

STATE OF MICHIGAN

IN THE 22ND CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

STATE OF MICHIGAN,
Plaintiff,

vs.

Case No. 12-663-FH
HON. MELINDA MORRIS

JOSEPH CORBIN BAILEY,
Defendant,

BRIAN L. MACKIE P25745
Washtenaw County Prosecutor
200 N. Main, Ste 300
Ann Arbor, MI 48104
(734) 222-6620

ROBERT J. KILLEWALD P39023
Attorney for Defendant
2160 Washtenaw Ave.
Ypsilanti, MI 48197
(734) 487-0500 /

MOTION TO SUPPRESS EVIDENCE
AND PROOF OF SERVICE

FILED
MAY 30 2012
CLERK OF CIRCUIT COURT
COUNTY OF WASHTENAW

NOW COMES the Defendant, Joseph C. Bailey, by and through his attorney, Robert J. Killewald, and moves that this Court suppress all physical evidence, including but not limited to the Defendant's skeleton hoodie, vest/jacket, black pants and shoes and all other illegally obtained evidence. This motion is based on the Fourth Amendment of the US Constitution, and Section 11 of the Michigan Constitution 1963 for the following reasons:

1. On or about April 9, 2012, at approximately 10:07 pm, the Broadway Party Store was robbed by two armed persons, one of which was reportedly wearing a skeleton

hoodie under a vest/jacket with black pants and black shoes.

2. That Ann Arbor Detective Christopher Fitzpatrick testified in court that he received Defendant's name as a potential suspect and went to the townhouse located at 2523 Adrienne Dr. in Ann Arbor. The Defendant, his mother Laura Custodio-Bailey (Mrs. Bailey) live there as tenants along with the Defendant's grandmother Dana Custodio, who is the leaseholder of the property. 6/7/12 PE, P38,L18-25. Mrs. Bailey is also the live-in aide for her mother Dana.

3. That the Defendant is an adult who has his own bedroom at the residence located at 2523 Adrienne, Ann Arbor and helps in the financial support of the residence.

Moreover, the Defendant also helps out with household expenses, owns the bedroom furniture and cleans his own room, does not allow others into his room without being present, keeps the door to his bedroom shut and had exclusive control of the room.

4. That Detective Fitzpatrick, when told by Defendant's mother that her son Joseph Bailey was not home, nonetheless specifically asked Mrs. Bailey if he could "check" Defendant's room to verify that he wasn't there. 6/7/12 PE, P39,L7-11.

A "She told us he wasn't there."

Q "Did you do anything to try and verify that?"

A "I asked if it was okay if we checked his room just to make sure he wasn't hiding or she was keeping him from talking to us."

5. That Mrs. Bailey, without authority, then permitted the detectives Fitzpatrick and Stanford to go to the Defendant's bedroom once they were inside the residence.

6. That under the pretext of "checking for the Defendant", Detectives Fitzpatrick and Stanford walked directly up the stairs, pushed opened Defendant's door, closed the door then stood in the room looking around.

6/7/12 PE, P42,L7-14.

Q And ah - what did you see?

A In - walking to the upstairs bedroom, m'm - opened the door, walked in, shutting the door, looking behind the door,. There hanging from the door ...

7. Notwithstanding the fact that Mrs. Bailey lacked the authority to permit the detectives to enter her son's room, the detectives' acts of opening Defendant's door, entering into and then closing the bedroom door to view the area, went beyond the scope of their initial request "to check" to see if Defendant was hiding in his bedroom.

8. That is, under the pretext of "checking for the Defendant," Detectives Fitzpatrick and Stanford, after closing the bedroom door and standing in the middle of the room looking around, observed a skeleton hoodie hanging on the back of the door which item was subsequently confiscated, along with other items such as black pants, vest and found in the room once a search warrant was obtained. 6/7/12 PE, P44, L10-18.

9. It is Defendant's position that had he been there, his presence in the bedroom would have been immediately known had the detectives simply opened the bedroom door, looked into the room from the hallway as well as easily determining he wasn't behind the door by looking through the space where the door is hinged.

10. Defendant argues that not only were the detectives wrongfully admitted into his room but that they also went beyond the scope of their request to "check for the Defendant," and what they were actually doing was looking for evidence regarding the armed robbery case which they claim to have found.

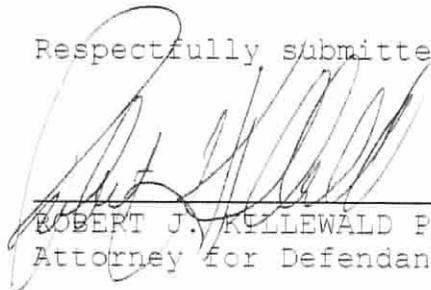
11. That the detectives' request (to look in his bedroom) must be extremely suspect since they never asked to

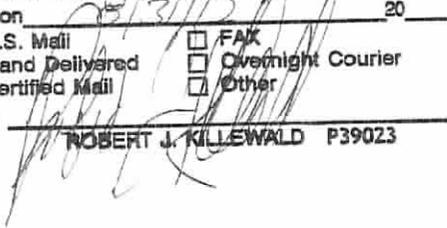
look anywhere else in the residence and, as Mrs. Bailey, who accompanied them to her son's room, will testify that the detectives never bothered to look under the bed nor did they check his closet to see if he was hiding in there.

12. That under the Fourth Amendment against unreasonable searches, the detectives' acts of standing and looking around in the Defendant's bedroom went beyond the scope of their permission to "check" his room as it should have been immediately clear the Defendant was not there. As such, any items and clothes were illegally discovered and should be suppressed.

