RENDERED: DECEMBER 5, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

SUPREME COURT GRANTED DISCRETIONARY REVIEW:
NOVEMBER 18, 2009
(FILE NO. 2008-SC-0965-DG)

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001379-MR

MICHAEL SHAWN PAYTON — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 05-CR-00216

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT AND THOMPSON, JUDGES.

CAPERTON, JUDGE: Michael Shawn Payton (Shawn) appeals from a judgment and sentence of the Grayson Circuit Court entered pursuant to a conditional guilty plea to the charges of two counts of possession of a controlled substance in the first degree, one count of possession of a controlled substance in the second degree, one

count of possession of drug paraphernalia, and one count of possession of marijuana.

We conclude that the warrantless search of Payton's home was valid as it was accomplished with the voluntary consent of Sharon Payton (Sharon), Shawn's wife and a resident of the home. Accordingly, we affirm.

On August 25, 2005, the Cabinet for Families and Children received an anonymous telephone call at their Hardin County office alleging methamphetamine existed and was being produced in the Grayson County home of Sharon and Shawn, where two children resided. The Grayson County Cabinet for Health and Family Services received the referral from the Hardin County office and the case was assigned to Rebecca Secora. Secora then contacted Deputy Blanton of the Grayson County Sheriff's Department, and requested that he accompany her to the residence.

On August 26, 2005, at approximately 1:30 p.m., Secora, Deputy Blanton, and another deputy went to the residence. At that time, the children were in school. When they arrived, Secora and the officers approached the front door and knocked. Sharon opened the door and observed Secora and the two deputies. Secora identified herself and stated that she had received information that there were drugs and children in the home.

The precise wording used by Deputy Blanton during his initial contact with Sharon is disputed. Secora and Sharon testified that he asked Sharon "was it all right if he looked around?" At another point in the suppression hearing, Secora

stated that she and the officers requested "just to come in." Deputy Blanton testified that he initially asked if he could look around but that he also informed her that the police would "like to search" the residence. It is not disputed that, in response, Sharon threw her hands in the air, opened the door, and said, "Come on in."

Upon entering the house, there were no illegal drugs or contraband in plain view. Deputy Blanton then proceeded to the master bedroom where he found Shawn and Jody Mercer, an acquaintance. Shawn immediately asked Deputy Blanton for a search warrant and Deputy Blanton told him that Sharon consented to the search of the residence. Shawn responded "Fine" or "Well, okay."[1]

Consent given, Deputy Blanton lifted the mattress from the Payton's bed and found a foil containing methamphetamine and two straws with methamphetamine residue. After finding the drugs, Deputy Blanton performed a pat-down search for weapons. In Mercer's sock, he found a syringe and, in his pocket, burnt foil. Deputy Blanton then continued his search of the residence and under a couch cushion in the living room he found a plastic box containing seven tablets of oxycontin and two hydrocodone pills. Mercer told the officers that the methamphetamine and pills belonged to him. Shawn, in the spirit of cooperation, then directed the officers to his personal "stash" of marijuana. Shawn was arrested, entered a conditional plea of guilty subsequent to a suppression hearing, and now appeals.

[1] It is important to note that at no point during the initial search did either Sharon or Shawn revoke the consent to search the home. *Commonwealth v. Fox*, 48 S.W.3d 24 (Ky.2001).

Shawn contends that the "knock-and-talk" procedure used to gain access to his residence, and the search conducted thereafter, violated his rights under the Fourth Amendment to the U.S. Constitution and Section 10 of the Kentucky Constitution to be free from an unreasonable search and seizure. Accordingly, Shawn argues that the evidence seized must be suppressed. In response, the Commonwealth argues that the search was conducted with consent and, as such, was valid and an exception to the search warrant requirement.

Our standard of review applicable to a decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If so, we must then conduct a *de novo* review of the trial court's application of the law to determine whether its decision is correct as a matter of law. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002).

