RENDRED: AUGUST 30, 2013; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000739-MR

DAVID ZAX MILAM — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 11-CR-00030

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: David Zax Milam appeals from a judgment and sentence resulting from his conditional plea of guilty. He reserved the opportunity in his plea to appeal the issue of whether the trial court erred when it denied his motion to suppress evidence that was seized during a warrantless search of a fraternity house. After careful review of the record, we affirm the judgment and sentence.

FACTUAL AND PROCEDURAL BACKGROUND

In fall 2010, David Zax Milam was a fraternity brother at the Delta Tau Delta Fraternity at the University of Kentucky and leased a room at the fraternity house. The building was located on the campus at the University of Kentucky but owned by the fraternity. On November 30, 2010, Detective John McBride of the Lexington Police Department received a tip that Milam was selling marijuana at the fraternity house. He and two other police detectives, Jason Beetz and David Saddler, went to the fraternity house for a "knock and talk" encounter to investigate the tip.

Ultimately, Milam was arrested, and on January 10, 2011, he was indicted by the Fayette County Grand Jury on several charges, including two counts of trafficking, possession of paraphernalia, and possession of a forged instrument, a fake I.D. The particular charge relevant to this appeal is the trafficking in a controlled substance within 1,000 yards of a school.

Following the indictment, Milam filed a motion to suppress the evidence seized. An initial suppression hearing was held and, subsequently, two more suppression hearings were held at the request of Milam's counsel. The first suppression hearing was held on August 12, 2011.

At this hearing, the Commonwealth called one witness, Detective Jason Beetz, who was a member of the University of Kentucky police department

and had participated in the arrest and search of Milam's room. Beetz testified that on the evening of November 30, 2010, after receiving the tip about Milam's activities, the officers went to the fraternity house to conduct a "knock and talk" with Milam. Upon arrival at the fraternity house, they went to the back door, mistakenly believing that the back door was the front door. Explaining this mistake, he noted that the detectives thought it was the front door since it was on Nicholasville Road,[1] had large Greek letters above the door, and faced the fraternity's parking area.

Continuing his testimony, he said that they knocked and rang the bell for a period of time between thirty seconds to three minutes, but no one responded. After some discussion, the detectives decided that a fraternity house was similar to an apartment and, therefore, they had the right to enter even though they did not have consent, a warrant, or exigent circumstances, which are typically necessary for warrantless entry.

Although the door had a keypad, Beetz said that the detectives were able to enter the fraternity house without using a code since the door was ajar and unlocked. Apparently, the door was slightly open although no space existed between it and the door jam. Upon entering the common area, which at the hearing

[1] It is unclear whether the back of the fraternity house faced Nicholasville Road or South Limestone Road. Both are named as the street behind the fraternity house in the record.

the detectives referred to as the "breezeway" or "foyer," they announced their presence and identified themselves as police officers.

Next, according to Beetz, they waited in the common area for a second or two to as long as a minute until a young man appeared from around the corner of an adjoining common area through another set of double doors that were directly opposite the outside double doors and faced the breezeway. The breezeway or foyer was where one entered after going through the outside double doors. If one went through the second set of double doors, he would be in the common area of the fraternity house.

Without asking the young man who he was or whether he was affiliated with the fraternity, the detectives, according to Beetz, identified themselves as police officers and said that they were looking for Milam. After the young man said that Milam lived there, he agreed to show them Milam's room. Thereafter, he led them up the stairwell that was in the breezeway.

Beetz explained that as the detectives followed the young man up the stairs, upon entry into the stairwell they could smell burnt marijuana. At the top of the stairwell, the young man opened a door to the second floor where the fraternity residents had their individual rooms. The smell became stronger as they got closer to Milam's room. The young man pointed out Milam's room, the detectives knocked, and Milam opened the door. As he opened the door, the smell of

marijuana was overwhelming, and the detective saw a full jar of marijuana sitting on a coffee table in the room.

Then, Beetz testified that they asked Milam if they could enter the room, and he acquiesced. Six other people were in Milam's room, and the officers asked them to leave. During the officers' time in the room, Milam told them that he had thirty clients, mostly in-house fraternity brothers, and that he purchased his marijuana in Louisville, Kentucky. He also consented to a search of his room whereupon the detectives discovered marijuana, $1,700, Adderall pills, scales, pipes, rolling papers, grinders, a fake driver's license, and zip-lock bags. Besides these items, Milam's phone was taken and later searched after the procurement of a warrant. The search of the phone revealed numerous buyer/seller communications.

