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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL DATE 9-15-05 ELIA GROVE, D.C.

2005-SC-0122-TG

RAYMOND COY WRIGHT — APPELLANT

V.

TRANSFER FROM COURT OF APPEALS NO. 04-CA-1066
APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
2003-CR-0006

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a conditional guilty plea pursuant to RCr 8.09. The circuit judge entered a judgment of conviction of manufacturing methamphetamine and sentenced Wright to twenty years in prison. The sole issue is whether Wright was denied his right against unreasonable searches and seizures when the circuit judge overruled the motion to suppress the search.

Wright was indicted for manufacturing methamphetamine while in the possession of a handgun, possession of a handgun by a convicted felon and as a first-degree persistent felony offender. He entered a plea agreement with the prosecution by which the Commonwealth agreed to dismiss Counts 2 and 3 of the indictment, to omit the handgun enhancement and to recommend a twenty-year sentence. Wright

entered a conditional guilty plea pursuant to the plea agreement, preserving the right to appeal the denial of the suppression motion.

At the suppression hearing, the first witness was Wright who testified he lived in a rented house and did not give permission for it to be searched. He stated that there were two women, Cathy and Tiffany, at the residence when he left to go to work and that he told Tiffany not to let anyone in.

A police officer, the second and final witness at the suppression hearing, stated that an ex-girlfriend of Wright, Shannon, had obtained an arrest warrant for a violation of an EPO. The officer testified he went to Wright's place of employment and was told he had left after receiving a telephone call. The officer then went to the residence where he talked to a female, Tiffany, and asked if Wright was there, but she indicated he should be at work. The officer told Tiffany that Wright had left work and asked if he could look around the residence to see if Wright was there. Tiffany consented and the officer went inside to search unsuccessfully for Wright.

As he walked through a laundry room, the officer noticed items used to manufacture methamphetamine. He then called another officer who specializes in methamphetamine cases. When that officer arrived, the first policeman spoke with Tiffany again, explaining that he had found several items used in the manufacture of methamphetamine. He testified that she gave consent for a further search.

The ex-girlfriend, Shannon, who was staying at the house, advised the police officer that she lived there and had several items in the house. She gave written consent to search the house. The ex-girlfriend, who had obtained the EPO, took the officer into the house and showed him several items belonging to her and some mail she had received there. The officer also testified that the violation of the EPO occurred

that day at that residence, which made him assume that the ex-girlfriend lived there. During a second search of the house, a handgun was found.

Wright argued that the ex-girlfriend did not have permission to be at the house or give consent for a search. The trial judge overruled the motion to suppress. The conditional guilty plea was entered. This appeal followed.

Under the factual circumstances testified to at the suppression hearing by the police officer, the circuit judge correctly denied the motion to suppress. Payton v. New York, 445 U.S. 573, 100 S.Ct. 71, 63 L.Ed.2d 639 (1980) and Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) provide that an arrest warrant together with a reasonable belief that the subject of the warrant was at his residence authorized a search of that residence to attempt to locate the subject. Here, the officer testified that he was advised that Wright would be at work and when he arrived at work he was told that Wright had received a telephone call and had left. He believed that Wright had probably gone home. The officer testified that he spoke with a female, Tiffany, at the residence who said Wright should have been at work, but when advised that he was not at work, she gave consent to the search.

Tiffany was in charge of the residence and when the officers sought consent for the search, she agreed. It was reasonable for the officer to believe that the woman had authority over the residence. See Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), which holds that a warrantless search incident to consent is valid so long as the consenting party had authority over the premises. See also Colbert v. Commonwealth, 43 S.W.3d 777 (Ky. 2001), in which we recognized the principle of the apparent authority to authorize a consensual search. Both the first and second searches were permissible.

In addition, the officer also had the consent of an ex-girlfriend for the more extensive search for evidence of manufacturing. The ex-girlfriend told the officer that she was living at the house and showed him various items that belonged to her. She gave written consent for the search. Again, the information provided to the police supported a reasonable belief that the ex-girlfriend had apparent authority to authorize a search of the residence. Rodriguez, supra; Colbert, supra.

In his reply brief, Wright notes for the first time that the record contains neither oral nor written findings of fact or conclusions of law. He contends that this case must be remanded for that reason. Wright further claims that this case should be remanded for a new evidentiary hearing because the circuit judge improperly shifted the burden of proof. He asserts that this occurred when he was called to testify first at the suppression hearing.

These issues were not raised at the circuit court level or in the initial brief filed by Wright. Accordingly, they are not properly preserved for appellate review. See CR 76.12(4)(e). See also Clark v. Clark, 601 S.W.2d 614 (Ky.App. 1980).

We recognize that the circuit judge failed to enter either oral or written findings of fact or conclusions of law in the record. Nevertheless, it is not always necessary to remand the case to the circuit judge when the theory on which he based the ruling was apparent from the record. Cf. Coleman v. Commonwealth, 100 S.W.3d 745 (Ky. 2003). Here, we can ascertain the basis for the decision by the circuit judge and remanding this case is unnecessary.

There was no impermissible shifting of the burden of proof. Wright was called to testify first, but he was directed to take the witness stand by his own defense counsel. He has no basis to complain now.

The search in this case was conducted with the consent of a resident in control of the premises and with the consent of an ex-girlfriend who had taken an emergency protective order. The police had reasonable belief that the consenting parties in each case had authority over the premises and the subsequent searches were valid. The circuit judge correctly denied the motion to suppress.

The judgment of conviction is affirmed.

All concur.

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