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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001058-MR

JAMES EDDIE LACEY

APPELLANT

v. APPEAL FROM HART CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NO. 06-CR-00079

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

MOORE, JUDGE: James Eddie Lacey appeals from a Hart Circuit Court order denying his motion to suppress evidence collected during a search of his residence. Having properly preserved the issue for appeal, Lacey insists the warrantless search of his house violated the Fourth Amendment of the United States

Constitution and Section 10 of the Kentucky Constitution. Upon review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 22, 2007, Appellant entered conditional guilty pleas to the offenses of First Degree Possession of a Controlled Substance (methamphetamine) and Possession of Drug Paraphernalia, Second Offense.¹ He was sentenced to serve a total of six years' imprisonment, with time running consecutively. After accepting Appellant's plea agreement, the trial court conducted a suppression hearing regarding the circumstances surrounding Appellant's arrest. It is this ruling from which Appellant now appeals.

Stemming from a prior conviction, Appellant was released from prison on May 27, 2005, and placed on parole under the supervision of Kentucky Probation and Parole Officer Tom LaFollette. LaFollette testified that on March 1, 2006, the Franklin County Sheriff's Office in Columbus, Ohio, informed him that Appellant had been arrested for possession of methamphetamine and possession of chemicals used to manufacture methamphetamine. LaFollette further stated that he had received two or three anonymous telephone calls from individuals in the Hart County area indicating Appellant was using methamphetamine and possibly manufacturing the illegal substance.

¹ According to the record, Appellant was also indicted by the Hart County Grand Jury for Possession of a firearm by a Convicted Felon and Persistent Felony Offender in the Second Degree. However, these charges were dismissed pursuant to Appellant's plea agreement.

Based upon this information, LaFollette decided to conduct a search of Appellant's residence.² He contacted Hart County Sheriff Boston Hensley about his suspicion that Appellant may have drugs in his home, and Hensley agreed to assist him in the search for security purposes only.³ On June 12, 2006, LaFollette, Hensley and other law enforcement officers traveled to Appellant's home in Hart County, Kentucky. Appellant's wife Tracy, answered the door, and LaFollette informed her that he suspected drug activity in the house and was there to conduct a home visit. LaFollette advised Tracy that the police officers were present for security purposes only.

According to LaFollette, Tracy denied the presence of any drugs in the home and gave him verbal consent to search the residence. LaFollette searched the Appellant's bedroom in the presence of Tracy and found three bowls containing what he believed to be a controlled substance. Tracy claimed to have no idea the bowls were in her bedroom and was subsequently read her rights by Hensley.⁴ Thereafter, Tracy, at the request of LaFollette, telephoned her husband and informed him that LaFollette and police officers were at the house and asked

² Pursuant to an agreement signed by Appellant and LaFollette entitled "Conditions of Parole," Appellant may be subject to search and seizure if LaFollette had reason to believe LaFollette may have illegal drugs, alcohol, volatile substance or other contraband on his person or property. Furthermore, Appellant was to permit LaFollette to visit his residence and place of employment at any time.

³ Hensley also informed LaFollette that he had information suggesting Appellant was involved in other illegal activities.

⁴ Hensley's testimony regarding the search of Appellant's home corroborated LaFollette's testimony. Specifically, he stated that Tracy gave verbal permission to enter the home, and he would not have forcibly entered the home without her consent.

that he return. Upon returning, Appellant was arrested and stated that anything discovered belonged to him, not his wife.

In a signed affidavit attached to Appellant's Motion to Suppress, Tracy claimed she never provided consent to search the home. Tracy also testified at the suppression hearing and again maintained that she did not consent to the search and further claimed she was unaware of the presence of drugs in the house. LaFollette testified that Tracy's statements were false, claiming he would have never entered the home without verbal or written consent.⁵ To further complicate matters, a police report written by Hart County Deputy Sheriff Kenneth Glass implies that permission to search the residence was not obtained from Tracy until after LaFollette found the bowls containing the suspected illegal substance.⁶ As to Glass' police report, LaFollette stated there were mistakes regarding the sequence of events, reiterating his assertion that Tracy provided consent before he entered the home and found the evidence.

On cross-examination, LaFollette made what appear to be several conflicting statements. He testified that he had reasonable suspicion to search

⁵ It is noted that the trial court included in its order LaFollette's testimony that he would have never entered the residence without verbal or written consent. However, a review of the suppression hearing videotape reveals that Appellant's attorney objected to LaFollette's statement as self-serving. The trial court ruled that LaFollette's response to whether Tracy's affidavit was true or false would be confined to a yes or no answer.

⁶ Specifically, the report stated the following: "Sheriff Hensley received a tip on drug activity at this residence. Sheriff Hensley, Deputy Glass [sic], Deputy Edwards, KSP Trooper Reynolds, Parole and Probation Officer Tom LaFollette, [sic] MPD Shirley responded to this residence after Tom made contact with Tracy Lacey and found several bowls with residue that was filed tested and later ID [sic] as meth by Eddie Lacey that [sic] came to the residence later. We got permission to search from Mrs. Lacey and found several more items that contained suspected meth and items used to smoke dope with."

Appellant's home based on the anonymous telephone calls he had received and Appellant's arrest in Franklin County, Ohio. He then explained as a parole officer he did not need reasonable suspicion to conduct a search of Appellant's house to verify the offender's residence or well-being. Nonetheless, LaFollette further testified that he obtained Tracy's consent because she was the only adult there and he could not have entered without her permission. However, LaFollette then stated that he needed consent to conduct a search, but subsequently testified that even if Tracy had not given consent, he would have still searched the residence anyway.⁷

After hearing the evidence and testimony from witnesses, the trial court declared that LaFollette had the authority to conduct a home visit without consent, but only if he had reasonable suspicion that Appellant was violating his parole. Nevertheless, the trial court determined, by a preponderance of the evidence, that Tracy gave voluntary consent to the search.⁸ As a result, Appellant's motion to suppress was denied.

