered in the search warrant.⁵⁵

A. THE COURT’S ANALYSIS OF STATE V. DRISCOLL

The court looked towards *State v. Driscoll* to aid in its analysis.⁵⁶ In *Driscoll*, law enforcement executed a search warrant on a residence with the intent of discovering evidence of cocaine trafficking.⁵⁷ While executing the warrant, the police searched inside the defendant’s purse.⁵⁸ Inside the purse, law enforcement found, among other things, methamphetamine and a large quantity of cash.⁵⁹ Driscoll attempted to have the evidence suppressed on two grounds: (1) her purse, because she was a visitor, was outside the scope of the warrant; and (2) she had a reasonable expectation of privacy in her purse requiring law enforcement to obtain a second search warrant before searching its contents.⁶⁰

49. *Id.*

50. *Id.* ¶ 11, 862 N.W.2d at 805.

51. *Id.* ¶ 9, 862 N.W.2d at 804 (citing *State v. Bollingberg*, 2004 ND 30, ¶ 14, 674 N.W.2d 281, 284).

52. *Id.* at 804-05 (quoting *State v. Erickson*, 496 N.W.2d 555, 560) (N.D. 1993)).

53. *See State v. Driscoll*, 2005 ND 105, ¶ 17, 697 N.W.2d 351, 358.

54. *Taylor*, ¶ 11, 862 N.W.2d at 805.

55. *Id.* ¶ 15, 862 N.W.2d at 807.

56. *Id.* ¶¶ 12-13, 862 N.W.2d at 806-07.

57. *Driscoll*, ¶¶ 2-3, 697 N.W.2d at 353-54.

58. *Id.* ¶ 3, 697 N.W.2d at 354.

59. *Id.*

60. *Id.* ¶¶ 11, 21, 697 N.W.2d at 356, 359.

The court did not agree.⁶¹ It found that Driscoll was not a visitor to the residence because she had been staying six nights out of the week at the residence.⁶² The court also found that when law enforcement was applying for the warrant, they “had no knowledge of exactly who was responsible for the drug activity.”⁶³ The court reasoned that “it was not necessary that the search warrant particularize exactly where the drug evidence would be found in the apartment”⁶⁴ and that officers “were permitted to search the purse, or any other item that could reasonably house the objects of the search.”⁶⁵ Thus, the *Driscoll* court upheld the search and seizure of the defendant’s purse.⁶⁶

The court paralleled the facts in *Driscoll* and the facts present in *Taylor*.⁶⁷ The court specifically looked at the fact that the officers in *Driscoll* were unable to identify every person of interest in their application for the search warrant.⁶⁸ The only names present in *Taylor*’s search warrant were Nathe along with “unknown counterparts.”⁶⁹ After completing a garbage pull, officers were able to verify a nexus between the residence to be searched and criminal activity.⁷⁰ This allowed the officers to obtain a search warrant for the *residence*, not a specific person.⁷¹ The court reasoned that because Taylor’s bedroom was part of the residence and, like Driscoll’s purse, could have reasonably contained the items being searched for, law enforcement’s search was within the scope of the warrant.⁷² The court further clarified that if Taylor had had a greater expectation of privacy in his bedroom, apart from the residence as a whole, then the search would have been beyond the warrant’s scope.⁷³

61. *Id.* ¶ 21, 697 N.W.2d at 359.

62. *Id.* ¶ 20, 697 N.W.2d at 358-59.

63. *Id.* ¶ 14, 697 N.W.2d at 357.

64. *Id.*

65. *Id.* ¶ 18, 697 N.W.2d at 358.

Viewing these facts as a whole, it was not only reasonable for police to believe the purse could contain evidence of narcotics activity, but it was also reasonable for police to view Driscoll, and her property, as being intimately involved with the apartment unit and the drug activity apparently occurring there.

Id. ¶ 20, 697 N.W.2d at 359.

66. *Id.* ¶ 21

67. *State v. Taylor*, 2015 ND 100, ¶ 13, 862 N.W.2d 801, 806.

68. *Id.*

69. *Id.* ¶ 2, 862 N.W.2d at 803.

70. *Id.* ¶ 13, 862 N.W.2d at 806.

71. *Id.* ¶ 2, 862 N.W.2d at 803.

72. *Id.* ¶ 13, 862 N.W.2d at 806.

73. *Id.* at 806-07.

Whether a person has “a reasonable expectation of privacy in a given area must be decided on a case-by-case basis.”⁷⁴ Because of this, the court’s analysis is extremely fact specific. To determine the level of privacy Taylor expected in his bedroom, the court relied on *State v. Gatlin* to outline the elements and factors of whether an individual has a reasonable expectation of privacy.⁷⁵ *Gatlin* states:

A reasonable expectation of privacy has two elements: 1) the individual must exhibit an actual, subjective expectation of privacy, and 2) that expectation must be one that society recognizes as reasonable.

