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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001184-MR

JOSEPH ALLEN CHISHOLM — APPELLANT

v.

APPEAL FROM OWEN CIRCUIT COURT
HONORABLE REBECCA LESLIE KNIGHT, JUDGE
ACTION NO. 17-CR-00002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: J. LAMBERT, MAZE, AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: Joseph Allen Chisholm appeals from a conditional guilty plea in Owen Circuit Court. Chisholm argues that the fruits of a search should have been suppressed because the police were not given proper consent to enter a residence where he was subsequently arrested. For the reasons stated

below, we AFFIRM in part, REVERSE in part, and REMAND the judgment on appeal.

On January 9, 2017, Owen County Sheriff's Deputy Goodrich received information that Chisholm and L.J. Prather, who had active arrest warrants, were at the home of Melissa Heitzman in Owen County, Kentucky. At that time, Heitzman was in jail and her children were at the residence purportedly being cared for by Chisholm and Prather. Deputy Goodrich and Kentucky State Police Trooper Payton went to the residence to make contact with Chisholm and Prather. Deputy Goodrich knocked at the front door, which was answered by a boy who was about 13 or 14 years old. Goodrich asked the boy if Goodrich could enter the residence, and the boy said "sure." The boy said that he had to restrain a pit bull first. Goodrich would later testify that he expressly asked the boy for consent to search the home.

Deputy Goodrich waited while the boy restrained the pit bull. Goodrich and Payton then entered the home, and Payton found Chisholm sitting on a bed. Payton observed a neatly folded gum wrapper on the bedside table next to Chisholm which contained a substance later determined to be methamphetamine. Payton placed Chisholm under arrest based on the active warrant.

The following month, the Owen County grand jury indicted Chisholm on one count each of possession of a controlled substance (first offense) and

possession of drug paraphernalia. On April 3, 2017, Chisholm filed a motion to suppress the methamphetamine evidence. In support of the motion, Chisholm argued that law enforcement did not have a search warrant, and the search did not meet any exigent circumstances or exceptions.

A suppression hearing was conducted where Goodrich, Payton and Heitzman testified. Chisholm, through counsel, did not make an argument to the court. The Commonwealth asserted that Heitzman's teenage son validly consented to the search, that Chisholm was properly arrested pursuant to the outstanding warrant, and that the methamphetamine was discovered during a proper search incident to arrest. After considering the testimony, the trial court found the Commonwealth's argument persuasive and denied the motion to suppress.

Chisholm then entered a conditional guilty plea, in which he preserved the right to appeal the denial of the motion to suppress. He was sentenced to a concurrent sentence of 18 months in prison, and assessed costs and a public defender fee. This appeal followed.

Chisholm now argues that the Owen Circuit Court committed reversible error in denying his motion to suppress. Specifically, he contends that the facts presented to the trial court do not support the court's finding that the teenage boy gave valid consent for the officers' entry and search of the residence. Chisholm maintains that the only evidence of record regarding consent was the

officer's testimony. Citing *Commonwealth v. Hatcher*, 199 S.W.3d 124, 128 (Ky. 2006), Chisholm argues that a trial court cannot make an informed decision regarding the validity of the consent without knowing the minor's age or hearing his testimony. Chisholm directs our attention to extra-jurisdictional caselaw standing for the proposition that the police cannot rely on the consent of a child to bind a parent, that a parent does not surrender the privacy of his home to the discretion of the child, and that the presence of a police officer can easily influence a child to overstep the limits set by his or her parents.

Chisholm notes that there were two adults at the house to watch the child during his mother's incarceration, and that no evidence was adduced that the child was entrusted with any responsibility in the home. In sum, Chisholm maintains that the child had no authority to give valid consent to the police, that the mere testimony of a police officer was insufficient to demonstrate the presence of valid consent, and that the trial court erred in failing to so rule.

If a trial court's decision on a motion to suppress is supported by substantial evidence, the decision is conclusive. *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002). An appellate court may review the findings for clear error, while giving due deference to the inferences drawn from the facts by the trial judge. *Id*. After determining that the findings are supported by substantial evidence, an appellate court then conducts a *de novo* review of the trial court's

application of the law to the facts to determine if the decision comports with the law. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002).

As a general rule, a warrantless entry is prohibited for purposes of investigation, search or arrest. *Id*. A valid exception to this rule is consent, whether obtained from the individual who is the target of the search or from a third party who possesses common authority over the premises. *Payton v. Commonwealth*, 327 S.W.3d 468, 479 (Ky. 2010). When evaluating the validity of consent, the trial court must determine whether a police officer could reasonably believe from the available information that the consenting party had the authority to consent. *Commonwealth v. Nourse*, 177 S.W.3d 691, 696 (Ky. 2005).

In examining this issue, we must first note that at the suppression hearing, Chisholm presented no evidence nor made any argument that the teenage resident did not or could not consent to the officers' entry into the home. The sole and undisputed evidence presented was that the teenager, who is the son of the homeowner, consented to the search. No evidence was produced nor argument made that the teenager did not consent, nor that ineffectual consent was given. Further, Deputy Goodrich testified that the homeowner and parent of the teenager, Melissa Heitzman, was in jail at the time of the search.

The question for our consideration, then, is whether the undisputed testimony at the suppression hearing constitutes substantial evidence that valid

consent was given. We must answer this question in the affirmative. The Commonwealth produced testimony that the homeowner was in jail, and that her teenage son consented to the search. No countervailing evidence was offered, and Chisholm did not argue at the suppression hearing that the teenager's consent was not valid.

In *Perkins v. Commonwealth*, 237 S.W.3d 215, 221 (Ky. App. 2007), a panel of this Court reaffirmed that a 15-year-old boy's consent to a home entry and search was valid because police officers reasonably believed that the boy "had sufficient control and apparent authority over the premises to give valid consent to their entry." In *Perkins*, the boy's father - who was wanted - was present in the home at the time the teenager gave consent. In the matter before us, the uncontroverted testimony was that the teenager's mother was not present but was in jail. Her absence, together with the actions of her teenager in restraining a pit bull before allowing entry by a stranger, bolsters the officers' reasonable belief that the teenager had sufficient authority and control over the premises to give valid consent.

Given the totality of the record and the uncontroverted testimony at the suppression hearing, we conclude that the trial court's factual findings are supported by substantial evidence. In applying *de novo* the law to the facts, it is

apparent that the Owen Circuit Court correctly determined that the investigating officers properly relied on the valid consent of the teenage resident.

Chisholm next argues that the trial court erred in ordering his payment of a $750 public defender fee arising from his conditional guilty plea. The Commonwealth acknowledges that this fee was improper because Chisholm was found to be a pauper. *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012). Accordingly, we REVERSE and REMAND as to the imposition of the public defender fee, and in all other respects AFFIRM the judgment on appeal.

ALL CONCUR.

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