

IMPORTANT NOTICE **NOT TO BE PUBLISHED OPINION**

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

2010-SC-000066-MR

TIMOTHY W. HACK

APPELLANT

V.

ON APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN HOWARD, JUDGE
NO. 09-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Timothy Hack, entered a conditional guilty plea in Hardin Circuit Court to Complicity to Commit Manufacturing in Methamphetamine; Controlled Substance Endangering the Welfare of a Minor, Fourth Degree; Complicity to Commit Tampering with Physical Evidence; Possession of Drug Paraphernalia, Second or Subsequent Offense; and of being a Persistent Felony Offender, Second Degree. Appellant received a sentence totaling twenty years for the crimes. He now appeals as a matter of right. Ky. Const. § 110(2)(b).

I. Background

The instant case arose out of a home visit initiated by Jane Maeser, an employee of the Grayson County Cabinet for Health and Family Services (CHFS). At the behest of her supervisor, Maeser travelled to Appellant's

residence in Hardin County to complete a follow-up visit. Appellant had an open file with CHFS dating back to 2007, when he resided with another woman and her children. Based on her past experiences with Appellant, Maeser suspected Appellant's involvement in manufacturing methamphetamine and, thus, requested a police escort for the home visit.

The next day, December 10, 2008, Detective Rex Allaman of the Greater Hardin County Drug Task Force, Deputy Robert Dover of the Hardin County Sherriff's Office, and an "Officer Thompson,"¹ accompanied Maeser to Appellant's residence. After arriving, Deputy Dover, a uniformed officer, and Maeser knocked on the front door, received no answer, and proceeded to the back of the house. Appellant's wife and co-resident, Rachael Hack, answered the back door and informed the group that clothes and a chair obstructed the back door, and asked them to return to the front door. After a delay, Rachael answered the front door. Deputy Dover identified himself and Maeser, and informed Rachael that they were there to follow up on a CHFS case on her husband. At that point, Rachael either invited in or consented to the group's entrance.

Upon entry, Allaman smelled an odor commonly associated with a "lab situation." He also noticed what he believed to be a methamphetamine pipe sitting on a table, in plain view. At that point, Deputy Dover advised both Appellant and Rachael of their *Miranda* rights and read them a "consent to

¹ Officer Thompson is a law enforcement officer; the record is unclear on his precise affiliation.

search” form. *Miranda v. Arizona*, 384 U.S. 436 (1966). Appellant and Rachael signed this consent form, allowing the police to search the residence.

The search revealed numerous items commonly used to manufacture methamphetamine, including: a pipe, pills, a pyrex dish, glassware, and a pill guide, among other things. The police also removed a false wall inside the house and found a Mountain Dew bottle with a “seized” cap, containing an unidentified liquid, a plate with residue on it, a bottle of liquid fire, a funnel, coffee filters, salt, protective gloves, iodine bottles, pill wash containers, gasoline, antifreeze, ammonium nitrate, plastic tubing, a digital scale, razor blades, stained measuring spoons, an electric burner plate, and pseudoephedrine in a pill bottle. Several weeks later, a Hardin County Grand Jury indicted Appellant based on the fruits of the above search, and Appellant entered a plea of not guilty.

Appellant next filed a motion to suppress all evidence gathered on December 10, 2008, alleging that the search was unconstitutional. At the hearing, the only evidence presented was the testimony of Maeser, Dover, and Allaman. The trial court then denied Appellant’s motion to suppress, finding that the purpose of the visit was to close an open CHFS case, there was no evidence of a ruse or that the police used false pretenses to gain entry into Appellant’s house, and the consent to search was validly given.

Following denial of his motion to suppress, Appellant entered a conditional guilty plea to: one count of Complicity to Commit Manufacturing in

Methamphetamine; one count of Controlled Substance Endangering the Welfare of a Minor, Fourth Degree; one count of Complicity to Commit Tampering with Physical Evidence; one count of Possession of Drug Paraphernalia, Second or Subsequent Offense; and one count of Persistent Felony Offender, Second Degree. The terms of the plea agreement mandated that Appellant serve a total of twenty years' imprisonment.

As reserved by his conditional plea agreement, Appellant now appeals the denial of his motion to suppress to this Court. In a single argument, Appellant contends that the police officers used a ruse to gain entry into his residence, which merits suppression of all evidence seized that day.²

II. Analysis

Appellant argues that the police opportunistically used Maeser's request for a police escort to gain entry into his residence under the guise of accompanying her to close out a CHFS case. Without citation to any pertinent legal authority, Appellant specifically contends that this alleged ruse is evidenced by the following facts: Maeser worked for the Grayson (not Hardin) County Cabinet of Health and Family Services, was not a licensed social worker, and "did not have any documents on Timothy Hack with her" presumably at the time of the home visit.³ Accordingly, Appellant claims that it

² Appellant makes no arguments regarding the "consent to search" form he and Rachael signed.

