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RENDERED: SEPTEMBER 26, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000496-MR

JASON DUKES — APPELLANT

V.

ON APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
NO. 12-CR-00002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Jason Dukes, appeals the McLean Circuit Court's denial of his motion to suppress evidence from an out-building on his mother's property. The trial court found the Appellant's mother voluntarily consented to the search and denied the motion. This Court affirms.

I. Background

In September 2011, Appellant was on parole and participating in a deferred prosecution program for other charges. Under the terms of his parole supervision agreement, Appellant reported to Parole Officer Paul Newman. Shortly before the search at issue in this case, Officer Newman received several anonymous phone calls suggesting that Appellant was manufacturing methamphetamine. This information was corroborated by several of Officer Newman's supervisees who were acquainted with Appellant.

In the same time frame, McLean County Deputy Sheriff Tim McCoy received a tip from a local gas station attendant that the Appellant had been purchasing large amounts of ether—a main ingredient in methamphetamine. Shortly thereafter, Deputy McCoy made a traffic stop of a relative of the Appellant. The relative smelled strongly of ammonia—a chemical associated with methamphetamine labs—and stated that he was coming from the Appellant's home.

Officer Newman and Deputy McCoy exchanged their respective information about Appellant, and soon after Officer Newman decided to make a home visit to the Appellant's mother's residence. At the time of the visit, the Appellant was living with his mother, Vickie Dukes, at her home.

Officer Newman, accompanied by Deputy McCoy and one other police officer, visited the Appellant's mother's home on October 27, 2011. Upon their arrival at the home, the officers knocked on the door and spoke to Appellant's mother. When the officers asked about Appellant, Ms. Dukes said that he was not at the home. It is undisputed by all parties that Appellant's mother then consented to a cursory search of the home to confirm that Appellant was not at the residence.

After the cursory search of the residence was completed, law enforcement officers searched an out-building on the property. The exact circumstances leading to the search of the out-building are in dispute. It is undisputed, however, that this search revealed evidence of the manufacture of methamphetamine.

Appellant was subsequently indicted for manufacturing methamphetamine and being a persistent felony offender in the first degree. He moved to suppress the evidence discovered in the out-building on his mother's property, arguing that his mother did not consent to the search and that his protection against warrantless searches under the Fourth Amendment to the U.S. Constitution and §10 of the Kentucky Constitution had been violated.

At the suppression hearing, three witnesses testified. Officer Newman and Deputy McCoy were called for the Commonwealth. The Appellant's mother, Vickie Dukes, testified for the Appellant.

The officers testified that after completing the search of Ms. Dukes' residence, they asked about the out-building and Ms. Dukes told them that Appellant spent a lot of time there. They also testified that they asked Ms. Dukes for permission to look inside the out-building to confirm that the Appellant was not inside and that Ms. Dukes consented. Both officers testified that they smelled a strong ether odor as they approached the building and that Ms. Dukes walked with them to the building and turned the door knob to allow them in the building. The officers stated that they looked inside the building and did not find the Appellant, but that there was obvious evidence of methamphetamine manufacture, including a blender containing a white powdery substance, a mason jar filled with clear liquid, punctured cans of ether, and stripped lithium batteries, among other items. Officer McCoy testified that a warrant was then issued for Appellant's arrest.

Conversely, Ms. Dukes testified that she did not consent to the search of the out-building. She stated that although she did not precisely remember

what was said at the end of the cursory search of her home, she believed that when she escorted the officers outside they were leaving her property. She stated that she went back inside her home and that it was only when she heard her dog bark outside and went to check on the noise that she realized the officers were searching the out-building. Ms. Dukes denied opening the door to the building, stating instead that the door was locked and that the keys were lost.

The trial court denied Appellant's motion to suppress, concluding that Ms. Dukes, as the owner of the property, had authority to consent to the search of the home and out-building, and Ms. Dukes did in fact voluntarily consent to the search of the out-building. Appellant then entered a conditional guilty plea reserving the right to appeal the suppression issue. As a result, he was convicted of manufacturing methamphetamine and being a second-degree persistent felony offender and was sentenced to twenty years' imprisonment. This appeal followed as a matter of right. *See* Ky. Const. § 110(2)(b).

II. Analysis

Appellant argues that his rights under the Fourth Amendment of the United States Constitution and § 10 of the Kentucky Constitution were violated by the search of the out-building on his mother's property. He contends that the trial court erred when it denied his motion to suppress the evidence from the search because there was not sufficient evidence to support a finding that consent to the search was given.

The question whether consent to a search was given is a preliminary evidentiary issue and is decided by the trial court. KRE 104(a); *Talbott v.*

Commonwealth, 968 S.W.2d 76, 82 (Ky. 1998). It is a question of fact to be determined by a preponderance of the evidence from the totality of the circumstances. *Talbott*, 968 S.W.2d at 76 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992)). The factual findings of the trial court are reviewed under the clear error standard, *Hampton v. Commonwealth*, 231 S.W.3d 740, 749 (Ky. 2007), and are conclusive if supported by substantial evidence, RCr 9.78; *Diehl v. Commonwealth*, 673 S.W.2d 711, 712 (Ky. 1984).

