

SECOND CIRCUIT REVIEW

Apartment-Dwellers May Have a Reasonable Expectation of Privacy in Shared Spaces

By Martin Flumenbaum and Brad S. Karp

May 25, 2023

In *United States v. Lewis*, 62 F.4th 733 (2d Cir. 2023), the U.S. Court of Appeals for the Second Circuit addressed whether the Fourth Amendment's protections against unreasonable search and seizure extends to the warrantless search of a shared back porch of a multiunit dwelling. In a unanimous opinion authored by Circuit Judge Alison Nathan and joined by Circuit Judges Raymond Lohier and Susan Carney, the panel affirmed the district court's denial of the defendant-appellant's motion to suppress evidence that police recovered from the shared porch behind his three-apartment house, but declined to adopt a categorical rule that occupants of multiunit dwellings have no reasonable expectation of privacy in shared spaces.

By refusing to adopt such a categorical rule, the Second Circuit was careful not to draw distinctions between residents of apartments and those in single-family homes—a distinction that some other circuits have similarly refused to draw. The Second Circuit's decision also shows the importance of defendants articulating in such cases specific facts regarding their use of the relevant area of the shared space.



Martin Flumenbaum



Brad S. Karp

Background and District Court Ruling

In 2017, police obtained a search warrant for appellant Vas-hun Lewis' apartment, which was located on the second floor of a three-apartment house. The warrant stated that "the 2nd floor apartment as well as the basement, is the target location." The warrant was based on a confidential informant's statement that they had recently seen large quantities of cigarettes, heroin and marijuana in Lewis' bedroom. The informant also allegedly saw Lewis in possession of a handgun while he was in his apartment and in the basement of the house.

When police executed the search warrant, they searched Lewis' second-floor apartment and a "small back porch (or landing area) off the ground-floor rear door of the three-story building," which "opened into a common stairwell that led up to the second- and third-story apartments." On the porch, the police found a laundry basket and, in it, marijuana and a handgun stuffed inside of a sock.

Lewis pleaded guilty in state court to possessing marijuana with intent to distribute. He was then charged in a

MARTIN FLUMENBAUM and BRAD S. KARP are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison, specializing in complex commercial and white-collar defense litigation. Karp is the chairman of the firm. KRISTINA BUNTING and CHLOE LEWIS, litigation associates at the firm, assisted in the preparation of this column.

federal indictment with gun possession in furtherance of drug trafficking and being a felon in possession of a firearm. Lewis filed a motion to suppress the drugs and the gun recovered from the back porch on grounds that, among other things, the search of the back porch was illegal because it went beyond the parameters of the search warrant. The government opposed the motion and argued that Lewis was not entitled to Fourth Amendment protection over the items on the back porch because he had no expectation of privacy in a common area of a multiunit building. The district court agreed with the government and denied Lewis' motion to suppress as to the search of the back porch. After trial and sentencing, Lewis appealed several of the district court's rulings, including the court's denial of his motion to suppress.

The Second Circuit's Opinion

The Second Circuit affirmed the district court's rulings, including its denial of Lewis' suppression motion, but rejected a bright-line rule that the Fourth Amendment always permits warrantless searches of shared areas in multiunit buildings over which a defendant lacks exclusive control. Citing U.S. Supreme Court precedent, the circuit explained that there is a history of extending privacy protections to certain shared spaces, including spaces accessible to housemates, social guests, co-workers and landlords. A categorical rule as to shared spaces in multiunit buildings would have the effect of extending broader protections to those with the means to reside in single-family dwellings or who live outside of densely populated urban areas. The court emphasized that the Fourth Amendment demands a fact-intensive analysis of the nature of the space at issue and the defendant's relationship to it, as a categorical approach would "dilute the warrant requirement in a context where significant privacy interests are at stake." See *Missouri v. McNeely*, 569 U.S. 141, 158 (2013) (plurality).

Nonetheless, the panel concluded that Lewis failed to meet his burden to establish that he had a reasonable expectation of privacy over the shared back porch of the triplex where he lived. In affirming the district court's ruling, the panel characterized the district court's analysis as "fact specific" and "individualized." Although the district court

used broad language when it stated that Lewis' suppression motion failed because he did not have exclusive control over the porch in the multiunit dwelling, the panel explained, the court had indeed conducted a fact-based inquiry and considered that the porch was not "locked or closed off" and could "be easily used by other individuals ... visiting the building." The panel noted that during the hearing on the suppression motion, Lewis failed to articulate any specific facts regarding his use of the back porch, the porch's proximity to his apartment, or its accessibility to the public. In fact, he conceded during the hearing that the back porch was a shared area with a door that entered into a shared hallway. The court thus found that the district court did not err when it concluded "the back porch was ... a common area as that phrase is used in the case law," and that, as a result, "Lewis did not have standing to suppress any evidence found in the area."

By refusing to adopt such a categorical rule, the Second Circuit was careful not to draw distinctions between residents of apartments and those in single-family homes—a distinction that some other circuits have similarly refused to draw.

Conclusion

In its decision, the Second Circuit affirmed that the question of whether Fourth Amendment protections extend to shared spaces is a fact-intensive question and took care not to create a categorical rule that could disadvantage occupants of shared spaces. The absence of a categorical rule means that there is little practical guidance for determining the bounds of an individual's Fourth Amendment rights in the context of multiunit dwellings. But the decision shows that those seeking to suppress a warrantless search on grounds that they had a reasonable expectation of privacy in a shared space should take care to develop a robust set of individualized facts pertaining to the use, privacy and physical characteristics of the area.