After Beetz's testimony, Milam's defense counsel called two witnesses. The first witness was Detective McBride. His testimony was substantially the same as Beetz's testimony. Then, Milam testified in a limited manner. He said that the fraternity house, including the breezeway, was not open to the public and that signs outside it identified it as private property. Further, Milam said that the door in which the detectives came through was locked and required a numeric keypad for entry. And, he observed that his individual room had a private lock.

After this hearing, at the request of Milam, a second hearing was held on August 15, 2011. Milam called one witness, Nicholas Stewart, who was the president of Delta Tau Delta at the time Milam was arrested. Stewart testified that the bylaws of the fraternity required that the doors of the house remained locked and access was only allowed to members and their guests. The reason for the doors being locked was that earlier in the year the fraternity had an "open door" policy, which allowed entry to anyone. But when the fraternity was implicated in alcohol violations and almost kicked off campus, the fraternity members began locking the doors to meet the University of Kentucky's rules.

Stewart explained that the national fraternity organization owns the house and the residents must sign a lease agreement in order to reside in the fraternity house. The lease provides the resident a room and use of the common areas. Further, the lease prohibits the selling of marijuana. Stewart maintained that no one was certain as to the identity of the person who led the police officers to Milam's room. He conceded, however, that the fraternity member who took the detectives to Milam's room did nothing wrong and violated no fraternity bylaws.

Stewart stated that there were signs in the parking area denoting that the area was for private parking. The purpose of the signs was to prevent tailgating. Besides the signs about parking, Stewart thought there might have been temporary private property signs, but he could not recall with certainty whether

such signs were in the back-door area. (In fact, the photographs entered into evidence did not show any signs stating that the property was private. Some photographs, introduced into evidence, however, did have signs stating that the parking lot was for private parking.)

At the conclusion of the second hearing, the parties made their arguments to the trial court. Milam contended that the fraternity house was like a private residence and, hence, the entry to the breezeway was improper. In response, the Commonwealth claimed that the fraternity house was like an apartment or hotel and not subject to the same privacy interests as a private home. After considering the arguments, the trial court made oral findings of fact and conclusions of law, which will be delineated below, and denied the motion to suppress.

Then, at the request of Milam, a third suppression hearing was held on December 21, 2011. At this hearing, Matthew Neagli testified. He was identified as the fraternity brother who had met the detectives on the night of the incident and led them to Milam's room. Neagli contradicted the detective's testimony and stated that they had gone beyond the breezeway and entered beyond a second set of double doors into a private area of the fraternity house. He testified that there were four or five officers although, in fact, there were three officers. And, he claimed none wore uniforms although he did recall seeing a vest identifying them as police.

Actually, Beetz was in uniform and the other two officers were wearing police vests.

Further, Neagli said that he did not agree to take them upstairs to Milam's room but that they just "followed" him. Finally, he claimed that when they reached the second floor, the detectives just pushed past him and shouted out for Milam. Notwithstanding this testimony, Neagli admitted that the smell of marijuana was present as he opened the stairwell door on the second floor. And, significantly, he testified that the keypad lock on the door, which the detectives had entered, was not functional nor was the door locked at the time of the incident.

Then, Milam recalled Stewart to the stand. Stewart provided no new information but confirmed, contrary to his statements at the second hearing, that the keypad lock on the back door of the fraternity house did not work at the time of the incident. The trial court judge observed that in his previous testimony, Stewart had misrepresented the functionality of the keypad lock and misstated that the back door was always locked. After the trial court judge highlighted the discrepancy in Stewart's earlier testimony, Stewart confirmed that at the time of Milam's arrest anyone could walk into the house through the door. Further, Stewart acknowledged that he was not at the fraternity house on the evening of Milam's arrest so he could give no specific information about the door on that evening.

At this time, the trial court orally reiterated the early findings of fact and conclusions of law and made additional findings and conclusions. Once again, it denied the motion to suppress.

On January 6, 2012, Milam entered a conditional guilty plea conditioned on the appeal of the denial of his suppression motion. He was formally sentenced to one (1) year, probated for three (3) years by a judgment entered on March 21, 2012. Milam now appeals from this judgment.