It is the most basic premise of our constitutional law and one well-known to our citizens that an officer's warrantless entry and search of a person's home is generally prohibited. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). However, exceptions to the warrant requirement have evolved, including that voluntary consent by a person with authority over the residence vitiates the need for a warrant. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

In the matter sub judice, the trial court found that Sharon voluntarily consented to the officer's search of the residence by her statement "Come on in,"

and that the search did not exceed the scope of that consent. It further found that Sharon's consent was valid as to Shawn.

The test for determining whether the consent given was voluntary is set forth in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The Fourth and Fourteenth Amendments to the U.S. Constitution require "consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Id*. at 228, 93 S.Ct. at 2048.

The burden rests with the Commonwealth to prove by a preponderance of the evidence that the consent was voluntarily given under the circumstances. "Whether consent is the result of express or implied coercion is a question of fact . . . and thus, we must defer to the trial court's finding if it is supported by substantial evidence." *Krause v. Commonwealth*, 206 S.W.3d 922, 924 (Ky. 2006).

The knock-and-talk procedure employed by law enforcement officers is becoming increasingly prevalent and has been approved as constitutionally permissible by the courts. Quoting *Davis v.United States*, 327 F.2d 301 (9th Cir. 1964), the Court in *Perkins v. Commonwealth*, 237 S.W.3d 215, 218, 219 (Ky.App. 2007), summarized the rule as follows:

> Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a

> condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof - whether the questioner be a pollster, a salesman, or an officer of the law.

When an occupant is confronted with police officers at the doorstep and is informed that the officers are investigating suspected criminal activity, the occupant is left with the unenviable decisions of whether to allow the officer's entry into the residence and whether to allow a search. When a knock-and-talk culminates into a warrantless search of the residence, the officer's conduct is subject to Fourth Amendment scrutiny. *Id*. at 220.

Although the inherent potential for intimidation will not negate consent, the Commonwealth cannot meet its burden by showing mere "acquiescence to a claim of lawful authority." *Pate v. Commonwealth*, 243 S.W.3d 327, 330 (Ky. 2007), citing *Bumper v. North Carolina*, 391 U.S. 543, 549, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). In determining whether consent is voluntary, the court must make a careful scrutiny of the entire circumstances of a specific case. *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992).

The circuit court conducted a suppression hearing concerning the search of Shawn and Sharon's home. At the hearing, the testimony was that Secona and the officers presented themselves at the door to the Payton's home and knocked on the door. When Sharon answered the door, Secora explained the nature of the complaint and their purpose for coming to the home. Deputy

Blanton's testimony, though controverted, was that he requested to look around and search the residence. Sharon's undisputed response to Secora and the officers was "Come on in," accompanied by the gesture of throwing her hands in the air.

The circuit court found that Sharon's verbal response of "Come on in" and the opening of the door were sufficient to justify not only the officer's entry but also the search of the residence. While we agree that, as commonly used, the phrase "come on in" is understood as an invitation to enter the residence and not as permission for the invitee to have access to the entire residence. In the case sub judice, Deputy Blanton testified that Sharon made the statement in response to his statement that he would "like to search the residence" and her statement was accompanied by the simultaneous act of opening the door to accommodate the entry. The trial court so found and we must defer to the findings of the trial court if supported by substantial evidence. *Talbott v. Commonwealth*, 968 S.W.2d 76, 82 (Ky. 1998). Our review of the record reveals that the findings of the trial court were supported by substantial evidence. Thus, our legal analysis will be based on the factual findings of the trial court.

Preliminarily and without contest, Sharon's consent to search the premises was valid absent Shawn's contemporaneous objection. *Illinois v. Rodriguez,* 497 U.S. 177, 186, 110 S.Ct. 2793, 2800, 111 L.Ed.2d 148 (1990); *United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242* (1974). Consent given, we now proceed to analyze the legal scope of the consent given

premised on the fact that Deputy Blanton stated that he would "like to search the residence."

