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# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-000904-MR

JEANETTE LINDEMAN — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 02-CR-00022-001

COMMONWEALTH OF KENTUCKY — APPELLEE

AND: NO. 2006-CA-000906-MR

CLIFTON MACHNIAK — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 02-CR-00022-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

KELLER, JUDGE: Jeanette Lindeman and Clifton Machniak have separately appealed from the judgment of the Pike Circuit Court convicting them of cultivating marijuana, more than five plants, and sentencing them to two years' imprisonment. Specifically, Lindeman and Machniak are contesting the circuit court's denial of their motions to withdraw their guilty pleas and to reconsider that order. In an earlier opinion, the Court of Appeals partially reversed the circuit court's denial of their motion to suppress evidence seized during a warrantless search. Having determined that Lindeman and Machniak prevailed in their first appeal, we hold that the circuit court erred in refusing to allow them to withdraw their guilty pleas and proceed with a trial. Hence, we reverse and remand.

On October 5, 2001, Deputies Christopher Phillips and Bob Wright of the Pike County Sheriff's Department were traveling in the Road Creek area of Pike County, Kentucky, when they encountered two juveniles near an abandoned ATV. A marijuana odor emanated from one of the juveniles, and the deputies found a suspected marijuana joint in his pocket. The deputies took the juvenile into custody and returned him to his home a short distance away. Deputy Phillips took the juvenile to the front door and Lindeman, the juvenile's mother, answered his knock. Meanwhile, Deputy Wright

[1] Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

proceeded to the back of the trailer as a safety precaution. Along the back of the trailer, Deputy Wright saw several buckets containing suspected marijuana plants. Deputy Wright returned to the front porch of the trailer, where Deputy Phillips was discussing what had happened with Lindeman, and told Deputy Phillips about the plants he saw behind the trailer. At that point, Deputy Phillips arrested Lindeman, who told him that her boyfriend, Machniak, was in the trailer. Deputy Phillips knocked on the door again. When Machniak answered the door, Deputy Phillips saw marijuana leaves and a scale on a coffee table. Machniak stated that he also lived in the trailer, and Deputy Phillips arrested him as well.

After taking them into custody, Deputy Phillips had Lindeman, Machniak, and the juvenile wait in the patrol car. While she was in the patrol car, Lindeman gave Deputy Phillips permission to enter the residence with her son so that he could retrieve her medication from a drawer in the coffee table. From the vantage point of the coffee table, Deputy Phillips saw either a marijuana plant or several plants in the kitchen. He then walked through the trailer and discovered a large number of marijuana plants in the kitchen, along the hallway, and in a bedroom. Many of the plants were under grow lights. Outside, Deputy Wright encountered an out-building filled with marijuana plants and grow lights. Deputy Phillips called his supervisor, Officer Bert Hatfield, who responded to the scene. They photographed the scene and removed the evidence to the sheriff's department, where the marijuana was destroyed after testing. In all, the officers seized approximately 1,200 marijuana plants from inside and outside of the trailer and

from the out-building. There is no dispute that the deputies did not obtain a search warrant before conducting their search.

The Pike County grand jury indicted both Lindeman and Machniak on one count each of Cultivating Marijuana, More Than Five Plants, pursuant to KRS 218A.1423.[2] Lindeman and Machniak moved to suppress the evidence seized during the warrantless search. The circuit court denied the motion, and Lindeman and Machniak opted to enter guilty pleas with a recommended sentence of two years' imprisonment, conditioned upon their right to appeal the adverse suppression ruling. In an opinion rendered April 9, 2004, and made final on March 15, 2005, the Court of Appeals affirmed in part and reversed in part the circuit court's decision to deny the motion to suppress. Specifically, this Court held:

> The circuit court properly found that the marijuana plants seized in the backyard were discovered as the result of a warrantless search based on probable cause and exigent circumstances. The plants found within plain view upon the consensual entry into the residence are also admissible. Any evidence seized as a result of the warrantless intrusion into the hallway and the bedroom of the residence must be suppressed as well as that found in the outbuilding.

*Lindeman v. Commonwealth*, 2002-CA-001676-MR, and *Machniak v. Commonwealth*, 2002-CA-001686-MR (slip op. p. 12). The plants the Court referenced in the backyard were described earlier in the opinion as those found in plain view in buckets behind the trailer.

[2] The language of the statute actually reads "cultivation of five (5) or more plants of marijuana" rather than "More Than Five Plants" as is stated in the indictments.

Lindeman and Machniak returned to circuit court in early 2006, when they orally moved to withdraw their guilty pleas pursuant to RCr 8.09 and to proceed with trial. They argued that they had prevailed on appeal in that the vast majority of the evidence seized by the deputies was suppressed. The Commonwealth, on the other hand, contended that Lindeman and Machniak did not prevail on appeal, because there was sufficient evidence that had not been suppressed to support the convictions. The Commonwealth also argued that the Court of Appeals did not reverse their convictions or remand the cases, meaning that procedurally they could not withdraw their guilty pleas. The circuit court denied their motions as well as their motions to reconsider those rulings, and remanded them into custody to serve their two-year sentences. These appeals followed.[3]

On appeal, both Lindeman and Machniak rely upon *United States v. Leake*, 95 F.3d 409 (6th Cir. 1996), to support their arguments that they prevailed on their appeals from the circuit court's suppression ruling and should therefore have been allowed to withdraw their guilty pleas. They argue that the vast majority of the marijuana plants were suppressed, leaving a factual issue as to how many plants remained to support the charges. In his brief, Machniak specifically stated that he would not have agreed to plead guilty with a recommended sentence over the minimum prescribed by statute had he known the actual number of plants in evidence was four to six, as opposed to 1,200. In its briefs, the Commonwealth argues that the appeals are untimely or are from nonappealable orders, meaning that the appeals must be dismissed. If not, their claims

[3] This Court consolidated the two appeals for a decision on the merits on May 26, 2006.

still fail because Lindeman and Machniak did not prevail on appeal, as sufficient evidence still remains to support their convictions.

