

RENDERED: OCTOBER 9, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000463-MR

MARK MILES

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 07-CR-00360

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; HARRIS,¹ SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Mark Miles appeals from a Campbell Circuit Court final judgment convicting him of Trafficking in Marijuana Within 1000 Yards of a School and sentencing him to four years' imprisonment. Miles raises three issues²

¹ Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² On page 10 of his brief, Miles mentions a failure of the officers to read his *Miranda* rights. No such issue was raised in the trial court, and we will not address it.

on appeal: (1) whether the police had authority to enter his residence; (2) whether the plain view exception to the warrant requirement applies to certain items seized; and (3) whether the police improperly searched boxes in his home. Finding no error in the trial court's decisions, we affirm the judgment of conviction.

On February 25, 2008, Mark Miles was convicted of one count of Trafficking in Marijuana within 1,000 Yards of a School. The conviction stemmed from the events of July 4, 2007. On that date, Amy Due, Miles's girlfriend, went to the Newport Police station and reported that Miles assaulted her. She told police that Miles kept a gun in their residence. Officer Chris Fangman accompanied Due to the residence where she opened the door with her keys.

Upon entering the residence, Officer Fangman saw Miles sitting at a computer desk along with a scale and a plastic baggy of marijuana. Officer Fangman also smelled marijuana. While in the home, Officer Fangman located several lock boxes. After Miles gave him consent to open the boxes, Officer Fangman found two sets of scales, \$1,200, and five baggies of marijuana. Following his indictment, Miles moved to suppress the incriminating evidence, an evidentiary hearing was held, and the trial court denied the motion by an order entered on November 13, 2007. Miles was subsequently tried by a jury and convicted. This appeal follows.

First, Miles claims that Officer Fangman unlawfully entered his residence because Due did not have the authority to invite them. When

determining whether a third-party consent to enter was valid, we must examine whether a “reasonable police officer faced with the prevailing facts reasonably believed that the consenting party had common authority over the premises to be searched.” *Commonwealth v. Nourse*, 177 S.W.3d 691, 696 (Ky. 2005), quoting *United States v. Gillis*, 358 F.3d 386, 390 (6th Cir. 2004). Further, “[c]ommon authority . . . rests on mutual use of the property by persons generally having joint access or control for most purposes[.]” *United States v. Matlock*, 415 U.S. 164, 171 n.7, 94 S.Ct. 988, 993 n.7; 39 L.Ed.2d 242 (1974).

Due told Officer Fangman that she lived at the residence with Miles and used her key to unlock the door. When Due and Officer Fangman entered the residence, Miles did not object to her entrance or the entrance of Officer Fangman. Miles, however, argues that Due no longer had common authority because she was in the process of moving out. Due still possessed her key and used the key without Miles’s objection. Miles failed to present any evidence of moving boxes or changed locks that should have signified to Officer Fangman that Due no longer had common control over the residence. In light of these circumstances, we find that Officer Fangman had a reasonable belief that Due had common authority over the residence and the authority to consent to his entrance.

Second, Miles argues that the bag of marijuana and scale found on the desk were illegally seized. Officer Fangman, however, testified that the items were discovered in plain view. Although a warrantless search is presumed to be unreasonable and unlawful, the presumption can be overcome when evidence is

seized under the plain view doctrine. *Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006). Under this exception to the warrant requirement, law enforcement officials may seize evidence without a warrant when the initial entry was lawful, the evidence was inadvertently discovered, and the incriminating nature was readily apparent. *Id.* Officer Fangman lawfully entered the residence and saw marijuana and scales on the computer desk where Miles was sitting. Therefore, we find that a warrant was not required.

As for Miles's claims that items were not discovered in plain view, we must give great deference to the trial court's credibility assessments. The ability to assess the credibility of witnesses and to draw reasonable inferences from the testimony is solely vested in the discretion of the trial court. *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002). In light of Officer Fangman's testimony, we find that ample evidence existed to support the trial court's conclusion that the items were lawfully seized under the plain view doctrine.

Finally, Miles claims that Officer Fangman illegally searched the locked boxes. Officer Fangman, however, claims that Miles consented to the search of the boxes. Again, the ability to assess witness credibility lies solely within the sound discretion of the trial court. *Id.* Although Miles testified that he never consented to the search, the court obviously gave greater weight to Officer Fangman's testimony.

Miles argues that it is unreasonable to believe that a man would consent to a search of an item containing contraband. Although it may seem

unwise, it is not uncommon. We are not persuaded by Miles's argument that his consent to search would be illogical. We find that Officer Fangman's testimony was sufficient evidence to support the trial court's conclusion that Miles consented to the search of the boxes.

Because we conclude that the Campbell Circuit Court properly denied Miles's motion to suppress the evidence seized at the time of his arrest, we affirm the judgment under review.

ALL CONCUR.

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