When a search is consensual, "the standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness - what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 1803-1804, 114 L.Ed.2d 297 (1991). We now focus our analysis on the objective reasonableness of what consent was granted.

The facts of this case support the legal conclusion that Sharon's statement "Come on in," in response to the purpose of the visit as stated by Secora and the officers, and the simultaneous act of opening the door to accommodate the entry are sufficient to support the trial court's finding that Sharon consented to both the officer's entry and search of the residence. This is akin to a typical knock-and-talk situation where officers approach the residence, knock, and inform the occupants that they are investigating criminal activity. In fact, according to Secora's testimony, while the presence of the officers was the result of Cabinet policy, the stated purpose of the visit was to investigate the referral of possible child neglect, a noncriminal matter, *and* drugs, certainly a matter having criminal implications.

In *Hallum v. Commonwealth*, 219 S.W.3d 216 (Ky.App. 2007), this Court addressed a scenario in the context of a Fourth Amendment challenge wherein we emphasized the noncriminal nature of a knock-and-talk procedure.

The social worker was accompanied by two law enforcement officers to a home that was referred for possible child neglect and drug use in the residence. Upon their arrival, the social worker sought permission for herself and the deputies to enter the house. After receiving permission, the three entered and, in a bedroom, in plain view, the officer observed various items indicating possible illegal drug activity. Prior to seizing the evidence, the deputies secured a warrant.

This Court reasoned that the entry into the room by the officer did not require consent because:

> [W]hen Ms. Finnerty [the social worker] entered the closed bedroom to investigate the referral she had received, it was not unreasonable for the detective to enter the room because the visit was not criminal in nature. Thus, the detective did not need to receive Appellant's consent to enter the bedroom. Moreover, once Ms. Finnerty told Appellant that she was required to look in the bedroom, Appellant told her to go ahead and do so. He did not tell the detective that he could not go into the room with her.

Id. at 222. The officer in *Hallum* did not perform an extensive search of the residence or seize any evidence until after a warrant was obtained. At that point, the investigation was clearly no longer being performed by the Cabinet but had evolved into a criminal investigation and one with Fourth Amendment implications.

However, the case before our Court presents additional facts and, thereby, broadens the scope of the initial knock-and-talk into a criminal investigation at first contact with the Paytons. Secora stated the purpose of the

visit concerned child neglect and drugs *and Deputy Blanton requested* to look around and search the residence. When Sharon responded with "Come on in," and threw up her hands, thereby giving consent to search, the requirement for a search warrant was obviated. Thus, while the courts in this Commonwealth deem that a knock-and-talk, instigated by the Cabinet, is not a criminal investigation, a separate request by officers accompanying the Cabinet can broaden the character of the visit to include a criminal investigation. Here, this broadening occurred at first contact with the Paytons. Therefore, we conclude that the search of the residence did not exceed the scope of the consent given by Sharon.

In that we have concluded consent was given to search the residence and the ensuing search was within the scope given by the consent, we must now address whether voluntary consent given by a co-occupant of a residence who shared common authority over the property is sufficient to authorize a search when the defendant is present. *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). Particularly, we must consider whether Shawn's verbal exchange with the officers revoked the consent to search as to him.

Shawn argues that he should have been advised that he could have revoked the consent given by Sharon. However, under Kentucky law, there is no requirement that an occupant be advised of his Miranda rights or that he had the right to refuse the search. *Cook*, 826 S.W.2d at 331. Thus, Deputy Blanton's explanation in response to Shawn's question, "do you have a warrant," need not

have gone beyond the explanation given by Deputy Blanton, i.e., Sharon gave us consent to search.