³ Maeser initially testified that she identified herself as a social worker, but later said she did not believe she ever told anyone she was a social worker. Rather she testified that she was a social *service* worker with the Grayson County Cabinet for Health and Family Services.

is clear that the officers were present to search the residence for drugs, but did not have probable cause to obtain a warrant.

Before we evaluate Appellant's claim, we pause to briefly note that we review the trial court's factual findings in connection with the denial of a motion to suppress evidence under a clearly erroneous standard.

Commonwealth v. Banks, 68 S.W.3d 347 (Ky. 2001). In the present case, the trial court found no credible evidence indicating that the police employed a ruse. We agree.

Although we note that the use of ruses is not necessarily unconstitutional,⁴ there is no evidence here suggesting that the police employed a ruse to gain admission to Appellant's residence. As stated above, the *only* evidence is the testimony of two law enforcement officers and an employee of the Cabinet of Health and Family Services. Thus a review of the record reveals the following uncontroverted testimony: Maeser was employed by the Grayson County Cabinet of Health and Family Services; a supervisor instructed Maeser to close out Appellant's open case; Hack's Hardin County residence was very close to the Grayson County line; Maeser went to the Hack residence with a police escort due to suspicion of prior drug use and manufacturing; Dover, a uniformed officer, explained to Racheal Hack that he was there with Maeser so that she could close an open case on Appellant; and

⁴ See *Krause v. Commonwealth*, 206 S.W.3d 922, 926-27 (Ky. 2006) (listing numerous ruses that passed constitutional muster).

Rachael invited in or consented to the entrance of Dover, Maeser, Allaman, and Thompson into the Hack residence.⁵

Based on the above uncontroverted testimony given at the suppression hearing, we find the trial court's conclusion—that there was no credible evidence of a ruse—was not clearly erroneous. Appellant's argument regarding Maeser's failure to bring documents to the home visit or suggestion that Maeser was outside her jurisdiction is without basis. No evidence was presented that CHFS workers are required to bring paperwork on follow-up visits or that they may only operate in one county. Arguments based on conjecture are unpersuasive; as we have previously stated, “[w]e will not engage in gratuitous speculation . . . based upon a silent record.” *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Consequently, we affirm the trial court's factual findings that the law enforcement officers did not employ a ruse to gain admission, but were consensually present in the Hack residence.

In an alternative form of the above argument, Appellant contends that “consent was not voluntarily obtained because Ms. Hack was effectively coerced by Deputy Dover's statement” regarding the purpose of Maeser's visit. Appellant argues that Dover's misrepresentations placed the officers inside the residence, at which point they saw the methamphetamine pipe and smelled the chemical odor. In support of this argument, Appellant cites to *Krause v. Commonwealth*, wherein we cautioned that the use of a ruse cannot frustrate

⁵ While Allaman's testimony was sloppily worded at some points, he consistently repeated that Rachael Hack consented to his request to enter.

the constitutional requirements that a warrantless entry into and search of a home must be free of coercion. 206 S.W. 3d 922 (Ky. 2006). However, Appellant concedes that *Krause* is “not directly on point.”

In *Krause*, a police officer concocted a false story regarding the rape of a young girl inside the appellant’s residence in order to secure permission to search appellant’s residence. *Krause*, 206 S.W.3d at 924. However, the officer’s true intention was to search the residence for drugs, since the officer knew no such assault actually occurred. *Id.* In a narrow holding, we concluded that the deception employed by the police officer was unfair and unconscionable, rendering the appellant’s consent to search the house unconstitutionally invalid. *Id.* at 927-28.

The holding in *Krause* is inapposite to the present case, as Appellant’s argument relates to the officers’ *consent to enter*. Moreover, Appellant does not submit any argument relating to the “consent to search” form he signed. Rather, the consent to search was given after the police were already inside the house and observed a methamphetamine pipe in plain sight. As we have previously held, in order to constitutionally seize objects in plain view, a law enforcement officer must lawfully “arriv[e] at the place where the evidence could be plainly viewed.” *Hazel v. Commonwealth*, 833 S.W.2d 831, 833 (Ky. 1992) (internal citations omitted). As the trial court found—a conclusion we hold was not clearly erroneous—the law enforcement officers were inside the Hack residence pursuant to Rachael Hack’s invitation or consent.

Consequently, Appellant's reliance on *Krause* is misguided and, thus, his coercion argument is also unavailing.

III. Conclusion

For the reasons above, we affirm the trial court's denial of Appellant's motion to suppress, and therefore affirm its judgment and sentence.

All sitting. All concur.

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