

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-002275-MR

JOHN ALLEN, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
ACTION NO. 08-CR-00283

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, MOORE, AND STUMBO, JUDGES.

STUMBO, JUDGE: John Allen, Jr. appeals from a Judgment of the Fayette Circuit Court reflecting a conditional plea of guilty to one count of Possession of a Controlled Substance, First-Degree, and one count of Possession of Drug Paraphernalia. Allen argues that the trial court erred in overruling his motion to suppress evidence obtained by police when they employed a “ruse” to gain entry

into his residence. For the reasons stated below, we affirm the Judgment on appeal.

John Allen and the Commonwealth each direct our attention to the Findings of Fact set out in the Fayette Circuit Court's Opinion and Order denying Allen's motion to suppress, and from which Allen now appeals. The circuit court set out the relevant facts of this action therein as follows:

Officer Patrick testified . . . that on January 31, 2008, that he was working routine patrol of Central Sector [in Lexington, Kentucky] from 4 p.m. to midnight. According to Officer Patrick, he had received numerous complaints regarding narcotics use and activity in that area. That evening, at approximately 7:45 p.m., he drove by 460 Kenton Street, observed the door open and three subjects on the porch who were "acting suspicious."

Officer Patrick continued past the residence, past Fourth Street to Transylvania University where he parked his vehicle. He got out of his vehicle on Fourth Street and looked up Kenton Street where he observed one of the individuals he had seen on the porch of 460 Kenton Street coming toward him. Officer Patrick made contact with the gentleman who identified himself as Clem. Officer Patrick conducted a traffic stop. He detected a strong odor of alcohol and conducted field sobriety tests. Clem had a crack rock in his mouth and spit it out on the ground. Officer Patrick questioned Clem about the origin of the crack. Clem responded, "You saw where I was at." Clem told Officer Patrick that the residence belonged to "Pops" or "Poppie." Clem was placed under arrest. Officer Patrick called for a transport unit and requested an additional unit to assist with a "knock and talk" investigation.

Officer Patrick testified that he knew "Pops" is a nickname utilized by Allen. He also knew Allen's residence is located at 460 Kenton Street and is a known crack house or smoke house. After the additional officer

arrived, both he and Officer Patrick went to 460 Kenton Street. Officer Patrick knocked on the door. A female voice asked, "Who is it?" Officer Patrick responded, "Chris." The female occupant opened the door.

Once the door was opened, Officer Patrick immediately shined his flashlight into the residence. He testified that Allen was sitting on a couch approximately five feet in front of the door with a crack pipe in his right hand. When Allen saw the police at the door, he immediately tried to conceal the crack pipe by moving his hands down. Both Officer Patrick and the other officer identified themselves as police, entered the residence, and gave a verbal command to Allen to put his hands up. Allen complied. Officer Patrick saw the crack pipe, ordered Allen to put it down and placed Allen under arrest for possession of drug paraphernalia. A search incident to arrest revealed 3.1 grams of suspected crack cocaine, [and] a brown purse on the floor under Allen's leg. The purse contained a crack pipe and \$250 cash. Allen was read his Miranda rights and subsequently arrested. Allen did not make statements to the police.

Allen was later charged with one count each of Trafficking in a Controlled Substance, First-Degree, and Possession of Drug Paraphernalia. The matter proceeded in Fayette Circuit Court, and on June 4, 2008, Allen moved to suppress the evidence obtained by the police when they entered the residence at 460 Kenton Street. As a basis for the motion, Allen argued that the arresting officer misrepresented himself on a "knock and talk" visit to Allen's home by identifying himself as "Chris" rather than a police officer. Allen maintained that this misrepresentation resulted in a violation of his rights afforded under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky

Constitution sufficient to sustain his motion to suppress the evidence obtained by the police.

A hearing on the motion was conducted in Fayette Circuit Court, and on August 8, 2008, the court rendered an Opinion and Order denying the motion and which forms the basis of the instant appeal. The court determined in relevant part that the primary issue before it was whether the ruse used by Officer Patrick to get an occupant inside the residence at 460 Kenton Street to open the door frustrated the purpose of the “knock and announce” rule and was therefore unconstitutional. That ruse consisted of Officer Patrick’s announcement to the female occupant of the residence that his name was “Chris.” The court determined that the facts of the case fell squarely within an exception to the “knock and announce” rule as set out in Kentucky case law, which provides that there is no constitutional impediment to the use of subterfuge or a ruse to gain entry to a residence. According to the Fayette Circuit Court, the rationale underlying this rule is that entry through the use of deception and accomplished without force is not a “breaking” requiring officers to first knock and announce their authority and purpose. The court’s resultant Order denied Allen’s motion to suppress.

Allen subsequently accepted a reduction in the charges to one count of Possession of a Controlled Substance, First-Degree, and one count of Possession of Drug Paraphernalia in exchange for his plea of guilty. The plea was conditioned on the reservation of Allen’s right to appeal the adverse ruling on his motion to suppress. A Judgment on Guilty Plea was rendered on September 17, 2008, and

Allen was sentenced to a term of five years in prison. Allen was placed on probation, and this appeal followed.