STANDARD OF REVIEW

Our standard of review of a trial court's denial of a motion to suppress is twofold as set out in *Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996), and adopted by Kentucky in *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998). First, appellate review of a trial court's denial of a motion to suppress evidence must determine whether the trial court's findings of fact are supported by substantial evidence. *Id*. If supported by substantial evidence, the findings of fact are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Drake v. Commonwealth*, 222 S.W.3d 254 (Ky. App. 2007). Substantial evidence has been defined as evidence possessing sufficient probative value to induce conviction in the minds of reasonable men. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). Hence, if the findings are supported by substantial evidence, they are conclusive

and will not be disturbed. *Commonwealth v. Harrelson*, 14 S.W.3d 541, 549 (Ky. 2000).

Second, an appellate court conducts a *de novo* review of the trial court's application of law to the established facts to determine whether its ruling was correct as a matter of law. Under *de novo* review, we owe no deference to the trial court's application of the law to the established facts. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998). With this standard in mind, we turn to the facts of this case.

ANALYSIS

Synopsis of Parties' Argument

Milam argues that the police officers' entry into the fraternity house was improper and, therefore, the evidence used against him should be suppressed. Furthermore, he contends that even if Milam did not have a reasonable expectation of privacy regarding the officers' entry into the fraternity house, no one gave them consent to enter the residential area of the building. In response, the Commonwealth argues that the trial court correctly denied the motion to suppress because the police officers' entry through an unlocked door was not improper. Moreover, the police officers did not violate Milam's privacy when they went up the stairway to Milam's room.

Substantial Evidence

Initially, we review the factual findings of the trial judge to see if they are supported by substantial evidence. RCr 9.78. Here, the trial court rendered oral findings of fact and conclusions of law. For purposes of ascertaining whether the trial court's findings of fact were based on substantial evidence, we note the key findings: that the officers went to the entrance of the house facing Nicholasville Road to conduct a "knock and talk;" that this entrance, while technically the back door, was commonly used as entrance to the house; that the officers did not see any "members only" signs on the exterior of the building; and, that the officers knocked on the door and rang the doorbell but no one answered the door. The trial court also found that the door was ajar and that the officers entered a common breezeway and announced their presence. After the third suppression hearing, the trial court made the additional finding that the keypad was not even functional.

Continuing with its findings, the trial court determined that a young man, whom the officers believed was a fraternity brother, came out, acknowledged that Milam lived there, and offered to show them Milam's room. At the third suppression hearing, this person was identified as Neagli. During the third suppression hearing, the trial court determined that Neagli's credibility was somewhat questionable. Notwithstanding Neagli's testimony, the trial court found

that the second set of doors was open and that the officers did not breach these doors.

Besides these findings, the trial court also decided that the officers followed Neagli to Milam's room on the second floor and smelled burning marijuana. The trial court asserted that regardless of whether Neagli led the way or affirmatively offered to lead the way is irrelevant. Under either set of facts, the trial court concluded that he consented to the officers' entry. They knocked on Milam's door, he answered, and they smelled and saw marijuana in plain view. Milam then agreed to the officers' entry and search of his room.

Our review of the record reveals that the trial court made an adequate and thoughtful synthesis of the evidence that was presented. Moreover, we recognize that the trial court is best situated to judge the credibility of the witnesses. Hence, in the instant case, the trial court's findings of fact are supported by substantial evidence and are conclusive.

De Novo Review of Legal Issues

We now address the trial court's legal reasoning *de novo*. As expressed above, we owe no deference to it. *See Cinelli*, 997 S.W.2d 474. To start our analysis, a reiteration of the trial court's conclusions of law is necessary. Relying on *Quintana v. Commonwealth*, 276 S.W.3d 753 (Ky. 2008), the trial court judge reasoned that the officers did not violate Milam's privacy rights when

they entered the fraternity house through an unlocked door and stepped into the breezeway. Furthermore, the trial court judge compared the fraternity house to an apartment house or hotel, and rejected Milam's claim that the fraternity house was similar to a private residence.

Continuing on, the trial court distinguished the legal authority cited by Milam. The specific cases were *State v. Miller*, 2011 WL 1167181 (Ohio App. 2011), and *Reardon v. Wroan*, 811 F.2d 1025 (7th Cir. 1987). The trial court concluded that a fraternity house with a nonfunctional keypad and a door that was ajar is similar to an apartment building where an open, unlocked door leads into a common hallway. Furthermore, the trial court held that the police officers did not violate Milam's privacy rights because they never went beyond the breezeway, which was open to the public. The breezeway permitted them and any member of the public to enter and announce their presence. To illustrate, the trial court noted that a pizza delivery person could enter the breezeway in order to deliver a pizza.