On appeal, Appellant argues the trial court erred when it denied his motion to suppress because LaFollette was not acting under the reasonable suspicion that Appellant had contraband at his residence. Furthermore, Appellant insists the trial court erred in determining that evidence supported a finding that

⁷ On redirect, LaFollette testified that had Tracy not given consent, he would have contacted the Department of Corrections and his supervisor to obtain consent to conduct the search.

⁸ The trial court's finding that Tracy gave consent was based upon the following: (1) the testimony of LaFollette and Hensley; (2) Glass' police report was contradicted by every witness, including Tracy; (3) Tracy had an incentive to testify in favor of Appellant, and (4) the lack of credibility of Tracy's testimony due to drugs being discovered in the house after she denied the presence of any.

Tracy gave consent to the search. Appellant moves this Court to reverse and remand this matter with instructions to suppress all the evidence obtained as a result of the warrantless search of his residence.

II. STANDARD OF REVIEW

Appellate review of a motion to suppress involves a two-step process. First, the trial court's findings of fact are conclusive if they are supported by substantial evidence. *Hallum v. Commonwealth*, 219 S.W.3d 216, 220 (Ky. App. 2007); RCr 9.78. We then review *de novo* the trial court's application of the law to the facts. *Hallum*, 219 S.W.3d at 220; *see also Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004). "We review findings of fact for clear error, and we give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Hallum*, 149 S.W.3d at 220 (internal quotation marks omitted).

III. ANALYSIS

In *Coleman v. Commonwealth*, the Kentucky Supreme Court held that an officer must possess reasonable suspicion that a parolee is violating the terms of his parole to conduct a home visit without consent. 100 S.W.3d 745 (Ky. 2002). Appellant contends that LaFollette lacked the reasonable suspicion necessary to conduct the home visit.⁹ However, as the Commonwealth correctly points out, Appellant's argument is misplaced because the trial court's ruling was not based

⁹ Although we normally review the trial court's findings of fact first, due to the nature of Appellant's arguments, our analysis is better served by first addressing the issue of reasonable suspicion.

on whether LaFollette had reasonable suspicion to conduct the search. Instead, the trial court determined that Tracy gave the verbal consent LaFollette needed to conduct the home visit, rendering the issue of reasonable suspicion moot.

The Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution protect citizens from unreasonable and unwarranted searches and seizures. *Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006). “A search conducted without a warrant is unreasonable unless it falls within one of the few exceptions to the warrant requirement.” *Hallum*, 219 S.W.3d at 221. As correctly stated by the trial court, a well-established exception to the warrant requirement is a search conducted pursuant to proper consent. *Colbert v. Commonwealth*, 43 S.W.3d 777, 779-800 (Ky. 2000). Furthermore, consent may be provided by either the target of the search or from a third party “who possesses common authority over the premises.”¹⁰ *Id.*

Therefore, Appellant’s reasonable suspicion argument is irrelevant, and the only issue for review is the trial court’s determination that Tracy gave LaFollette consent to search the residence. Alluding to the trial court’s reference to *Smith v. Commonwealth*, 181 S.W.3d 53 (Ky. App. 2005), Appellant contends the trial court’s finding that Tracy consented to the search of Appellant’s residence was not supported by substantial evidence.¹¹

¹⁰ According to records in the Hart County P.V.A.’s Office, Tracy is listed as an owner of the residence.

¹¹ It is noted that Appellant concedes Tracy had authority to consent to a search.

In *Smith*, the issue concerned a written consent form signed by the defendant permitting medical personnel to test her blood following a DUI crash. More importantly, the defendant argued she could not have voluntarily signed the consent form due to the extent of her injuries. The Court held in *Smith* that the written consent form, combined with testimony from witnesses, was substantial evidence that the defendant had the capacity to voluntarily consent. *Id.* at 58.

Unlike *Smith*, Appellant does not allege Tracy's consent was not voluntary. Instead, Appellant mistakenly interprets *Smith* as standing for the position that a signed, written consent form equates to substantial evidence that consent was given. Because Tracy never gave written consent to LaFollette, Appellant argues the trial court's finding was not supported by substantial evidence. Yet, the written consent form in *Smith* was only considered with respect to the issue of whether the defendant's consent was voluntary. Thus, it is not applicable to Appellant's argument that Tracy never gave consent in the first place.

Even though Appellant does not challenge whether the trial court's findings of fact constitute substantial evidence that Tracy consented to the search, we believe the evidence and testimony support such a ruling. "The trial court is in the best position to judge the **credibility** of witnesses and this Court is bound by the trial court's findings of fact unless there is a clear error or abuse of discretion." *Greene v. Commonwealth*, 244 S.W.3d 128, 136 (Ky. App. 2008)(emphasis added). As previously indicated, one reason the trial court determined Tracy gave

consent, notwithstanding her contrary sworn affidavit and testimony, was because it found LaFollette and Hensley to be more credible.

We agree that Tracy had substantial incentive to testify in favor of Appellant. Not only was Appellant her husband, a condition of his plea agreement was that all charges against her would be dropped. In addition, methamphetamine was found in the home after she denied the presence of any illegal substances.¹² As a result, we find no clear error or abuse of discretion by the trial court and must defer to its credibility determinations. Accordingly, we affirm the trial court's order denying Appellant's motion to suppress.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dennie Hardin
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Julie R. Scott
Assistant Attorney General
Frankfort, Kentucky

¹² Although Glass' police report raises questions about when consent was given, the fact that every witness, including Tracy, contradicted its description of the events renders it unreliable.