Allen now argues that the Fayette Circuit Court erred in denying his motion to suppress the evidence obtained by the police when they entered the residence at 460 Kenton Street. He maintains that suppression of the evidence is required because Officer Patrick used a ruse to gain entry into the residence where the evidence was discovered. Allen directs our attention to those provisions of the United States and Kentucky Constitutions which prohibit unreasonable searches and seizures, and maintains that the circuit court misinterpreted *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998), and *Krause v. Commonwealth*, 206 S.W.3d 922 (Ky. 2006), in support of its conclusion that the use of the ruse by the police was not violative of Allen's right against unreasonable searches and seizures. He notes that unlike the matter at bar, the *Adcock* decision centered on the execution of a search warrant. He also maintains that the facts of *Krause* are distinguishable, because in *Krause* a police officer gained entry to a home by falsely stating that an alleged victim maintained that she was raped in the home. In support of his contention that he was entitled to a suppression order, Allen argues that in the matter at bar, consent was not voluntarily given by the female occupant because she was "effectively coerced by Officer Patrick's identification of himself as 'Chris' as opposed to rightful identification as an officer of the law." Allen also contends that the police could have engaged in other means of investigating their suspicion that crack was being sold at the residence by way of monitoring the

residence or using a confidential informant. In sum, Allen argues that the ruse used by Officer Patrick did not fall within the limited exception to the prohibition against unreasonable search and seizure as set out in *Adcock* or *Krause*, and that as such he is entitled to an Order reversing the denial of his motion to suppress.

Having closely studied the written arguments, the record and the law, we find no basis for disturbing the Order on appeal. We must first note that the suppression hearing at issue was neither electronically nor stenographically recorded, or was a narrative statement of the proceeding entered into the record. See generally, CR 75.13. Where the record on appeal does not contain a transcript of evidence or narrative statement, we must assume that the evidence supported the factual findings of the circuit court. *Porter v. Harper*, 477 S.W.2d 778 (Ky. 1972). The question then becomes whether the circuit court properly determined that the constitutional safeguards, the statutory law or case law as applied to these facts was not violated. *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). We must answer that question in the affirmative.

In *Adcock*, a police officer disguised as a pizza delivery person knocked on the defendant's door and announced that he had a pizza for delivery. When the occupant opened the door, the officer executed a valid search warrant of the residence. On review of an Opinion of this Court affirming *Adcock*'s conviction, the Kentucky Supreme Court determined that a ruse used to facilitate the execution of a valid search warrant is constitutionally distinguishable from the

prohibition against “no knock entry.”<sup>1</sup> It based this conclusion on the determination that otherwise lawful entry (via the search warrant) obtained through the use of a ruse and accomplished without force is not a “breaking” requiring officers to first announce their authority and purpose. *Adcock* at 9.

The facts of *Adcock* are a reasonable analog to those preceding Allen’s arrest. Whereas the approaching officer in *Adcock* pretended to be a pizza delivery person, Officer Patrick stated that his name was “Chris.” Similarly, just as the officer in *Adcock* made lawful entry based on the execution of a valid search warrant, Officer Patrick made lawful entry into the Allen residence upon observing through the doorway Allen’s possession of a crack pipe. In each case, the ruse did not place the officer inside the residence, but rather caused the occupant to open the door to the residence.

The *Krause* opinion, upon which the circuit court relied in part in denying Allen’s motion to suppress, is also properly applied to the instant facts. *Krause* held in relevant part that under the “plain view doctrine,” a warrantless seizure of illegal substances or objects is constitutionally valid so long as the police officer has not violated the Fourth Amendment in arriving at the place where the evidence could be plainly viewed. *Krause* at 923. Relying on *Adcock* for the determination that an officer may employ a ruse to cause an occupant to open the door to a residence, the circuit court also properly applied *Krause* in support of its

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<sup>1</sup> The “knock and announce rule” set out in *Wilson v. Arkansas*, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995), has three purposes: (1) to protect law enforcement officers and household occupants from potential violence; (2) to prevent unnecessary destruction of private property; and (3) to protect people from unnecessary intrusion into their private activities.

conclusion that the plain view doctrine justified Officer Patrick's entry into the residence. Officer Patrick stated that after the female occupant opened the door, he shined a flashlight into the residence and observed Allen in plain view with a crack pipe in his hand. Allen was located about five feet from the door. Allen was subsequently arrested, and a search incident to arrest resulted in the discovery of additional evidence. We find no error.

For the foregoing reasons, we affirm the Fayette Circuit Court's Opinion and Order denying Allen's motion to suppress. Because Allen's guilty plea was conditioned on the reservation of his right to appeal the Opinion and Order, we affirm the Final Judgment and Sentence of Probation.

ALL CONCUR.

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