Several factors that contribute to determining whether a legitimate expectation of privacy exists include: Whether the party has a possessory interest in the things seized or the place searched; whether the party can exclude others from that place; whether the party took precautions to maintain the privacy; and whether the party had a key to the premises.⁷⁶

In its analysis of whether Taylor had a reasonable expectation of privacy in his bedroom, the court took a close look at the facts.⁷⁷ It noted that Taylor no doubt had a possessory interest in the items seized and the place searched;⁷⁸ but the court also indicated that the record was silent on whether Taylor had the ability to exclude others from his bedroom or whether he had his own key to the room.⁷⁹ There also was no indication that Taylor took any steps to keep his room private; officers were able to look into the bedroom and see what appeared to be marijuana.⁸⁰ Because there was little, if not nothing, in the record which pointed towards Taylor trying to keep his bedroom secure and independent from the rest of the house, the court found that he did not have a reasonable expectation of privacy in his bedroom.⁸¹ Thus, the court held that because (1) Taylor’s bedroom was part of the “residence” as a whole and (2) Taylor did not have a reasonable expectation of privacy in his bedroom, separate from the rest of the residence, law enforcement did not exceed the scope of the search

74. *Id.* ¶ 11, 862 N.W.2d at 805.

75. *Id.* ¶ 14, 862 N.W.2d at 807.

76. *Id.* (quoting *State v. Gatlin*, 2014 ND 162, ¶ 5, 861 N.W.2d 178, 181)

77. *Id.* ¶ 15.

78. *Id.* The personal items located in Taylor’s bedroom included checks, a passport, and a title to a vehicle. *Id.* ¶ 2, 862 N.W.2d at 803.

79. *Id.* ¶ 15, 862 N.W.2d at 807.

80. *Id.*

81. *Id.*

warrant.⁸² All of this being said, in its holding, the court was quick to reiterate that whether there is a reasonable expectation of privacy is decided on a case-by-case basis.⁸³

B. DISTINGUISHING TAYLOR FROM UNITED STATES V. GREATHOUSE AND UNITED STATES V. DAVIS.

The defendant points to the holdings in *United States v. Greathouse* and *United States v. Davis* in his argument as to why law enforcement unconstitutionally expanded the scope of the search warrant.⁸⁴ In *Greathouse*, the court found that the defendant had a reasonable expectation of privacy in his personal bedroom in a shared house.⁸⁵ The court used two factors in making this determination: (1) whether steps were taken by the individual to preserve the area as private, and (2) whether that individual's expectation of privacy was reasonable.⁸⁶ In applying these two factors, the court looked at three pertinent facts. First, that the defendant's bedroom door was closed and had a sign posted on the outside reading "Do Not Enter."⁸⁷ Second, although the door did not have a separate doorbell or number, the defendant testified that he was the only one who had access to the room.⁸⁸ And third, officers were immediately told that the defendant was renting the room, and it was apparent to the officers that the residents were not related.⁸⁹

The court in *Taylor* did not adopt the reasoning of the *Greathouse* court, but did point out that even if it were to apply *Greathouse's* reasoning to *Taylor's* facts, the result would be the same: the search would be upheld.⁹⁰ There simply were no facts present in *Taylor's* record to indicate that he had taken steps to preserve his privacy interest in his bedroom.⁹¹

Taylor subsequently relied on *Davis*⁹² to support his argument that the warrant was limited to the areas under Nathe's control because he was the

82. *See id.*

83. *Id.*

84. *Id.* ¶¶ 16-19, 862 N.W.2d at 807-08.

85. *United States v. Greathouse*, 297 F. Supp. 2d 1264, 1274-75 (D. Or. 2003).

86. *Id.* at 1273-74.

87. *Id.* at 1274.

88. *Id.*

89. *Id.*

90. *State v. Taylor*, 2015 ND 100, ¶ 17, 862 N.W.2d 801, 807-08.

91. *Id.* ¶ 15, 862 N.W.2d at 807.

92. *United States v. Davis*, 557 F.2d 1239 (1977). In *Davis*, law enforcement officers, while executing a search warrant, discovered that there were two separate apartments which did not appear to be part of the main residence. *Id.* at 1247-48. The court held that the warrant applied to all areas where "officers have reason to believe" are under the control of the defendant. *See id.* at 1248.

focus of the investigation.⁹³ The court did not agree.⁹⁴ Although it is true that the search warrant named “Nathe and unknown counterparts,”⁹⁵ the Fourth Amendment does not require search warrants to name the people who own or occupy the described premises.⁹⁶ Because of this, the court reiterates that under *Driscoll*, a lawful search of the premises “extends to the entire area in which the object of the search may be found.”⁹⁷ Thus, the court held that Taylor did not meet his burden of showing that the search warrant for the residence was impermissibly expanded to include his private bedroom.⁹⁸

IV. IMPACT AND EFFECTS OF APPLICATION

Whether or not a person has a reasonable expectation of privacy in his or her private bedroom is determined on a case-by-case basis.⁹⁹ And as such, the facts presented at a suppression hearing or trial are of upmost importance; the court cannot read facts into the record that simply are not there. But what does this mean for the practice of law in North Dakota? Why should it matter whether a bedroom door has its own lock or a sign reading “Do Not Disturb”? The importance lies with the increasing prevalence of non-familial living. Twenty years ago, protecting one’s privacy from roommates typically only involved college students. But now, with the presence of the oil boom and the housing shortage being felt across the entire state, more and more adults are opting to cohabitate with each other.¹⁰⁰

This increase in cohabitation leads to two separate questions: (1) How can law enforcement properly execute a warrant without impermissibly expanding the scope into areas which individuals have reasonable expectations of privacy? and (2) How can individuals sharing a living space protect themselves from the search warrants of their roommates?

