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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2012-CA-000955-MR

JOSE RICO DE-LEON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
INDICTMENT NO. 11-CR-00217

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, MAZE, AND THOMPSON, JUDGES.

MAZE, JUDGE: Jose Rico De-leon ("Jose") appeals from the May 4, 2012, final judgment of the Fayette Circuit Court which found him guilty of trafficking in marijuana, cultivation of marijuana, and drug paraphernalia charges. He also appeals the trial court's August 16, 2011, opinion and order denying his motion to suppress certain evidence. For the following reasons, we conclude that the trial court properly denied the motion. Hence, we affirm.

On December 15, 2010, Detective John Scott Gibbons of the Lexington Division of Police requested the issuance of a search warrant for 1916 Appomattox Road in Lexington, Kentucky. The search of that residence serves as the focus for this appeal. The residence was inhabited by Jose's brother, Jorge Rico De-leon. Detective Gibbons testified that the search warrant was secured by information acquired from two confidential informants.

The first informant ("C.I. #1") indicated that he had received a pound of marijuana from Manuel Varillas-Gomez and that Jorge had arrived at C.I. #1's residence to collect payment for the marijuana. C.I. #1 further indicated that Jorge returned to C.I. #1's residence on multiple occasions attempting to sell additional marijuana. Additionally, C.I. #1 asserted that he had followed Jorge to Floral Park, where he claimed to live.

The second informant ("C.I. #2") was utilized by officers on December 14, 2010, in an attempt to set up a controlled buy between Jorge and C.I. #2. C.I. #2 met with Jorge at Domino's Pizza, where Jorge allegedly offered to sell eight pounds of marijuana to C.I. #2 at the rate of $4,500.00 per pound. C.I. #2 requested a sample of the marijuana and Jorge left explaining that he was leaving to retrieve the sample and that he lived on Appomattox Road. The interaction was not recorded by law enforcement. Thereafter, Detective Dwayne Baillio, who was conducting surveillance at 200 and 204 Floral Park, witnessed Jorge walk up the driveway of 204 Floral Park, briefly enter 200 Floral Park, and then leave in a 2003 Chevy Impala. Detective Gibbons testified that he followed the Impala to the

Appomattox Road residence, witnessed Jorge enter the house momentarily, and then followed Jorge back to Floral Park where he delivered the sample to C.I. #2. Jorge then informed C.I. #2 that he had gone to retrieve the sample and that he lived on Appomattox Road.

The search warrant was executed on December 16, 2010. On the same day, prior to the warrant's execution, officers attempted to arrange another controlled buy involving Jorge. At that time, Detective Gibbons was staking out the area where the buy was supposed to take place; Detective Baillio was staking out 200 and 204 Floral Park; and several other detectives were watching the residence on Appomattox. Gibbons testified that his team witnessed the Impala travel from Floral Park to the Appomattox residence where Jorge exited the vehicle, entered the residence, and then came outside several times to look around. Thereafter, a gold Ford Contour arrived at the residence driven by Jose and containing Ramiro Rico De-leon, another brother to Jose and Jorge. Because the individuals at the residence appeared as though they were ready to depart, the search warrant was commenced.

Jose and his two brothers, Jorge and Ramiro, were patted down, handcuffed, and placed in the living room of the Appomattox residence while the search was executed. The search revealed a marijuana grow operation comprised of forty-three marijuana plants and four pounds of freshly cultivated marijuana that was drying. Detective Gibbons testified that Jose indicated that he had formerly lived at 200 Floral Park but now lived at 204 Floral Park and had left some of his

property at 200 Floral Park. Jose also informed Detective Gibbons that he was aware of the growing operation but was only at the residence to see Jorge about obtaining a job. The officers also searched the Floral Park residences. The searches of those residences are not a subject of this appeal, however, and will therefore not be addressed herein.

Jose was indicted on five counts of drug-related charges and the charges were consolidated with related charges against Jorge, Ramiro and their sister, Maria Rico De-leon. Thereafter, they jointly moved to suppress all evidence seized or obtained by police as a result of the search of the Appomattox residence. On August 16, 2011, the trial court denied the motion. In support of its order, the trial court concluded: (1) that only Jorge had standing to challenge the validity of the search warrant executed at the Appomattox residence; and (2) that the affidavit seeking the warrant sufficiently established probable cause that evidence of marijuana trafficking was likely to be found at the Appomattox residence.

