RENDERED: OCTOBER 26, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002470-MR

JAMES KEVIN JARBOE — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
INDICTMENT NO. 05-CR-00697

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, TAYLOR, and WINE, JUDGES.

LAMBERT, JUDGE: James Jarboe appeals from a judgment of the Kenton Circuit Court that sentenced him to a five-year probated term after his entry of a conditional plea of guilty. Jarboe contends that the trial court erred in failing to grant his motion to suppress evidence that was found in a search of a residence he occupied but in which he claimed no ownership interest. After our review, we affirm.

On April 16, 2005, Officer J.J. Byrd, Kenton County Police, went to a private residence at 14361 Dixon Road based on a tip that he received from a detective

that some runaway juveniles were at the residence. Upon arrival, Byrd did not observe anyone outside. He further had no information that its owner, Dwight Henry, was involved in any controlled substance activity nor did he have an arrest warrant or a search warrant. The residence has a front door, which was shut, and the shades on the front of the house were drawn. Officer Byrd did not approach the front door as it appeared the side sliding glass door was used as the main entry. Upon approaching the sliding glass door, Byrd saw Jarboe lying on the floor. Byrd, who was armed and in uniform, knocked on the sliding glass door, and Jarboe came to the door.

Officer Byrd testified that he had detected the odor of marijuana before Jarboe opened the door, but it grew stronger after the door was opened. When asked if this was his residence, Jarboe told Officer Byrd that he did not live at the house, but that he had gotten a flat tire on the truck parked outside and was resting on the floor. Officer Byrd asked whether there were any juveniles in the residence, and Jarboe said there were not. Officer Byrd then informed Jarboe that he smelled marijuana and inquired whether there was any marijuana there. Jarboe became nervous and tried to shut the door. Officer Byrd put his foot in the door to prevent it from closing all the way and promptly called for another unit.

Jarboe called the owner of the residence, Dwight Henry, and told him that the police were at his house. Byrd overheard Jarboe tell Henry that he had smoked marijuana in the garage so the smell should not be in the house. Officer Byrd asked to speak with Henry, informed him that he had smelled marijuana, and requested permission

to search the residence. Meanwhile, Jarboe was growing more excited and began yelling, "[t]hey're already in the house so he doesn't need your f***in permission cause he's already in the house." Henry, however, consented to a search of his residence.

Upon searching the residence, Officer Byrd observed a small planter of marijuana and freshly picked buds in the living room as well as an elaborate growing operation with over 200 plants, marijuana in a bucket, and a video on how to grow marijuana.

Jarboe was subsequently charged with a single count of Cultivation of More than Five Marijuana Plants in violation of KRS 218A.1423. After entering a plea of not guilty, Jarboe filed a Motion to Suppress the evidence based on the warrantless entry of the residence. At the suppression hearing, both Officer Byrd and Henry testified. Henry testified that Jarboe was a friend he allowed to be on the premises almost whenever he wanted to be there. Furthermore, he admitted that Jarboe occasionally slept there and was permitted to smoke marijuana on the premises. After careful review, the trial court denied the Motion to Suppress based on lack of standing. Jarboe then entered a conditional guilty plea under Rule 8.09 and was sentenced to five years probated for a term of five years. This appeal followed.

Jarboe argues that the trial court erred in denying his Motion to Suppress based on lack of standing. He specifically contends that he had a legitimate expectation of privacy in the premises and his expectation was reasonable. He alleges that because he was given free access to the residence that he should be classified as a co-

tenant/occupant/guest, giving him standing to challenge the police officer's entry into the residence. Furthermore, he asserts that his act of closing the door was a clear and permissible withholding of consent to search that is not only equal to but also more valid than the owner's consent to search. We disagree.

The Unites States Supreme Court has held that "capacity to claim the protection of the Fourth Amendment depends...upon whether the person who claims the protection...has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978); *see also Rawlings v. Kentucky*, 448 U.S. 98, 106, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). A legitimate expectation of privacy incorporates two elements. First, the defendant must have "exhibited an actual (subjective) expectation of privacy," and second, the defendant's subjective expectation must be "one that society is prepared to recognize as reasonable." *United States v. Tolbert*, 692 F.2d 1041, 1044 (6th Cir. 1982). Furthermore, the Supreme Court has held that a person who is merely present with the consent of the household may not assert a Fourth Amendment right. *See Minnesota v. Carter*, 525 U.S. 83, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998).