93. *Taylor*, ¶ 18, 862 N.W.2d at 808.

94. *Id.* ¶ 19.

95. *Id.* ¶ 2, 862 N.W.2d at 803.

96. *Id.* ¶ 19, 862 N.W.2d at 808.

97. *Id.* (quoting *State v. Driscoll*, 2005 ND 105, ¶ 16, 697 N.W.2d 351, 358).

98. *Id.* ¶ 20, 862 N.W.2d at 809.

99. *Id.* ¶ 11, 862 N.W.2d at 805 (citing *State v. Kitchen*, 1997 ND 241, ¶ 12, 572 N.W.2d 106, 109).

100. Tessa Berenson, *Oil Is the New Gold: Inside North Dakota's Oil Rush*, TIME (June 24, 2014), <http://time.com/2911836/oil-north-dakota/>. Williston’s population has doubled since 2010. *Id.* “[T]he steady stream of hopeful workers into the small town means that, even with high wages, many are stuck living [in] temporary housing facilities sprouting up in the Bakken oil region while they wait for more permanent housing to be built.” *Id.* In Mountrail County, one-third of the population is living in temporary housing. A.G. Sulzberger, *Oil Rigs Bring Camps of Men to the Prairie*, N.Y. TIMES (Nov. 25, 2011), http://www.nytimes.com/2011/11/26/us/north-dakota-oil-boom-creates-camps-of-men.html?_r=0.

A. SETTING LAW ENFORCEMENT UP FOR SUCCESS

There are certain situations in which law enforcement should be on the lookout for when executing a search warrant on what they believe to be a single-family residence. Some red flags for law enforcement would be if each bedroom has an individual lock on the outside, if the bedrooms are separately numbered, or if there are private entrances to each room. It is important to note that just because a person has a reasonable expectation of privacy in his or her separate bedroom, it does not mean that officers cannot search the bedroom; it means that law enforcement must secure the room and apply for another search warrant, similar to as they would if they seized a person's computer.

But just as there are facts which would support a reasonable expectation of privacy, there too are facts which would point towards its defeat. Open bedroom doors are one of these facts. It would be exceedingly difficult to prove that the owner of the bedroom had a right to exclude others from the room and took precautions to maintain his privacy if the bedroom's door was wide open.¹⁰¹ In the end, it comes down to officers being aware: aware of the rising rate of co-habitation, aware of the facts that may point towards a residence housing multiple individuals, and most importantly, aware of when they should take a step back during the execution of a search warrant and apply for a subsequent warrant.

B. SETTING ROOMMATES UP FOR SUCCESS.

Residing with roommates may be the only option for some individuals, either because of the cost of living alone or due to the shortage of available housing. But sharing a house with others should not mean that an individual's room should be subject to a search warrant based on his or her roommate's possibly criminal activities. To protect oneself from such a search, there are a number of preventative steps that an individual can take. Some of the easiest and most effective steps include making it known to your roommates that only you are allowed into the room without prior approval, placing a lock on the door and possessing the only key, and keeping the door closed and locked when you are away.

But taking such steps is not enough; if law enforcement completes an unreasonable search, in violation of the Fourth Amendment, it is imperative that the facts outlining the defendant's efforts in maintaining privacy be put into the record. Courts cannot assume any fact. It is the defendant's burden

101. See *Taylor*, ¶ 15, 862 N.W.2d at 807 (noting that the door to Taylor's bedroom was not closed).

to prove that he had a reasonable expectation of privacy in his room, an expectation of privacy above and beyond the privacy in the residence as a whole. Defendants can prove their burden by simply following the above steps.

V. CONCLUSION

In *State v. Taylor*, the Supreme Court of North Dakota overturned the district court's finding that the defendant had a reasonable expectation of privacy in his personal bedroom of a shared residence.¹⁰² In determining that Taylor did not have a reasonable expectation of privacy in his bedroom, the court looked to whether Taylor (1) had a possessory interest in his bedroom, (2) could exclude others, (3) took precautions to maintain his privacy, and (4) had a key to the premises.¹⁰³ Although the court ultimately concluded that Taylor did not have a reasonable expectation of privacy in his room, separate from the residence, the court stated that such an interest must be determined on a case-by-case basis.¹⁰⁴ As such, the court did not reject the idea that an individual may have a separate, reasonable expectation of privacy in his bedroom, but instead provides that an individual must take certain steps to establish such an expectation.¹⁰⁵

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102. *Id.* ¶ 21, 862 N.W.2d at 809.

103. *Id.* ¶¶ 14-15, 862 N.W.2d at 807.

104. *Id.* ¶ 15.

105. *Id.*

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