Next, the police officers were met by a young man who was later identified as Matt Neagli, a member of the fraternity and resident of the house. In making his conclusions of law, the trial court judge believed that the police officers thought that the young man was a fraternity member and, therefore, had authority over the premises. Thus, the trial court determined that this fraternity member (Neagli), who was a third party, consented to the police officers' entry and had the

authority to lead them to Milam's room. Finally, the trial court judge deemed that the officers' entry into Milam's room was based on Milam's consent, since he voluntarily opened the door. At this juncture, they were assailed with the overwhelming smell of marijuana and could see the marijuana in plain sight.

We begin our legal examination by noting that, in general, warrantless searches are "per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967) (footnote omitted). Even though the statement is relatively straightforward, issues surrounding the analysis of the Fourth Amendment have become quite intricate.

As previously clarified, although warrantless searches are per se unreasonable, there are exceptions to the requirement for a warrant. *Bishop v. Commonwealth*, 237 S.W.3d 567, 569 (Ky. App. 2007). In general, under the Fourth Amendment to the United States Constitution, police may not conduct a warrantless search or seizure within a private residence unless both probable cause and exigent circumstances exist. *Kirk v. Louisiana*, 536 U.S. 635, 638, 122 S.Ct. 2458, 2459, 153 L.Ed.2d 599 (2002). Consent, however, may authorize a warrantless search. *Payton v. Commonwealth*, 327 S.W.3d 468, 469 (Ky. 2010).

Consent is the focus of our analysis since the police officers went to the fraternity house for a "knock and talk." In *Quintana*, which was cited by the

trial court judge, the Kentucky Supreme Court held that the knock and talk procedure is a proper police procedure and may be used to investigate residents of property, provided the police officers only go where they have a legal right to be. *Quintana*, 276 S.W.3d at 755. The Court stated that police may enter the curtilage of the house in limited circumstances without violating the Fourth Amendment. *Id*. Specifically, the Court held that police may walk upon the publicly accessible portions of a person's property and proceed to the front door to attempt to speak with the residents. "Essentially, the approach to the main entrance of a residence is properly 'invadable' curtilage ... because it is an area that is open to the public." *Id*. at 758.

Initially, we remark that the trial court's decision - that the door accessed by the police officers was, indeed, for all practical purposes the door primarily approached by both members and the public - was legally sound. In this case, whether it was labeled a "front door" or a "back door" is immaterial. Certainly, under a knock and talk encounter, it was permissible for the police officers to approach these double doors and ring the bell in order to speak with Milam. No violation of the Fourth Amendment occurred.

The next action in this matter for our purview occurred when the police officers pushed open the doors, which were unlocked and had an inoperative keypad, and went into a common area, the breezeway. Milam argues that this

action was a violation of his Fourth Amendment rights because he had an expectation of privacy in the breezeway of his residence, the fraternity house. In addition, he maintains the fraternity house is more like a private residence than an apartment complex or hotel. The Commonwealth differs and maintains that the layout of the fraternity house is analogous to an apartment or duplex with a common entrance. This issue is the crux of the dispute. Did the police officers violate Milam's expectation of privacy in the fraternity house by pushing open an unsecured door and entering into a common area but not into the residence itself?

Undoubtedly, the Kentucky and United States Constitutions prohibit unreasonable searches where persons have a reasonable expectation of privacy. *See Katz*, 389 U.S. at 351-352, 88 S.Ct. at 511-512. But, as stated in *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978), "[c]apacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Id*. (citations omitted).

The case at hand provides a situation that requires a very specific fact-oriented resolution. Milam maintains that the warrantless entry into the fraternity-house breezeway exceeded the parameters of a consensual knock and talk. He cites two cases from other jurisdictions to support his legal reasoning that persons

living in the fraternity house have an expectation similar to persons in private homes.

In contrast, the Commonwealth states that entry into the breezeway did not violate Milam's privacy rights, particularly since the police officers did not go beyond the breezeway but remained there and announced their presence. To bolster this contention, the Commonwealth highlights the fact that besides going to the fraternity house for a knock and talk, appropriately knocking on the door and ringing the bell, the officers entered through double doors that were not only unlocked but also ajar. And, the fraternity brothers knew that the door was not locked.