Lastly, Shawn argues that he revoked the consent given by Sharon and that he objected to the search of the residence. Whether Shawn's initial questioning of the officers as to whether they had a search warrant prior to continuing their search was tantamount to him refusing consent to the search is not the factual situation before our Court. We cannot take Shawn's initial actions out of context. When the officers entered the room occupied by Shawn, the right of the officer's presence was challenged by Shawn's questioning the officers as to a search warrant. The response of Deputy Blanton explained their presence, i.e., that Sharon had given them consent to search the residence. Of paramount importance was Shawn's response of "Fine," or "Well, okay" to Deputy Blanton's explanation. Such response is certainly consistent with both Shawn's acknowledgement and approval of the consent given by Sharon as well as satisfying his initial inquiry into the officer's presence in the residence. While Shawn's response may rise to the level of actual consent, it is enough that we decide that Shawn's actions did not rise to the level of an objection. *See Randolph*. Thus, Shawn neither revoked the consent given by Sharon nor objected to the search of the residence. Therefore, under the facts found by the trial court, we agree that the search of the residence passes constitutional scrutiny.

Based on the foregoing, we hold that the trial court did not err when it denied Shawn's motion to suppress the evidence seized from his residence. The judgment of conviction is affirmed.

LAMBERT, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent. Although the majority is correct when it deferred to the trial court's finding that Sharon consented to the entry into the residence, it commits grievous error when it then concludes that consent to enter the residence justified the extensive search.

The majority's reasoning strains both the law and my conscience. It is well embedded in our search and seizure law that the "consent given to enter the house does not extend to consent to search the premises." *Commonwealth v. Neal*, 84 S.W.3d 920, 925 (Ky.App. 2002). The majority, however, concludes that the invitation of entry into the residence is sufficient to support a warrantless search of virtually everything within the residence.

In this case, the desecration of the resident's constitutional rights is even more disturbing. This was not, as the majority suggests, a typical knock-and-talk situation where the officers approach the residence, knock, and inform the occupants that they are investigating criminal activity. The presence of the police officer was the result of Cabinet policy and the purpose of the visit was to investigate possible child neglect, a noncriminal matter. Using the majority's

logic, a school teacher accompanied by the school safety officer, a paramedic accompanied by a patrol officer, or an agricultural extension officer accompanied by a constable, who are invited into a residence on the premise that their presence is to investigate a noncriminal matter, are free to search every crevice of the residence and its contents. The attic, the basement, the medicine cabinet, drawers, mattresses, and other places generally not anticipated to be accessible or visible to a mere visitor, are the subject of a government search for unlimited evidence. I cannot be convinced that it is objectively reasonable to conclude that any reasonable person intends that socially customary phrase "come on in" is a waiver of the sacred constitutional right to be free from warrantless searches.

This case also presents what appears to be an issue yet to be addressed in Kentucky and one that the majority has failed to take the opportunity to provide guidance. In 2006, the United States Supreme Court rendered *Georgia v. Randolph,* 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), where it held that the voluntary consent of a co-tenant does not extend to a co-tenant who is present at the time the request to search is made and objects to the search. Therefore, even if Sharon's consent was voluntary, the impact of *Randolph* on Kentucky search and seizure law should be addressed. Shawn, who was present in the home at the time of the search, requested that the officers produce a warrant which, I believe, is consistent with a refusal of consent. Therefore, I believe the majority was required to address the application of *Randolph* and could not premise its result solely on its finding that Sharon's consent was voluntary.

I do not believe that the majority has properly applied the protections afforded by the U.S. and Kentucky Constitutions. Its opinion broadens the authority of the government to intrude into the sanctity of the home under the guise of a noncriminal investigation and without explanation to the occupant of the time and extent of the search to be conducted.

I conclude with the observation that the entire debate regarding verbal consent would be easily silenced if the law enforcement agencies utilized the available "consent to search form" that explicitly states the subject and scope of the search. According to the majority, the consent forms are not necessary because the mere opening of a door and permission to enter the residence is the equivalent of a consent to search the residence and its contents. Common sense dictates that law enforcement be required to use the written form when relying on consent to search an occupied residence and cease reliance on "an after the search analysis" to validate the consent.

BRIEFS FOR APPELLANT:

Susan Jackson Balliet
Assistant Public Advocate
Office of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Joshua D. Farley
Assistant Attorney General
Frankfort, Kentucky