RENDERED: October 17, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-3085-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM GREEN CIRCUIT COURT
HONORABLE W. M. HALL, JUDGE
INDICTMENT NO. 96-CR-00003

FINIS BART MILBY — APPELLEE

OPINION
AFFIRMING

* * * * * * * * * * * *

BEFORE: ABRAMSON, COMBS, and GARDNER, Judges.

ABRAMSON, JUDGE: This is an appeal by the Commonwealth of Kentucky from an order by Green Circuit Court holding that evidence relevant to the prosecution of Finis Bart Milby for trafficking in marijuana should be suppressed under the exclusionary rule because the evidence was obtained by an improper search and seizure. As a result of the suppression order, the charges against Milby were dismissed. After reviewing the arguments of the parties and the applicable authorities, we affirm.

In May 1996, Robert Mills orally agreed to rent a house to Milby. Milby made only one rental payment and, thereafter, refused to make further payments or to vacate the property. Upon

Milby's default, Mills commenced demanding that he either pay back rent or vacate the house. In December 1996, Mills sought and obtained an "eviction notice" from the sheriff's office. The precise nature of this notice is unclear from the record. This notice was subsequently served by Green County Deputy Sheriff Mike Matney who was familiar with Milby because he had been arrested on a prior "unrelated warrant." Milby still refused to vacate. In January 1997, Mills asked the county attorney how he could regain possession of his house and was advised that after this period of time, he was entitled to re-enter and take possession of the house. The county attorney also advised Mills that a deputy sheriff should accompany him into the house as a witness to his actions.

On January 19, 1997, Deputy Matney accompanied Mills to the house where Mills cut a lock on the front door so that the two men could enter the house. Upon entering the house, Deputy Matney observed a marijuana plant and a bucket containing packages of marijuana. Deputy Matney subsequently contacted the county attorney and obtained a search warrant. Other items were seized in the ensuing search. A Green County Grand Jury indicted Milby for possession of over eight ounces of marijuana. Milby filed a motion to suppress the marijuana, alleging that under Kentucky landlord and tenant law Mills did not have an immediate possessory interest in the house by virtue of the eviction notice and, therefore, could not lawfully enter. After a hearing, the

trial court granted the suppression motion and dismissed the charges against Milby. This appeal followed.

The search and seizure protections of the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution apply only to state actions, not the actions of private citizens. Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); Stone v. Commonwealth, Ky., 418 S.W.2d 646 (1967), cert. denied, 390 U.S. 1010, 88 S. Ct. 1259, 20 L. Ed. 2d 161 (1968). Moreover, "a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and . . . such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully." Walter v. United States, 447 U.S. 649, 656, 100 S. Ct. 2395, 65 L. Ed. 2d 410, 417 (1980). The initial question in this case is whether state action was involved in Mills' and Deputy Matney's entry into the house on January 19, 1997. Whether a person acted as an instrument or agent of the state depends on "the degree of the Government's participation in the private party's activities." Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 614, 109 S. Ct. 1402, 103 L. Ed. 2d 639, 658 (1989). This issue is resolved by considering the totality of the circumstances. Id. Of particular concern is whether the government encouraged or instigated the search and whether the party performing the search was assisting the authorities or merely advancing his own interests. United States v. Smythe, 84 F.3d 1240, 1242-43 (10th

Cir. 1996); United States v. Cleaveland, 38 F.3d 1092, 1093 (9th Cir. 1995).

A county attorney in Kentucky has a broad grant of authority to cooperate in the enforcement of criminal and penal laws within his judicial circuit. See KRS 15.725. In this case, the landlord and deputy were acting under the direct advice of the county attorney, who was presumably aware of Milby's arrest on the prior warrant. Moreover, at the suggestion of the county attorney a deputy sheriff accompanied Mills on the search and physically entered the premises. Cf. United States v. Cleaveland, supra (no state action where electric company employee initiated and conducted search while police officer was on standby a block away). Although admittedly a close question, we believe the breaking of the lock and the entering of the rental property under these circumstances constituted state action. The entire sequence of events originated with the advice of the county attorney and culminated with the active participation of a state actor, Deputy Matney. Considering the totality of the circumstances, we believe there was state action.

The particular facts of this case also raise the issue of whether entry into the house constitutes a search within contemplation of the Fourth Amendment and Section 10 of the Constitution of Kentucky. The Commonwealth argues that there was no search because Deputy Matney did not enter the house for the purpose of searching for contraband. The term “search” means an infringement of "an expectation of privacy that society is

prepared to consider reasonable." Maryland v. Macon, 472 U.S. 463, 469, 105 S. Ct. 2778, 86 L. Ed. 2d 370, 376 (1985). A "reasonable expectation of privacy" is defined in Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). An expectation of privacy is reasonable only where (1) the individual manifests a subjective expectation of privacy in the object of the challenged search; and (2) society is willing to recognize that subjective expectation as reasonable. Katz, 389 U.S. at 361, 88 S. Ct. at 516, 19 L. Ed. 2d at 588. The second element turns on "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." Oliver v. United States, 466 U.S. 170, 182-83, 104 S. Ct. 1735, 1743, 80 L. Ed. 2d 214 (1984). The question of the propriety of a search is determined upon the particular facts of each case. Estep v. Commonwealth, Ky., 663 S.W.2d 213, 215 (1983).

