

RENDERED: May 15, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-000555-MR

CARL E. YORK

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 95-CR-00137

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: GUIDUGLI, JOHNSON, AND SCHRODER, Judges.

JOHNSON, JUDGE: Carl E. York (York) appeals from the final judgment and sentence of imprisonment entered by the Madison Circuit Court on February 20, 1996, based upon his conditional guilty plea.¹ York pleaded guilty to trafficking in a controlled substance (cocaine) in the first degree in violation of Kentucky Revised Statutes (KRS) 218A.1412, trafficking in a controlled substance (Valium) in the third degree in violation of KRS 218A.1414, trafficking in marijuana in violation of KRS 218A.1421 and possession of drug paraphernalia, in violation of KRS 218A.500.

¹Kentucky Rules of Criminal Procedure (RCr) 8.09.

York's guilty plea was conditioned upon his right to appeal the trial court's denial of his motion to suppress. Having reviewed the record and the applicable law, we conclude that the trial court's factual findings are supported by substantial evidence and its ruling is correct as a matter of law. Thus, we affirm.

York was indicted on December 14, 1995, on the charges to which he pleaded guilty. He filed a motion to suppress evidence seized from his home and all incriminating statements which he gave following the seizure. York specifically (1) challenged the legality of the entry of the police into his home; (2) challenged the legality of the position the deputy occupied in his home when he found the marijuana in plain view; and (3) claimed the police entered the home under a pretext for the purpose of conducting a warrantless search. The trial court conducted a suppression hearing on January 4, 1996, and denied York's motion.

Ray Creech (Creech) testified that on November 30, 1995, he went to the Madison County Sheriff's office to obtain assistance in retrieving some property from the house in which York lived. Creech testified that he had moved out of the house at the same time York had moved into the house and that he had unknowingly taken a pair of York's sunglasses. After York noticed that the sunglasses were missing, he moved Creech's remaining property inside the house to hold as security until Creech returned the sunglasses. Creech testified that he had never had any problem with York but he requested police assistance to avoid any possible problem.

Deputy Bruce Thomas (Deputy Thomas) testified that he was assigned to accompany Creech. Deputy Thomas stated that the sheriff told him that York's landlord had stated that an unusual number of people visited York's house and that York had refused to allow the landlord to enter the house. The sheriff told Deputy Thomas that he suspected illegal activity. Deputy Thomas and Deputy Roger Portwood (Deputy Portwood) accompanied Creech to York's residence. When they arrived at approximately 5:30 p.m. it was almost dark, but no lights were on in the house or on the porch. Deputy Thomas knocked on the front door several times before York answered the door.

The testimony differs regarding the entry of the police into York's home and the precise location where Creech gave York the sunglasses. Deputy Thomas, Deputy Portwood and Creech testified that York told them they could enter; while York testified that he did not give them permission to enter the house, but that they nonetheless entered. Deputy Thomas, Deputy Portwood and Creech testified that Creech handed York the sunglasses after they were in the living room, whereas York testified that Creech handed him the sunglasses at the threshold of the door. Both York and Creech testified that York then told Creech that the sunglasses were all he had wanted and that he would return Creech's property.

The testimony also differs regarding where the deputies were standing when York gave Creech his property. York and Creech testified that York went into a room adjacent to the living room. Creech testified that the officers remained in the living room with

him while York retrieved the property. Creech stated that the adjacent room was "really cluttered" and that York got the carpet dye machine out and rolled it to him. York testified that he went to the room to retrieve the equipment and noticed after he picked up the equipment and turned to leave that the deputies were standing in the doorway of the adjacent room. Deputy Thomas testified that York held open a curtain hung over the doorway to the adjacent room and that he (Deputy Thomas) entered the room and helped York retrieve the machine. Creech, York, and Deputy Portwood stated that York came into the living room and handed Creech the equipment and handed Deputy Portwood some cords or hoses. York, Creech, and Deputy Portwood testified that the deputies were in the center of the living room when Creech left with his equipment.

