

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: APRIL 24, 2003  
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2001-SC-0300-MR

**FINAL**

DATE

5-15-03 EJA/Grow/HDL

DAVID MICHAEL FARRIS II

APPELLANT

V.

APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
00-CR-00060

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Appellant, David Michael Farris II, was charged with trafficking in five pounds or more of marijuana while in possession of a firearm and in possession of drug paraphernalia. A jury found Appellant guilty of the charged offenses and he was sentenced to a total of twenty years.

Valid arrest warrants for terroristic threatening were issued for Appellant and a person with whom he lived, Nathan Kirk. While the officers were in route to the residence to serve the warrants, they noticed a vehicle that resembled Kirk's vehicle, took pursuit, but were unable to locate it. At the residence, the officers knocked and heard what sounded like a male person and a female person talking. After a significant delay, Kim Bryan, Kirk's girlfriend, answered the door. The officers informed her that they had arrest warrants for Appellant and Kirk. Ms. Bryan informed the officers that neither gentleman was there, but the officers said they needed to verify that the

persons charged were not on the premises. Inside, officers noticed the smell of burned marijuana and discovered that the voices they had heard from outside were from a blaring television. They also observed in plain view what looked to be a rolled up marijuana joint.

In the meantime, about five minutes after the officers had entered the residence, an officer waiting outside observed Appellant drive past. The officer pursued and made the arrest. This officer took Appellant to the detention center and obtained the search warrant. The other person charged, Kirk, was not arrested at the residence any time during this encounter.

At the suppression hearing, an officer testified that when the Sheriff's deputies entered they looked only for the subjects of the warrant. The officers noted a locked room in the home, which they did not enter until the Sheriff arrived later and picked the lock. The officers testified that then they looked in the room to make sure the suspect was not there. Once the search warrant arrived, they seized the marijuana.

The search of the residence also revealed a loaded AR-15 assault rifle and an ashtray and a tray with suspected marijuana and stems. The large quantity of marijuana was discovered in the locked room and additional marijuana was discovered in a hall closet.

Appellant argues that the trial court improperly overruled his motion to suppress the marijuana. He argues that the locked room should not have been entered until the officers obtained a search warrant. There was no testimony that the officers detected the smell of marijuana emanating from the room nor did the officers hear voices or movements inside the room. The fact that the door was locked and that Ms. Bryan did not authorize entry into the room established an expectation of privacy.

The standard of appellate review of a trial court ruling denying suppression of evidence is “clearly erroneous” with regard to the factual findings.<sup>1</sup> Questions of law are reviewable under the *de novo* standard.<sup>2</sup> The trial court entered an order overruling Appellant’s motion to suppress that provides in part:

The Court finds that the officers [sic] has obtained valid arrest warrants for both Defendants and had proceeded to the residence of Defendant Kirk to execute the warrants, the warrants stating the address of Kirk’s residence on their faces and correctly so as both Defendants resided at the residence. The officers lawfully entered the residence for the purpose of serving the warrants and once inside were authorized to look in any places in the residence where a person might be concealed, including the locked room.

The trial court went on to question whether a search warrant was even necessary, and we see no need to address that question here.

In Payton v. New York,<sup>3</sup> the United States Supreme Court held that “an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.”<sup>4</sup> In Caine v. Commonwealth<sup>5</sup>, this Court considered a case with facts not dissimilar to these. Inside an apartment, police officers arrested one of two persons for whom they had an arrest warrant. The defendant in custody was taken into a bedroom with a window overlooking a street so the officers could observe whether someone had accompanied him. From the bedroom window, they saw the other person for whom they had a warrant and they also saw a wallet lying on a table near the bed. The wallet had been taken from the robbery-murder victim. Upon motion to suppress the seizure

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<sup>1</sup> Commonwealth v. Banks, Ky., 68 S.W.3d 347, 349 (2001).

<sup>2</sup> Id.

<sup>3</sup> 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

<sup>4</sup> Id. at 603.