Under the facts of this case, the inquiry is whether Milby had a reasonable expectation of privacy when 1) he had not paid rent to his landlord for six months; 2) his landlord had made repeated demands for him to either pay rent or vacate; 3) he had been served with an "eviction notice"; and 4) he was not residing at the rented house. The Commonwealth argues that Milby had no legitimate expectation of privacy. In spite of the foregoing factors mitigating otherwise, we believe Milby did have a reasonable expectation of privacy. He had padlocked the

residence and although an eviction notice had been served, no effort had been made to pursue the eviction.

Under Kentucky landlord-tenant law, an action of forcible detainer is the exclusive process whereby a landlord may evict a tenant who refuses to voluntarily relinquish possession. See generally, Bardenwerper, 3A Kentucky Practice, § 24 (1990). Under this process a tenant must first be notified of the action of forcible detainer. KRS 383.210(1). He then is entitled to a hearing. KRS 383.210(2). If a judgment is rendered in the landlord's favor, the district court judge may then issue a warrant of restitution directing the sheriff or constable to put the landlord into possession of the premises by removing the tenant and his property if necessary. KRS 383.245. In the present case, there is no claim or evidence that these procedures were followed. Absent compliance with these procedures, the landlord had no authority to break the padlock on the door of the rented house and enter the premises.

Tenants, including Milby, we believe, are entitled to have a reasonable expectation that landlords will not act beyond the law in entering leased premises. Further, society is willing to acknowledge this expectation of privacy as reasonable as evidenced by the statutes establishing the eviction process. In view of this, we believe that the action was a search in that it violated Milby's reasonable expectation of privacy. See Katz, supra. The Commonwealth argues that landlord-tenant law has no application to the issue because authority over premises to

search does not rest upon the law of property and because policemen are not required to be experts in the law of landlord and tenant. However, in consideration of the county attorney's involvement in the entry into the house and the deputy sheriff's familiarity with the eviction process culminating in a court order, we do not believe this argument has merit.

All warrantless searches are deemed unreasonable unless they fall under one of the exceptions to the warrant requirement. See Cook v. Commonwealth, Ky., 826 S.W.2d 329, 331 (1992). The burden is on the prosecution to prove that a particular warrantless search comes under one of the recognized exceptions. See Gallman v. Commonwealth, Ky., 578 S.W.2d 47, 48 (1979). The facts of this case implicate one actual exception to the warrant requirement, consent, and a related doctrine which is not technically an exception but nonetheless relevant, the plain view doctrine.

Consensual searches are exempt from the Fourth Amendment warrant and probable cause requirements. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Under the Commonwealth's theory, Mills had apparent authority to consent to entry into the house and the deputy in good faith believed that the landlord had the right to give such consent. Because of this apparent authority, the Commonwealth argues that the consent of the landlord was adequate to abrogate the Fourth Amendment warrant requirement. We disagree.

Consent searches are upheld where the consenting party and the party seeking suppression have mutual use of property based on joint access or control, "so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." United States v. Matlock, 415 U.S. 164, 171 n.7, 94 S. Ct. 988, 39 L. Ed. 2d 242, 250 n.7 (1974). In deciding whether the landlord had the right to consent to a search of the house, the relevant inquiry is whether Mills could permit the search in his own right and whether Milby had assumed the risk that the landlord might permit a search. See also Sanders v. Commonwealth, Ky., 609 S.W.2d 690 (1980) (consent must be given by one with "common authority" over premises). In Kentucky, a landlord's consent to an inspection cannot justify a warrantless inspection of premises after they have become the home of a tenant, absent consent of the tenant or an emergency. Louisville Bd. of Realtors v. City of Louisville, Ky. App., 634 S.W.2d 163, 166 (1982). See also Chapman v. United States, 365 U.S. 610, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961). In view of this, the landlord had no actual authority to consent to the entry of the home. Moreover, we do not believe that it was reasonable for Deputy Matney or the county attorney to believe that Mills had apparent authority. See generally Illinois v. Rodriguez, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990). Both men could be charged with knowledge of the landlord-tenant law and,

indeed, Deputy Matney testified to his familiarity with the process by which eviction is ordered by the court if a tenant does not voluntarily vacate. Thus, the search does not qualify as a valid consent search.

In its plurality opinion in Coolidge v. New Hampshire, supra, the U.S. Supreme Court set forth three requirements for a valid plain view seizure; prior justification for the officer's presence, inadvertence of discovery, and immediate apparentness that evidence has been found. The justification for the officer's presence can be a valid warrant, Coolidge, or a recognized exception to the warrant requirement. "Observation of these limitations provides sufficient protection for the public as guaranteed by Section 10 of the Constitution of Kentucky and the Fourth Amendment to the Constitution of the United States." Commonwealth v. Johnson, Ky., 777 S.W.2d 876, 879 (1989). More recently, the United States Supreme Court in Horton v. California, 596 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990), expressly rejected the inadvertence requirement and our Supreme Court decided to "follow their lead" in Hazel v. Commonwealth, Ky., 833 S.W.2d 831, 833 (1992).

In this case, it is apparent that one requirement of the Horton test is met. It appears uncontested that the marijuana was immediately recognizable as evidence. The question is whether there was prior justification for Deputy Matney's presence. We do not believe, under the circumstances, the presence of either the landlord or the deputy was justified. In

view of the proper means for eviction of a tenant and the absence of valid consent or an emergency, Louisville Bd. of Realtors, supra, there was no justification for the county attorney to have advised Mills that he and Deputy Matney could properly enter the house. There being no justification for the advice that led to the entering of the house, the first requirement of the Horton test is not satisfied and the plain view doctrine is not applicable.

Having found that there was a warrantless search and that no recognized exception to the warrant requirement is applicable, we affirm the trial court's judgment.

ALL CONCUR.

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