The testimony also differs regarding when Deputy Thomas went into the kitchen where the marijuana was found. Deputy Thomas testified that while he was in the living room he asked York if he had any other property belonging to Creech, and York stated that there was additional property in the utility room. The utility room was located on one end of the kitchen and the kitchen was located down three steep steps at the rear of the living room. Deputy Thomas stated that he was already standing in the living room at the top of the steps and he merely turned and went down the steps into the kitchen before York. He said he shined his flashlight on the ceiling to illuminate the steps. Standing at the bottom of the steps, he noticed a clear plastic bag containing

green leaves on the kitchen countertop directly in front of him. He suspected that the bag contained marijuana and asked York what was in the bag. York did not answer. Deputy Thomas arrested York, advised him of his Miranda² rights, searched York's person and found a bag of cocaine, several pocket knives, and a large amount of cash.

Deputy Thomas admitted that the only expressed permission York gave to the deputies, prior to the discovery of the marijuana, was permission to enter the house. Deputy Thomas stated that he believed he was implicitly invited into the adjacent room based upon York holding open the curtain. Deputy Thomas made no statement about being invited, expressly or implicitly, into the kitchen. Deputy Thomas contended that he stepped into the kitchen to get out of York's way so York could retrieve the other property and that he shined the flashlight so he could see where he was walking.

York testified that when Deputy Thomas asked him about other property he replied that there was one more piece of equipment in the utility room and that he would get the equipment. York stated that he went down the darkened steps, turned left and walked through the darkened kitchen to the utility room door. He testified that as he turned on the utility room light, he heard a noise and turned to see Deputy Thomas at the other end of the

²Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

kitchen looking around with his flashlight. Deputy Thomas had found a bag of marijuana on the kitchen countertop.

Deputy Portwood testified that he took some cords or hoses from York in the living room and helped Creech carry the equipment. He testified that when he took the cords and hoses from York, Deputy Thomas was in the middle of the living room and that Deputy Thomas was standing in the middle of the living room when Deputy Thomas asked York if any property remained. Deputy Portwood claimed that York told them that the remaining property was in a room downstairs and that Deputy Thomas went down the steps before York. He testified that York followed Deputy Thomas down the steps and that he followed York down the steps. He did not see the marijuana in the kitchen until it was pointed out by Deputy Thomas.

After York was arrested, he voluntarily signed a handwritten note and a prepared written form granting the police permission to search his house. The deputies found additional marijuana, cocaine, marijuana seeds, drug paraphernalia, over 300 Valium tablets, knives, guns, and more than \$2500 in cash.

At the suppression hearing, York contended that the "plain view" exception to warrantless searches did not apply to this search because Deputy Thomas did not have permission to be in the kitchen when he saw the marijuana. He pointed out that Deputy Thomas never even asserted that York gave him permission to enter the kitchen. York also claimed that the "search" was based upon a pretext since the sheriff told Deputy Thomas to accompany Creech because he had received reports of illegal activity at York's home;

and that his latter written consents were invalid because they were tainted by the illegal seizure.

The Commonwealth's position was that the deputies were in York's home for a legitimate and lawful purpose and with York's permission. The Commonwealth contended that York's actions of allowing the deputies to accompany him from room to room and to assist him in removing the property, and his holding of the curtain for Deputy Thomas, constituted his implied consent for the deputies to be in the kitchen where the marijuana was in plain view. The Commonwealth further argued that under the circumstances it was reasonable for the deputies to accompany York into the darkened kitchen, since he might have come out armed and shot someone.

The trial court denied York's motion to suppress and made the following oral findings and conclusions: The deputies' actions in being at York's house were a "legitimate effort to resolve a property dispute between private citizens." Creech's testimony was the most helpful since he was the only truly disinterested party. The testimony of Deputy Portwood and Deputy Thomas had no real distinctions. Based upon Creech's testimony, York gave the deputies permission to enter the house. York's action of handing the hose to Deputy Portwood showed York's consent for the deputies to be a part of the enterprise of returning the property. It was proper for Deputy Thomas to use a flashlight to illuminate the dark room. The bag of marijuana lying openly on the counter was readily discernable. The deputies' entry into the kitchen was not under a pretext. Both subsequent grants of written consent by York were

clearly consensual. The trial court's summation was that York consented to the initial police entry; there was a "plain view" search; and the subsequent searches were consensual. York entered a conditional guilty plea and received a five-year prison sentence on the cocaine trafficking conviction, two twelve-month sentences on each of the misdemeanor trafficking convictions and a thirty-day sentence on the possession of drug paraphernalia conviction. This appeal followed.