<sup>5</sup> Ky., 491 S.W.2d 824 (1973).

of the wallet, the trial court overruled and this Court affirmed. We quoted with approval from Coolidge v. New Hampshire<sup>6</sup> as follows:

The [plain view] doctrine serves to supplement the prior justification – whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused – and permits the warrantless seizure.

The officers in this case were authorized to conduct a sweep of the residence to reasonably determine if either Appellant or Kirk were on the premises.<sup>7</sup> The trial court believed the arrest warrant allowed the officers to search within the home in a manner and in places where a person could hide.

In our view, the officers properly entered the locked room for the limited purpose of verifying the presence or lack thereof of the other person for whom they had an arrest warrant. Once the officers were satisfied that the room was “cleared” there was no basis to further search the room. Of course, upon entry pursuant to the arrest warrant the plain view discovery of contraband justified the trial court’s ruling on Appellant’s motion to suppress.

Appellant’s next claim of error is that the trial court improperly overruled his motion for directed verdict seeking dismissal of the firearm penalty enhancement. He claims that the Commonwealth did not present sufficient evidence to provide a nexus between the offense of drug trafficking and possession of the firearm. Appellant argues that the evidence at trial did not connect the marijuana found in the locked room and the firearm found in Appellant’s room.

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<sup>6</sup> 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

<sup>7</sup> See Steagald v. United States, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981) (an arrest warrant authorizes the limited invasion of privacy in one’s home to execute the warrant).

At trial it was established that Kirk owned the residence and that Appellant resided there. The locked room did not contain any of Appellant's belongings. Kirk testified at trial that he owned the firearm and that a video presented at trial pictured him firing the weapon. Kirk also testified that he had no knowledge of Appellant keeping drugs in the home but he did know that Appellant sold marijuana from time to time. Kirk stated that Appellant had sold marijuana out of his home to Appellant's stepsisters, but the stepsisters denied ever purchasing marijuana from Appellant at the residence in question.

KRS 218A.992 allows for the enhancement of a penalty when the crime is committed in possession of a firearm. "[A] drug violation penalty may be enhanced under KRS 218A.992 if the violator has constructive possession of a firearm."<sup>8</sup> In Commonwealth v. Montague,<sup>9</sup> this Court held that "mere contemporaneous possession of a firearm is not sufficient to satisfy the nexus requirement."<sup>10</sup> There must be some proof of a nexus between the offense and the possession of a firearm. The Commonwealth can establish the nexus by proving that the defendant was in actual or constructive possession of the firearm when arrested or that the firearm was within the defendant's immediate control when arrested.<sup>11</sup> Without this type of evidence there must be proof consisting of more than mere possession.<sup>12</sup>

In the present case, Appellant was arrested outside the residence in his vehicle so he was not in actual possession of the firearm nor was it within his immediate control. Under Montague, the Commonwealth must present proof of constructive

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<sup>8</sup> Houston v. Commonwealth, Ky., 975 S.W.2d 925, 927 (1998).

<sup>9</sup> Ky., 23 S.W.3d 629 (2000).

<sup>10</sup> Id. at 632.

<sup>11</sup> Id. at 632-633.

<sup>12</sup> Id. at 633.

possession and a connection between the firearm and the crime. The Commonwealth presented testimony that Appellant sold marijuana from the residence where the gun was located. In Montague, this Court stated hypothetically "if drugs had been found in the Cadillac along with the gun, then a sufficient connection would have been established to create a question of fact for the jury."<sup>13</sup> While Appellant was not on the premises when he was arrested his gun and his marijuana were there and he was nearby. This authorized a finding of constructive possession.

The appellate standard of review is "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict."<sup>14</sup> A review of the evidence presented at trial reveals that the trial court properly held that the jury could reasonably find a nexus between the drug offense and the firearm providing the basis for the penalty enhancement under KRS 218A.992.

For the foregoing reasons, the judgment of the Boyd Circuit Court is affirmed.

Lambert, C.J., and Cooper, Graves, Stumbo and Wintersheimer, JJ., concur. Keller, J., concurs in result only. Johnstone, J., dissents.

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<sup>13</sup> Id.

<sup>14</sup> Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

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