In reviewing a denial on a Motion to Suppress, the trial judge's finding of fact regarding a defendant's standing to challenge alleged Fourth Amendment violations are examined for clear error, while the legal determination of standing is reviewed *de novo*. *See* RCr 9.78; *Commonwealth v. Banks*, 68 S.W.3d 347 (Ky. 2001); *Adcock v.*

Commonwealth, 967 S.W.2d 6 (Ky. 1998). We find no clear error in the court's findings of fact, and therefore turn to our *de novo* review of the application of law to those facts.

The record indicates that Jarboe was present in the residence with the permission of the owner on a more than regular basis, which would initially and generally indicate that he was more than merely present in the household. However, the facts also indicate that by telling Byrd he was not the owner, Jarboe presented himself as a third party without authority to consent. In addition, Jarboe called Henry, who he identified as the owner, and told him that they did not need his permission since they were already in the house. We agree with the trial court that these actions are an admission by Jarboe that he lacked authority over the premises. If Jarboe had presented Byrd with evidence of "apparent authority" by "exhibiting an actual (subjective) expectation of privacy" this would be a different situation, but it is undisputed that when asked if he lived in the residence Jarboe said no that he was only there to rest because his truck had a flat and that he further called and identified the owner of the residence.

Jarboe relies heavily on *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), which we find distinguishable on its facts. In *Randolph*, an estranged wife gave police permission to search the marital residence for items of drug use after her estranged husband, who was also present, had unequivocally refused to give consent. The Supreme Court held that "a physically present co-occupant's stated refusal to permit entry renders warrantless entry and search unreasonable and invalid as to him." *Id*. at 1516. In this case, however, Jarboe gave no indication that he was a co-occupant.

As stated previously, he intentionally misled the police officer by telling him he was resting there due to a flat tire. We will not now broaden the holding of *Randolph* to such a dissimilar fact scenario.

If we were to accept Jarboe's logic, we would be giving him the right to misrepresent and lie about his status in order to mislead a police officer. By failing to assert his alleged "privacy interest" at the time the police were present, Jarboe waived his right because he denied Byrd the opportunity to review the circumstances in light of the claimed "apparent authority." Therefore, we find that Jarboe does not have standing to bring the Motion to Suppress.

Accordingly, we affirm the judgment of the Kenton Circuit Court.

TAYLOR, JUDGE, CONCURS.

WINE, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

WINE, JUDGE, CONCURRING IN RESULT ONLY: While I agree that the trial court should be affirmed in its decision denying the motion to suppress, I disagree that Jarboe lacked standing. Jarboe did not mislead police as to the reason for his presence at the home on the day in question. He correctly answered that he did not own the home. However, he clearly had not only the permission of the homeowner to be in the home but permission to use it as well. Denying ownership is not abandonment as argued by the Commonwealth. Jarboe tried to stop the officer from entering into the home and refused permission to search the entire home. As noted by the Appellant, the

holding in *Georgia v. Randolph*, 547 U.S. 103, 106, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006), supports his position that "a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him."

While Jarboe had standing to challenge the search, Officer Byrd, based upon the strong odor of green (or live) marijuana, had probable cause to believe criminal activity was underfoot. *Cooper v. Commonwealth*, 577 S.W.2d 34 (Ky. 1979). Officer Byrd was only looking for a juvenile in the area of the home. It was not unreasonable for him to become suspicious as he approached the door and saw Jarboe lying on the floor. It was reasonable for Officer Byrd to knock on the door to see if Jarboe was all right. Jarboe's attempt to close the door in Officer Byrd's face while the officer was talking, created an exigent circumstance justifying his entry, as evidence might be destroyed. *Hallum v. Commonwealth*, 219 S.W.3d 216, 222 (Ky.App. 2007). In light of probable cause and exigent circumstances, this warrantless search was justified. *Commonwealth v. McManus*, 107 S.W.3d 175 (Ky. 2003).

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