We must begin our legal analysis with a brief discussion concerning our standard of review. RCr 9.78 provides that if the trial court's findings of fact are supported by substantial evidence they are conclusive. When the findings of fact are supported by substantial evidence, as they are herein, we must then determine "'whether the rule of law as applied to the established facts is or is not violated.'" Ornelas v. United States, ___ U.S. ___, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996) citing Pullman-Standard v. Swint, 456 U.S. 273, 289, n. 19, 102 S.Ct. 1781, 1791, n. 19, 72 L.Ed.2d 66 (1982).³ See Clay v. Commonwealth, Ky., 818 S.W.2d 264, 265 (1991); Hayes v. Commonwealth, Ky., 657 S.W.2d 948, 952 (1983); and Moore v. Commonwealth, Ky., 634 S.W.2d 426, 433 (1982).

³Many commentators have written extensively about the standard of review for a constitutional issue being a mixed fact-law question. See LaFave, Search and Seizure, § 11.7(c) (3rd ed., 1996). While Kentucky's appellate courts have never fully expounded upon this issue, a thorough discussion can be found in Ornelas, supra, Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); and United States v. McConney, supra.

The Fourth Amendment of the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.^[4]

The underlying constitutional principle is that "[at] the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 682, 5 L.Ed.2d 734, 739 (1961). A person's reasonable expectation of privacy is particularly relevant and we are not unmindful that the highest level of constitutional protection is afforded a person's home. Furthermore, "[e]vidence that is either the direct or indirect product of illegal police action must be suppressed as 'fruit of the poisonous tree.'" Churchwell v. Commonwealth, Ky.App., 843 S.W.2d 336 (1992) citing Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407, 416, 9 L.Ed.2d 441, 445 (1963).

The "plain view" doctrine is an exception to the warrant requirement. It allows a police officer to seize any item without a warrant if the officer (1) sees the object in plain view (2) from a position he legally occupied, and (3) the evidentiary value of

⁴Section Ten of the Kentucky Constitution provides no greater protection than the federal Fourth Amendment. LaFollette v. Commonwealth, Ky., 915 S.W.2d 747, 748 (1996).

the item in proving a crime is immediately apparent. Horton v. California, 496 U.S. 128, 136-137, 110 S.Ct. 2301, 110 L.Ed.2d 112, 123 (1990). See also Hazel v. Commonwealth, Ky., 833 S.W.2d 831, 833 (1992). It is a violation of the Fourth Amendment if an object is seized without each of the three requirements of the "plain view" doctrine being met. Horton, 496 U.S. at 133-134. "[T]he seizure of an object in plain view does not involve an intrusion on privacy. If the interest in privacy has been invaded, the violation must have occurred before the object came into plain view. . . ." Id. at 141 (footnote omitted).

In this case, the dispositive issue is whether the deputy was legally in the kitchen when he viewed the marijuana. Since the deputy relied on York's consent for him to be in a lawful position to view the marijuana, the government has the burden to establish the existence of effective consent. Florida v. Royer, 460 U.S. 491, 497, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229, 236 (1983); Schneckloth v. Bustamonte, 412 U.S. 218, 221-222, 93 S.Ct. 2041, 2045, 36 L.Ed.2d 854, 859 (1973); and Bumper v. North Carolina, 391 U.S. 543, 548-549, 88 S.Ct. 1788, 20 L.Ed.2d 797, 802 (1968). While "there will be endless variations in the facts and circumstances" and "there is [no] litmus-paper test" for determining consent, Royer, 460 U.S. at 506, "[n]either is it disputed that where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden

that is not satisfied by showing a mere submission to a claim of lawful authority." Id. at 497.

We hold that the trial court's findings of fact that Deputy Thomas was given expressed permission by York to enter the house and implied permission to enter the kitchen are supported by substantial evidence and that the trial court's conclusions that the plain view doctrine was applicable to the discovery of the marijuana is proper as a matter of law. The judgment of the Madison Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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