In fact, as previously described, the fraternity members' original testimony regarding whether the door was locked and/or secured was, at the very least, disingenuous. At the first hearing, Milam stated that the door was always locked and with a keypad. At the second hearing, Stewart, the fraternity president, stated that the door was always locked with a keypad whose code was only provided to fraternity members. But, at the last hearing, Neagli and Stewart both acknowledged that the door was almost always unlocked and that the keypad was nonfunctional.

To ascertain whether the police officers violated Milam's privacy rights, we return to *Quintana*. In the decision, the Supreme Court examined the

nature of knock and talk. In *Quintana*, it elucidated that the procedure is a commonly used police tool for situations such as a search for a lost pet or to ask a homeowner whether they have seen a suspicious person. But the court noted that controversy may arise when the officer is not looking for assistance from the resident but rather is using the procedure to look for evidence of wrongdoing by the resident, and approaches the home to ask for consent to search or to aid in spotting evidence in plain view or plain smell. *Id*. at 757. Such is the case here, where the officers were conducting an investigation based on a tip about trafficking in marijuana.

Ultimately, in *Quintana*, the Court decided that this procedure is proper in such cases and may be used for further investigation, "provided the officer goes only where he has a right to be." *Id*. at 755. Then, while going into detail about issues related to curtilage, it outlines the permitted purpose of the procedures in cases not just involving curtilage. The court establishes the determining factor for an appropriate knock and talk:

> Whether an officer is where he has a right to be when he does the knock and talk is defined by his limited purpose in going to the residence and the nature of the area he has invaded. There has been no finding of probable cause sufficient to grant a warrant, so the knock and talk is limited to only the areas which the public can reasonably expect to access.

Id. at 759. So, police officers may go to areas that the public can reasonably access.

In applying *Quintana* to this situation, the police officers had a tip regarding criminal activity on the part of Milam. Thus, they did not have sufficient evidence to justify the grant of a warrant. Nonetheless, they could, according to *Quintana*, go to a residence to talk with a person for investigative purposes. So, in our fact pattern, is the breezeway an area that the public could reasonably expect to access? Based specifically on the layout of this particular fraternity house, we agree with the trial court's assessment that the police officers did not violate Milam's privacy rights when they entered an unlocked breezeway, which was accessible to the public.

Our reasoning is bolstered by the original, misleading testimony given by Milam and Stewart that the doors were always locked and secured by a keypad. Ultimately, it was revealed that the doors were not typically locked and the keypad did not work. Further, photographs of the doors entered into evidence show that rather than typical doors on a home, these double doors were institutional doors fronting a common area and that another set of doors led into the living area of the fraternity house. So, since the fraternity members knew that the doors were typically unlocked, we do not believe that they had a supportable privacy expectation with regards to the double doors. Accordingly, the police officers did

not violate Milam's expectation of privacy when they entered into the breezeway through an unlocked and ajar door.

Notably, this analysis is bolstered by *United States v. Dillard*, 438 F.3d 675 (6th Cir. 2006), a case cited by the Commonwealth. In a similar fact pattern, the Sixth Circuit noted that "[t]he officers did not violate the Fourth Amendment when they entered Dillard's duplex and walked to the second floor because Dillard did not have a reasonable expectation of privacy in the common hallway and stairway of his duplex that were unlocked and open to the public." *Id*. at 682. The court explained its reasoning:

> There is no question that Dillard, as a tenant, had a possessory interest in the common hallway and stairway of his duplex and the right generally to exclude anyone who was not a tenant. But because Dillard made no effort to maintain his privacy in the common hallway and stairway, he did not have an objectively reasonable expectation of privacy in those areas. Both doors on the first floor were not only unlocked but also ajar. By not locking the duplex's doors, Dillard did nothing to indicate to the officers that they were not welcome in the common areas.

Id. Since Milam and the other fraternity members made no effort to secure the doors leading into the breezeway, a common area, they did not have an objectively reasonable expectation of privacy therein.

Further, we believe that the cases provided by Milam to support his argument that his privacy rights were violated are easily distinguished from this

case. In *State v. Miller*, an Ohio case, although the court did opine that fraternity houses are more like private homes for purposes of search and seizure, the facts therein are quite different from these facts. In *Miller*, the police officer opened the fraternity door by using a keypad combination since access to that building by the public was restricted at all times. Clearly, the public was not restricted in our case since the door was ajar, unlocked, and led into a breezeway. The *Reardon v. Wroan* case is a civil rights case wherein fraternity members sued the police for improper entry. The standard therein was not based on the exclusionary rule but on whether summary judgment was proper.