On January 6, 2012, Jose entered into a conditional guilty plea to amended charges of: (a) criminal facilitation: complicity to trafficking in marijuana greater than five pounds, first offense; (2) criminal facilitation: complicity to cultivation of marijuana (five or more plants); and (3) possession of drug paraphernalia. This appeal followed. Additional facts will be introduced as necessary.

Jose's sole issue on appeal is the trial court's denial of his motion to suppress. As a preliminary matter, we agree with the trial court that he lacks

standing to contest the search of the Appomattox residence. Jose relies on older cases, particularly *United States v. Jeffers*, 342 U.S. 48, 72 S. Ct. 93, 96 L. Ed. 59 (1951), and *Brown v. United States*, 411 U.S. 223, 227, 93 S. Ct. 1565, 1568, 36 L. Ed. 2d 208 (1973), both of which allow a defendant to challenge the validity of a search and seizure where the person claims a possessory interest in the property seized. *See also Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960). However, this line of cases was subsequently overruled in *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). In *Rakas*, the United States Supreme Court held that a person seeking to contest a search and seizure must possess a legitimate expectation of privacy in the place searched or property seized. 439 U.S at 143, 99 S. Ct. at 430. See also *United States v. Salvucci*, 448 U.S. 83, 84-85, 100 S. Ct. 2547, 2549-2556, 65 L. Ed 2d 619 (1980). Although Jose states that that he spent substantial amounts of time at the Appomattox residence and "most likely" stayed overnight at some time, his prior stays there do not raise him to the status of an overnight guest at the time the warrant was executed. Furthermore, Detective Gibbons's testimony indicated that Jose himself stated that he was not there as an overnight guest, and he has offered no evidence to the contrary. Based upon the totality of circumstances, Jose has failed to make a sufficient showing that his legitimate or reasonable expectations of privacy were violated by the search of the Appomattox residence. *Rawlings v. Kentucky*, 581 S.W.2d 348, 350 (1979). Furthermore, even if Jose had standing to challenge the search, the record would support denial of the motion to suppress.

The trial court conducted a full evidentiary hearing on the motion. Although the trial court found that only Jorge had standing to contest the search, the court actually made detailed findings of fact and conclusions of law on the merits of Jorge's motion to suppress. Those findings and conclusions are part of the record in this appeal, and the issues are identical to those argued by Jose.

Upon review of the denial of a motion to suppress, we give considerable deference to the trial court. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). We first ask whether the trial court's findings of fact are supported by substantial evidence. *Id.* If the findings are supported by substantial evidence, we must accept them as conclusive. *Id.* citing Kentucky Rules of Criminal Procedure (RCr) 9.78. Based upon those findings, we then ask whether the trial court's decision was correct as a matter of law. *Id.* This determination is made *de novo*. *Id.*

The trial court specifically found that the facts presented in the affidavit by Detective Gibbons were sufficient to establish probable cause for the issuance of the search warrant for the Appomattox Road residence. The trial court noted that "[t]he Affidavit sets forth details of the controlled buy and identifies the Residence as the location from which the Sample of marijuana was retrieved by Jorge." Based on the totality of the circumstances, the trial court concluded that the judge issuing the warrant had "substantial information to reach the conclusion that evidence of drug trafficking would be found at the Residence." The trial court's findings are supported by substantial evidence and its conclusions were

correct as a matter of law. *See Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983). Accordingly, the judgment of conviction by the Fayette Circuit Court is affirmed.

THOMPSON, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING: I concur but write separately to express my opinion that a person may certainly have a reasonable expectation of privacy in areas other than a residence.

In *Rakas v. Illinois*, 439 U.S. at 142, 99 S. Ct. at 430, the U.S. Supreme Court stated that, "*Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place." The relevant inquiry is not where Jose lives or spends the night, but whether he had a reasonable expectation of privacy in the premises. Certainly where one lives or spends the night is a substantial factor in determining whether a reasonable expectation of privacy exists as to any particular locale; however, the absence thereof does not weigh in favor of a lack of expectation of privacy provided the basis upon which the privacy is sought to be based is not residency.

Based on the facts *sub judice*, Jose had access to the residence on Appomattox Road for, apparently, the storing of illegal contraband. While to

others this might have been a residence, to Jose it was a storage facility for contraband. Regardless, whether the premises is viewed as a residence or a storage facility, a person, here Jose, may assert a reasonable expectation of privacy based on relevant facts. Nevertheless, I do concur in the result because of the lack of facts in the record developing a reasonable expectation of interest by Jose in the premises.

BRIEF FOR APPELLANT:

Matthew W. Boyd
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky
Frankfort, Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky