

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001535-MR

JOSE LUIS CRUCES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 08-CR-01602

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

STUMBO, JUDGE: Jose Luis Cruces appeals from a Judgment of the Fayette Circuit Court reflecting a conditional plea of guilty to one count each of rape in the third-degree and sodomy in the third-degree. Cruces argues that the trial court erred in failing to sustain his motion to suppress certain evidence because the

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

police did not obtain valid consent before searching an apartment where he was residing. We are persuaded that the Fayette Circuit Court properly concluded that the police obtained valid consent to search the apartment, and accordingly affirm the Judgment on appeal.

On October 18, 2008, a Lexington, Kentucky police officer received a complaint from a woman stating that the woman's 15-year-old daughter, "E.L.," had run away from home. The woman believed that E.L. was at Cruces' apartment, who is described in the record as E.L.'s adult boyfriend.

Two officers, accompanied by E.L.'s mother, then went to the apartment to look for E.L. The parties disagree as to what transpired when the police knocked on the apartment door. Officer McMinoway would later testify that Cruces opened the door, and spoke to E.L.'s mother in Spanish. McMinoway stated that Cruces gave verbal consent in Spanish for the police to enter the apartment, as well as consent in broken English and via body language.

Officer Holland testified that Daniel Castille opened the door, and that Castille gave verbal consent in English for the officers to enter. When they entered the apartment, Officer Holland saw four hispanic males in the living room, and Holland asked Castille if Holland could search the bedroom. According to Holland, Castille gave verbal consent in English for Holland to search the bedroom. Holland stated that he then went into the bedroom and found E.L.

The matter went before the Fayette County Grand Jury on December 15, 2008. Cruces was indicted on one count of rape in the third-degree and one

count of sodomy in the third-degree, because E.L. was under the age of 16 and statutorily unable to give consent.

On February 18, 2009, Cruces filed a motion to suppress all evidence obtained as a result of the search, including testimony, statements made by Cruces, fabric samples taken from a couch, and photographic evidence. As a basis for the motion, Cruces maintained that the police were not given valid consent to search the apartment. A motion on the hearing was conducted on March 17, 2009. The court determined that the Commonwealth produced evidence that Castille, Cruces or both had given verbal consent for the police to enter and search the apartment. The court denied the motion to suppress the evidence obtained as a result of the search.

On May 15, 2009, Cruces entered a plea of guilty as to each count of the indictment, in exchange for the Commonwealth's recommended one-year sentence on each count. The plea was conditioned on the reservation of Cruces' right to appeal the court's Order denying the motion to suppress. This appeal followed.

Cruces now argues that the Fayette Circuit Court erred in denying his motion to suppress the evidence obtained as the result of what he contends was an unlawful search of the apartment. He notes that the circuit court's ruling on the motion to suppress "leaves open the possibility of invalid consent," and contends that the Commonwealth did not prove consent whether Officer McMinoway's version of events or Officer Holland's version is correct. Cruces maintains that if

Officer McMinoway's version is correct, consent cannot be found from his testimony that Cruces spoke Spanish some of the time, broken English at other times, and indicated his consent through body language. He also notes that E.L.'s mother could not be relied on as a truthful interpreter because she had an interest in gaining entry to the apartment to find her daughter.

Cruces goes on to argue that irrespective of whether Castille or Cruces allegedly gave consent to enter and search the apartment, the Commonwealth did not demonstrate that the individual giving consent had the apparent or actual authority to do so. He also contends that the court improperly failed to make proper findings of fact on the ruling. In sum, Cruces seeks an Order vacating the circuit court's Order denying the motion to suppress.

We have closely examined the record, the written argument and the law, and find no error. The focus of Cruces' argument is that the Commonwealth did not demonstrate that valid consent was given for the police to enter the apartment, nor that the person or persons giving consent had the actual or apparent authority to do so. In denying Cruces' motion, the circuit court determined either that Cruces gave Officer McMinoway verbal consent to enter the apartment, or in the alternative that Castille gave valid consent to Officer Holland. It concluded that under the totality of the evidence, valid consent was given by one or both individuals.

The record supports this conclusion. Officer Holland's testimony is supported by that of Castille, who acknowledged that he gave the officers consent

to look for E.L. This testimony, taken alone, forms a sufficient basis for sustaining the circuit court's denial of Cruces' motion to suppress. Additionally, evidence was adduced that Castille gave the officers "a second permission" to continue their search for E.L. after the officers had entered the apartment.

Officer Holland and Castille each testified that Castille opened the door to the apartment when the officers knocked. This testimony, we believe, is sufficient to support the Commonwealth's claim that Castille had actual or apparent authority to consent to the search. Castille also testified that his children and nephew were asleep in the bedroom where E.L. was located; further bolstering the conclusion that he had actual or apparent authority to consent to the search of that area.

The burden of proof rests with the Commonwealth to prove by a preponderance of the evidence that a warrantless residential search falls under an exception to the warrant requirement. *Cook v. Commonwealth*, 826 S.W.2d 329 (Ky. 1992). "Consent to search is an exception to the warrant requirement." *Farmer v. Commonwealth*, 169 S.W.3d 50, 52 (Ky. App. 2005). In the instant case, the Commonwealth offered the testimony of Officer Holland and of Castille, each of whom stated that Castille opened the door and gave the officers consent to enter the apartment. Additionally, Officer McMinoway testified that Cruces consented to the search both through words and gestures. Consent to search may be in the form of words, gestures or conduct. *United States v. Griffin*, 530 F.2d 739 (7<sup>th</sup> Cir. 1976). Ultimately, the circuit court concluded that under either

scenario, and under the totality of the evidence presented, the Commonwealth met its burden of proof on this issue. We find no error in that conclusion.

Lastly, Cruces maintains that the circuit court improperly failed to make findings of fact on his motion as required by RCr 9.78. We are not persuaded by this argument. RCr 9.78 requires that – on a motion to suppress – “the trial court shall conduct an evidentiary hearing . . . and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion . . . and necessary to support the ruling.” The rule does not require written findings. In the matter at bar, the circuit court made findings which were electronically recorded and entered into the record. This is sufficient to comply with RCr 9.78, as it informs the parties as to the basis of the ruling. See generally, *Coleman v. Commonwealth*, 100 S.W.3d 745 (Ky. 2002). We find no error on this issue.

For the foregoing reasons, we affirm the Judgment of the Fayette Circuit Court.

ALL CONCUR.

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