Here, we have addressed the privacy rights under the Fourth Amendment in entering a common area of a building, not a home, by using a case-by-case analysis. We are not making any legal declaration about privacy rights attendant to the continuum of residences including private homes, apartments, fraternity houses, duplexes, hotels, and so on, other than perhaps suggesting that this analysis requires case-by-case consideration.

Rather, we are holding that in the specific fact pattern of this case, the breezeway operated more like the unlocked, common area of an apartment complex than a private residence. The home was owned by the national fraternity organization; each resident signed a lease; each resident was assigned a room with a specific number and its own lock; and, the residents had to abide by the rules of

the fraternity organization. The combination of these factors yields a relationship similar to a landlord/tenant one.

In a case recently decided by our Court, *Gentry v. Commonwealth*, __ S.W.3d __, 2012 WL 4839012 (Ky. App. 2012), we quoted from two United States Supreme Court cases concerning Fourth Amendment jurisprudence. These references are appropriate here, too. First, as explained in *Katz*, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. at 351, 88 S.Ct. at 511. And, as asserted in *United States v. Ellison*, 462 F.3d 557, 561 (6th Cir. 2006), "[a] tenet of constitutional jurisprudence is that the Fourth Amendment protects only what an individual seeks to keep private." Thus, since the fraternity members of Delta Tau Delta did not keep the door to the breezeway locked, they did not have an expectation of privacy in it.

Now, we consider Milam's second argument that consent was not given to the police officers to enter the residential area of the building. The police officers' testimony differed somewhat from the fraternity members. It is uncontroverted, however, that Neagli met the police officers, led them up the stairwell, which was in the breezeway, opened the unlocked door at the top of the stairwell and that Milam opened the door to his room.

Neagli testified more than a year after the evening of the incident. His statements contradicted some established facts. For example, he thought that there were five police officers and none were in uniform. In fact, there were only three officers, and Beetz was in uniform. Earlier, we held that substantial evidence supports the trial court's findings and, therefore, the findings are conclusive. This decision is applicable to our discussion on this issue as well.

In its findings, the trial court summarized that Neagli met the officers as they were standing in the breezeway, said that Milam lived there, and agreed to show them Milam's room. The trial court mentioned the differences between Neagli's testimony and the officers' testimony, that is, Neagli said he did not give consent for the officers to follow him, but he just led them up the stairs. Nevertheless, the trial court judge made no specific finding about the discrepancy in the testimony because he considered it irrelevant since Neagli obviously led them up the stairs.

It is well-settled that valid consent may be given by a third party to search the premises and such consent terminates the need for a search warrant. *Commonwealth v. Jones*, 217 S.W.3d 190, 198 (Ky. 2006). For the consent to be valid, the consenting party must share common authority over the premises to be searched. *Perkins v. Commonwealth*, 237 S.W.3d 215, 219 (Ky. App. 2007). Here, Neagli came out of the interior of the fraternity house, said that he knew

Milam and that Milam lived there, and then led the officers up the stairwell. It was reasonable under these circumstances for the officers to discern that Neagli had common authority over the premises to consent to the officers' entry. And, in fact, he had such authority since he was also a resident and fraternity brother. Indeed, Stewart, the president of the fraternity, affirmatively stated that Neagli violated no fraternity rule by taking the officers to Milam's room. Consent, implied or not, was provided by him.

Milam cites *United States v. Little*, 431 Fed. Appx. 417 (6th Cir. 2011), as supporting his contention that Neagli did not consent to the officers' entry into the second floor. In fact, this case is not persuasive authority since it is an unpublished decision. Moreover, we do not believe that whether the fraternity house is like a private home or an apartment complex is relevant here. The fact that Neagli lived in the fraternity house and was a member of the fraternity confers upon him authority to allow, that is, consent for the public to access the premises. Consequently, Neagli provided valid third-party consent for the officers to ascend the stairwell to Milam's room.

CONCLUSION

For these reasons, the judgment of the Fayette Circuit Court is affirmed.

LAMBERT, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I am convinced the police officers violated this young man's constitutional rights when they unlawfully entered his residence.