WHEREFORE, for all the above reasons, Defendant Joseph Bailey respectfully moves that this Honorable Court, rule this search illegal and suppress all physical evidence gained from this pretext request, including but not limited to, the skeleton hoodie, vest, pants and shoes.

Dated: 8/29/12

Respectfully submitted,

ROBERT J. KILLEWALD P39023
Attorney for Defendant

CERTIFICATE OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 8/31/12 20
By: U.S. Mail FAX
 Hand Delivered Overnight Courier
 Certified Mail Other
Signature 
ROBERT J. KILLEWALD P39023

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WASHTENAW COUNTY, MI
CLERK OF COURT

AUG 30 2012

FILED

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BRIEF IN SUPPORT
AND PROOF OF SERVICE

Whether a parent can consent to the allow officer's into an adult's private room and search his property depends on the circumstances.

Moreover, the adult child's privacy interest is not eliminated simply because he or she is not the homeowner. U.S. v. Salvucci, 448 U.S. 83,91 (1980) (property ownership is "neither the beginning nor the end" of the expectation of privacy). Merely living together also does not establish common authority over the private bedroom and closed containers of the other person. U.S. v. Duran, 957 F.2d 499, 505 (7th Cir. 1992).

There is no evidence that Mrs. Bailey had authority to allow the detectives access to the Defendant's bedroom.

As is the case at hand, some parents, though, live with their adult children in relations that are closer to the situation of normal rent-paying roommates.

As previously stated, Defendant is an adult who helped out with household expenses, owned his own bedroom furniture and cleaned his own room, didn't allow others into his room without being present, kept his bedroom door closed and had exclusive control of the room.

Courts have looked for "facts showing an agreement" in establishing the details of parental authority, such as evidence that rent was paid. Consequently, there is an expectation of privacy similar to what one would expect in a landlord-tenant relationship. Custodio Bailey, herself was a tenant at her mother's (Dana Custodio's) residence and therefore did not have the authority to allow the officers access to the Defendant's room, despite what the detectives may have thought.

While an entry may be valid if the third person without actual common authority consents to the search if the police officer reasonable believed that the third person had authority to consent there must be some basis for this

belief. United States v Matlock, 415 US 164, 186; 94 S Ct 988; 39 L Ed 2d 242 (1974). "The burden of establishing that common authority rests upon the State." Id at 181.

Furthermore, in Michigan, the prosecution is required to demonstrate, by clear and convincing evidence, "consent was freely and voluntarily given" under the totality of the circumstances. People v Raybon, 125 Mich App 295, 303;336 NW2d 782 (1983). Had the detectives asked, they would have realized that Dana Custodio was the leaseholder of the property and not her daughter, Mrs. Bailey. Since they did not inquire about the true owner for permission to enter nor did the prosecution explain why they only relied on Mrs. Baily's authority for permission to enter into the home and her son's bedroom their presence must be considered illegal.

Additionally, searches can take many forms. In the case at hand, the detectives, by virtue of entering and looking around in Joseph Bailey's bedroom under the pretext of just "checking for the Defendant," were actually searching for evidence regarding the armed robbery and therefore went beyond the scope of their permission to verify that the Defendant was not hiding in his room.

Moreover and as previously stated, the detectives' request "to check for Defendant only in his bedroom" must be extremely suspect since they never asked to look anywhere else in the residence nor as Mrs. Bailey, who accompanied the detectives to her son's room, will testify to, did the detectives ever bother to look under her son's bed or check his closet to see if he was hiding in there.

Both the Michigan and United States Constitutions afford protection against unreasonable searches and seizures and, as a general rule, a warrantless search is considered unreasonable. People v. Brzezinski, 243 Mich Ave 431, 433; 622 NW2d 528 (2000).

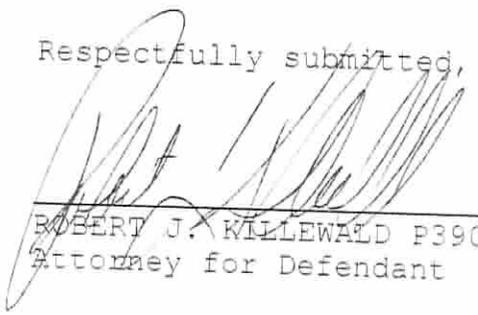
Evidence obtained in violation of the Fourth Amendment's protections against illegal searches and seizures is subject to the exclusionary rule, which precludes the prosecution from presenting the evidence at trial. People v. Goldston, 470 Mich 523, 528; 682 NW2d 479 (2004), citing Mapp v. Ohio, 367 US 643, 665, 660; 81 S Ct 1684; 6 L Ed 2d 1081 (1961).

WHEREFORE, Defendant prays that the Prosecution failed to establish that the mother, Custodio Bailey had the requisite "common authority" to consent to the entry into her son's bedroom.

However and more importantly, even if the detectives thought Custodio Bailey had the authority to allow them access to her son's bedroom, she nonetheless only gave permission to "check" to see if her son was present and not permission for the detectives to stand in the room and visibly search the bedroom for evidence. As such, for the above reasons and pursuant to aforementioned case law, the items taken from Defendant's bedroom should be suppressed and precluded from being used as evidence by the prosecution because the search was illegal.

Dated: 8/29/12

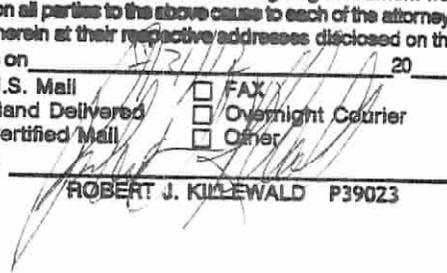
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Attorney for Defendant

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