At the outset, we shall address the Commonwealth's argument that the appeals should be dismissed as untimely taken from the 2002 judgments or as they were taken from nonappealable, oral rulings denying their motions to withdraw their guilty pleas. We disagree with this contention. First, we note that Lindeman and Machniak already appealed from their convictions when they prosecuted their direct appeals of the suppression rulings pursuant to their conditional guilty pleas. Second, although the Court of Appeals' opinions did not specifically order a remand, such can be implied in the partial reversal of the suppression rulings. Finally, we agree with Lindeman and Machniak that they did in fact appeal from written, appealable orders, in that the circuit court entered written orders denying their motions to reconsider its earlier, oral order denying their motions to withdraw their guilty pleas. For these reasons, we decline the Commonwealth's request that the appeals be dismissed on procedural grounds, and we shall review the merits of the circuit court's decision.

Kentucky's Rules of Criminal Procedure allow a defendant to enter a conditional guilty plea:

> With approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion. **A defendant shall be allowed to withdraw such plea upon prevailing on appeal.** (Emphasis added.)

RCr 8.09. The question at issue in these appeals is whether Lindeman and Machniak prevailed on appeal when the Court of Appeals only partially reversed the suppression ruling. We note that RCr 8.09 mirrors its federal counterpart, Fed.R.Crim.Proc. 11(a)(2). Therefore, we shall look to federal precedent in reaching our decision. The Sixth Circuit Court of Appeals addressed this issue in *United States v. Leake*, 95 F.3d 409 (6th Cir. 1996). In *Leake*, the defendant entered into a conditional guilty plea, the terms of which allowed him to withdraw his plea if he was fully successful on appeal. The Sixth Circuit determined that the motion to suppress should have been granted in part and denied in part, meaning that he was only partially successful. The Court noted that "Leake has thus been successful in excluding what appears to be the most damning evidence against him. Under these facts, we hold that Leake has 'prevail[ed],' to use the language of Rule 11(a)(2), and is entitled to withdraw his plea." *Id*. at 420. However, the Court went on to state:

> We do not mean to imply that every time a defendant manages to exclude any evidence on appeal following a conditional plea of guilty, he is entitled to withdraw his plea. The inquiry requires an examination of the degree of success and the probability that the excluded evidence would have had a material effect on the defendant's decision to plead guilty.

*Id*. at 420 n. 21.

In the present cases, we note that when Lindeman and Machniak entered their guilty pleas with the recommended two-year sentences, the Commonwealth, we presume, had evidence of approximately 1,200 marijuana plants to submit against them.

The crime of cultivating marijuana, five or more plants, is a Class D Felony, which carries a penalty range of one to five years' imprisonment. Here, they received sentences greater than minimum, but less than the maximum, that could have been imposed.

As a result of Lindeman's and Machniak's first appeals, the vast majority of the seized marijuana plants were suppressed. The only plants that were not suppressed were the plants located in buckets just behind the trailer and any that were in plain view from the trailer's entryway. Both Lindeman and Machniak assert that a factual issue exists as to how many plants remain to support the charges against them. We agree that the testimony concerning the number of plants is conflicting. Regarding the evidence in the trailer, Deputy Phillips testified at the suppression hearing that he saw "a plant in a container" in the kitchen when he entered the trailer, but later testified that he saw "several" plants in the kitchen. At the preliminary hearing, Deputy Phillips testified that he saw plants, but could not recall the exact number. Regarding the plants behind the trailer, Deputy Phillips testified that Deputy Wright told him he saw six plants in plain view in buckets. Deputy Wright testified that he saw six or eight plants outside of the back door of the trailer. However, Officer Hatfield, who counted the plants, testified that he saw two or three buckets, but could not recall how many plants he saw behind the trailer.

Based upon this conflicting evidence, we disagree with the Commonwealth's assertion that sufficient evidence exists to support Lindeman's and Machniak's convictions, which required the Commonwealth to prove that they were

cultivating five or more marijuana plants. Furthermore, we recognize the sheer number of plants that were excluded from evidence. Almost every one of the 1,200 plants seized was suppressed. In terms of numbers, Lindeman's and Machniak's degree of success was substantial in that they were successful in obtaining the suppression of most of the evidence available to the Commonwealth to use against them. Likewise, the excluded evidence would have had a material effect on their decisions to plead guilty with a recommended sentence of two years. Clearly, the number of plants seized had an impact on the number of years of imprisonment they were sentenced to, as well as on the circuit court's decision to not probate the sentences it imposed. When there were initially so many plants in evidence, conflicting evidence as to how many plants were in buckets behind the trailer and were visible in the kitchen did not adversely affect the Commonwealth's case. However, once all of the other plants were excluded, that information is crucial to the Commonwealth's case as well as to Lindeman's and Machniak's defense.

Because the evidence is conflicting as to the number of plants that were not suppressed and because the excluded evidence had a material impact on their initial decisions to plead guilty, we hold that Lindeman and Machniak prevailed in their earlier appeals. Therefore, pursuant to the plain language of RCR 8.09, the circuit court erred in denying their motions to withdraw their guilty pleas and proceed to trial. This is not to say that they cannot enter into new plea negotiations and enter another plea upon remand; that is left to the parties and to the discretion of the circuit court.

For the foregoing reasons, we reverse the orders of the Pike Circuit Court denying Lindeman's and Machniak's motions to withdraw their guilty pleas and for reconsideration, and remand these cases for further proceedings consistent with this opinion.

ALL CONCUR.

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