The initial inquiry is whether a resident of a fraternity house is afforded the same Fourth Amendment protections as a resident of a home. The majority suggests that a fraternity house is similar to an apartment complex where there are common areas accessible to the public. I disagree.

The Delta Tau Delta fraternity house is a typical fraternity house, providing a home for its members who traditionally refer to themselves as brothers. Like any private club, the house is not open to the public and leased only by those selected as fraternity members. According to the Delta Tau Delta fraternity bylaws, the doors are to remain locked and accessed only by members and their guests. Additionally, a sign located in the back of the house where the officers entered clearly designated the residence as private. I cannot discern any distinction between a fraternity house and a residential home leased by several people. Persuasive authorities in other jurisdictions that have addressed this issue are in

accord with my view. Because I believe the reasoning expressed by those Courts is sound, I quote their opinions at length.

In *Reardon v. Wroan*, 811 F.2d 1025 (7th Cir. 1987), the issue was considered in a 42 U.S.C. § 1983 action following a warrantless entry into a fraternity house. As a threshold matter, the Court considered whether the hallway to the fraternity house was comparable to the common areas of apartment buildings where privacy interests are not protected. *Id*. at 1028, n 2. Rejecting the argument that the two were comparable, the Court stated:

> Although there are certain similarities to the apartment building cases, fraternity residents clearly have a greater expectation of privacy in the common areas of their residence than do tenants of an apartment building. As the district court noted, fraternity members could best be characterized as "roommates in the same house," not simply co-tenants sharing certain common areas. Moreover, a fraternity, by definition, is intended to be something of an exclusive living arrangement with the goal of maximizing the privacy of its affairs.

Id.

In *State v. Houvener*, 145 Wash.App. 408, 186 P.3d. 370 (Wash. App. 2008), the Court held that a college dormitory resident had an expectation of privacy in a hallway located on his dormitory floor. Citing *Reardon*, the Court explained:

> While the application process for a dormitory living group is presumably less rigorous than for fraternities, the physical layout of the premises in *Reardon* is similar

> to the sixth floor of Stephenson East. As the court found, the residents of the sixth floor share a study area and bathroom, and they are viewed as a living group independent of residents of other floors. While outsiders can access the lobby, they may not access any of the floors without a pass key or without the escort of a resident of that floor[.]
>
> Thus, similar to the fraternity members in *Reardon,* Mr. Houvener had an expectation of privacy in the hallway, to the exclusion of residents of Stephenson East's other floors or other outsiders.

Id. at 417, 136 P.3d at 374.

In *State v. Miller*, 2011 WL 1167181 (Ohio App. 2011), the Court held that the warrantless search of a fraternity house was illegal. *Id*. at 4. Concluding that the fraternity house was the same as a private residence, the Court reasoned:

> At the time of the search, Delta Tau Delta fraternity house provided residence for six or seven students with access to the building by the public restricted at all times. We agree with the *Reardon* court that the shared living arrangement at a fraternity house supports treating residents as "roommates in the same house." We conclude that appellants met their burden of showing a reasonable expectation of privacy throughout the house and that the fraternity house should be treated as a home for purposes of Fourth Amendment protections against unreasonable searches and seizures by law enforcement officials.

Id. at 3.

Although the majority distinguishes *Reardon* and *Miller*, the basic premise of those cases that a fraternity house is the same as a private residence for purposes of the Fourth Amendment was not based on the particular facts surrounding the search. It is this premise that I cannot ignore and, therefore, the principle that "searches and seizures inside a home without a warrant are presumptively unreasonable" is applicable. *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980).

There are narrow exceptions to the warrant requirement, including that a police officer may conduct a knock and talk by approaching the main entrance of a residence, and knocking on the door. Such a warrantless intrusion on the curtilage is justified because it is "common knowledge that the public may at least go up to a home's front door, if the way is not barred." *Quintana v. Commonwealth*, 276 S.W.3d 753, 758 (Ky. 2008). However, this exception to the warrant requirement is limited.

In *Quintana*, the Court emphasized that a warrantless knock and talk is legal if the officer only goes where he has a right to be.

> Whether an officer is where he has a right to be when he does the knock and talk is defined by his limited purpose in going to the residence and the nature of the area he has invaded. There has been no finding of probable cause sufficient to grant a warrant**,** so the knock and talk is

> limited to only the areas which the public can reasonably expect to access.

Id. at 759.