Under this standard of review, an appellate court looks only at whether a trial court's denial of a motion to suppress was supported by substantial evidence and was thus not clearly erroneous.

> Though substantial evidence exists when there is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established, it does not mean the evidence must be absolutely compelling or lead inescapably to one conclusion. Rather, substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion or evidence that has sufficient probative value to induce conviction in the minds of reasonable men.

CertainTeed Corporation v. Dexter, 330 S.W.3d 64, 71 (Ky. 2010) (citations, quotation marks, and brackets omitted). This is a "deferential standard of review," *Hampton*, 231 S.W.3d at 749, meaning the trial court will not be overturned lightly.

In this case, the trial court heard testimony from three witnesses. Two officers testified that after an undisputed cursory search of her residence, Ms. Dukes consented to their search of the out-building on her property and escorted them to the building, even turning the doorknob for them to enter.

Ms. Dukes testified to the contrary. There is no other evidence concerning the circumstances under which consent was or was not given.

Appellant argues because each witness's testimony is equally plausible and there is no other evidence to support the existence of consent, it was not possible for the trial court to find consent by the preponderance of evidence under the totality of the circumstances. This is incorrect. The trial court is entirely within its discretion to weigh the credibility of witnesses and draw reasonable inferences and factual findings from their testimony. *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002); RCr 9.78.

This discretion of the trial court is not lessened when testimony at an evidentiary hearing is scarce or inconsistent. As this Court noted in *Hampton v. Commonwealth*, a case concerning competing versions of consent to a search,

> While the court was ultimately required to choose between various competing and inconsistent versions of the events, that does not undermine the decision. In fact, that is the essential function of the trial court as the trier of fact when presented with preliminary questions such as whether consent was voluntarily given.

Hampton, 231 S.W.3d at 749.

The trial court heard competing, inconsistent stories about the circumstances surrounding the search of the out-building, and its decision to believe that a particular version of those facts is more credible does not mean that the trial court's finding was not supported by substantial evidence. Indeed, contrary to Appellant's assertion, the trial court appropriately performed one of its essential functions in deciding between these competing stories.

The testimony from the officers that Ms. Dukes consented to the search was more than a scintilla of evidence and was indeed substantial evidence. As such, this Court concludes that the trial court's finding that Ms. Dukes voluntarily consented to the search of her out-building was not clearly erroneous.

Having found that the trial court's findings of fact were supported by substantial evidence, the Court must now decide whether its application of law to those facts is correct as a matter of law. *Commonwealth v. Pride*, 302 S.W.3d 43, 49 (Ky. 2010) (citing *Ornelas v. United States*, 517 U.S. 690, 698-99 (1996). A trial court's decision that a search and seizure was proper is reviewed *de novo*. *Ornelas*, 517 U.S. at 691; *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001).

Warrantless searches are unreasonable unless they fall into one of the exceptions to the warrant requirement. *Commonwealth v. Ousley*, 393 S.W.3d 15, 23 (Ky. 2013). Consent to a search is a well-recognized exception to the warrant requirement, whether it is given by the target of the search or a third party who possesses common authority over the premises. *Commonwealth v. Jones*, 217 S.W.3d 190, 198 (Ky. 2006). Here, the trial court correctly determined that because Appellant's mother consented to the search of the out-building, no warrant was needed. Thus, this Court holds that the trial court did not err by denying Appellant's motion.

Third-party standing to challenge a search is not an issue in this case. Testimony at the suppression hearing showed that the Appellant was not the actual owner of the property and lived in a common living room while at the

residence, rather than a private room.[1] The test for a third party to consent to a search rests on whether the third party has common authority or a sufficient relationship to the area to be searched. *Colbert v. Commonwealth*, 43 S.W.3d 777, 781 (Ky. 2001) (citing *United States v. Matlock*, 415 U.S. 164 (1974)). The Appellant's mother clearly had the authority and relationship to the home and out-building that she owned to consent to the search.

III. Conclusion

Because the trial court's factual finding that Appellant's mother consented to the search of the out-building on her property was supported by substantial evidence, it was not clearly erroneous. Thus, there was no violation of Appellant's rights under the Fourth Amendment of the United States Constitution or §10 of the Kentucky Constitution. Appellant was thus not entitled to have the evidence suppressed. For this reason, the trial court is affirmed.

All sitting. All concur.

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[1] Furthermore, according to Ms. Duke's testimony, Appellant spent the vast majority of his time at his girlfriend's home. To challenge a search, the Appellant must be able to claim a "reasonable expectation of privacy" in the place to be searched. *Katz v. United States*, 389 U.S. 347 (1967); *see also Watkins v. Commonwealth*, 307 S.W.3d 628 (Ky. 2010). The standing of the Appellant in this case thus seems dubious. However, the parties have not raised this issue, and the outcome would be the same either way. Thus the Court does not have to decide it.

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