The Court limited the area in which an officer may invade by establishing four factors to consider: "proximity to the house, whether the area is enclosed with the house, how the area is being used, and what the resident has done to secure his privacy." *Id*. at 760. If the area is determined to be within the protected curtilage, "then the officer is not in a place where he has a right to be, and any evidence illegally seized must be suppressed." *Id*. Noting that it was rare that a backyard would not enjoy the protection of the curtilage, the Court proceeded with its analysis of the facts and held that the backyard was within the curtilage where the officer had no right to be absent a warrant. *Id*. at 760-761. I reach the same result in this case.

As emphasized in *Quintana*, the location and nature of the area approached by the officers is at the center of the court's analysis. Consequently, I am compelled to clarify the majority's use of the term "breezeway" to describe the area. A breezeway is typically an open-sided passageway that connects two buildings. Here, the area in question was enclosed and accessed by a door and more accurately referred to as a foyer. Nevertheless, to be consistent with the majority's terminology, I also use the term breezeway.

There were multiple levels of unconstitutional intrusions that ultimately led to the seizure of the evidence against Milam. First, the officers approached the back door in an area marked private. Although, perhaps done in the mistaken belief that it was the front door, their good faith does not excuse the violation of a constitutional right. In *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), the Supreme Court created a limited good-faith exception to the exclusionary rule when officers reasonably and in good faith rely on a search warrant that is subsequently held to be defective. In this case, there was no warrant and, therefore, the officer's good faith is not an issue. Moreover, the officers did not merely ring the doorbell and, when they received no response, leave the premises: They opened the door and entered an enclosed area without a warrant.

As emphasized in *Quintana*, the question is whether a reasonable person would believe that he or she could enter the area where the officer conducted a knock and talk. *Quintana*, 276 S.W.3d at 759. I submit that no reasonable person believes he or she has the right to enter an area marked private, go through a door with a doorbell and security system, and enter an enclosed area of a residence. Even the officers' actions demonstrate that they did not believe the area was accessible by the general public. By ringing the doorbell, they were obviously aware that the door opened into the residence and proceeded to enter

only under the erroneous legal conclusion that a fraternity house is the same as an apartment building accessible to the general public up to the door of a specific unit.

The majority holds that because "the fraternity members of Delta Tau Delta did not keep the door to the breezeway locked, they did not have an expectation of privacy[.]" It relies on *United States v. Dillard*, 438 F.3d 675 (6th Cir. 2006).

I disagree that *Dillard* is similar to this case. *Dillard* involved a duplex and officers entered through an unlocked front door into a hallway that provided access to two units. The Court pointed out these crucial facts when it stated:

> Both doors on the first floor were not only unlocked but also ajar. By not locking the duplex's doors, Dillard did nothing to indicate to the officers that they were not welcome in the common areas.
>
> Moreover, without being able to pass through the hallway and stairway, there was no visible way for the police or anyone else to alert the duplex tenants of their presence. There was no intercom system, and Holton testified that she was not sure if there was a doorbell.

Id. at 682.

Here, in contrast, the house was designated as private, the door had a doorbell, and, although not functioning, a security keypad. Under the circumstances, any reasonable person would be alerted that the area was not open

to the public. An unlocked door to a house is nonetheless a door signifying the area past the threshold is one in which strangers are unwelcome.

Because I would reverse, on the grounds stated, I briefly address whether Neagli consented to the officers' entry. It was the Commonwealth's burden to prove by a preponderance of the evidence that Neagli voluntarily consented to the officers' proceeding to Milam's room. *Anderson v. Commonwealth*, 902 S.W.2d 269, 271-272 (Ky.App. 1995). According to Neagli, he did not give the officers permission to follow him up the stairs to Milam's room and was not asked to allow the officers to proceed to Milam's room. However, there was contrary testimony that Neagli did consent. Although the majority notes the trial court made no finding regarding Neagli's consent, it finds Neagli consented to the officers' entry and "led the officers up the stairwell." I believe it is appropriate for the trial court, not this court, to make a factual finding regarding whether the Commonwealth met its burden.

In conclusion, I believe the majority has based its opinion on three faulty premises: (1) a fraternity house is comparable to an apartment building where the tenants share common areas open to the general public; (2) the entry door was in an area outside the protected curtilage of the fraternity house and where the officers had a right to be; and (3) because the door was unlocked, Milam had no expectation of privacy. I would reverse.

BRIEF FOR APPELLANT:

Fred E. Peters
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky