

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JAMIEN PENEBAKER,	:	
	:	
Appellant	:	No. 1534 WDA 2010

Appeal from the Judgment of Sentence July 26, 2010,
Court of Common Pleas, Allegheny County,
Criminal Division at No. CP-02-CR-0006959-2009

BEFORE: DONOHUE, SHOGAN and WECHT, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: February 26, 2013

Appellant, Jamien Penebaker (“Penebaker”), appeals from the trial court’s July 26, 2010 judgment of sentence. We affirm.

The record reveals that on February 23, 2009, Penebaker was driving a red Chevrolet with heavily tinted windows. Suspecting that the windows violated Pennsylvania’s motor vehicle code, City of Pittsburgh Police Officers Kenneth Simon (“Simon”) and Chad Finney (“Finney”) turned on the overhead flashing lights of their marked police vehicle and stopped Penebaker. Penebaker exited the vehicle and ran towards his home at 3961 Brighton Road, ignoring the officers’ orders to stop. Penebaker was shouting for his mother to unlock the door of the home when officers Simon and Finney apprehended him. Finney conducted a pat down search of Penebaker, during which he recovered a bag of marijuana, several cell

phones, and cash. Penebaker was arrested for marijuana possession and informed of his *Miranda*¹ rights. When Penebaker's mother, Michele Suber ("Suber") finally answered the door, officers Simon and Finney informed her that Penebaker was under arrest for possession of marijuana.

After reading Penebaker his *Miranda* rights and securing him in the back seat of their police vehicle, officers Simon and Finney asked Penebaker whether he was involved in narcotics trafficking, and whether they could search his bedroom in the house. Penebaker stated he had \$800.00 in cash and corresponding paystubs in his bedroom, and that the officers could check.

Subsequently, Simon told Suber that Penebaker consented to a search of his bedroom. Simon asked for Suber's consent to enter the home. Simon told Suber that she did not have to consent to the search, but that if she refused to consent police would secure the home while they sought a search warrant. Suber asked for some time to think about it. After several minutes, she verbally consented to the search and stated that she would sign a consent to search form when it arrived.

Suber also had a conversation with Officer Andrew Jones ("Jones"), during which she told him she was unsure whether she wanted police in her home. Jones informed her that she could refuse consent but that the police

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

would seek a warrant if she did. Jones also told Suber that she could be liable for any unlawful items found in her home.

After giving verbal consent for the search, Suber accompanied several police officers to Penebaker's room. The search of Penebaker's bedroom yielded 63 baggies later determined to contain a total of 2.04 grams of heroin, a Taurus .357 magnum handgun in operable condition, \$6,740.00 in United States currency, several cell phones, and other drug paraphernalia.

On October 21, 2009, Penebaker filed a motion to suppress the evidence obtained during the search. The trial court conducted a hearing on that Motion on March 29, 2010, at the conclusion of which it denied Penebaker's motion. Immediately thereafter, the trial court conducted a bench trial on stipulated facts. The court found Penebaker guilty as set forth above, and entered the judgment of sentence currently on appeal on July 26, 2010. Penebaker filed a timely post-sentence motion on July 30, 2010, challenging the weight and sufficiency of the evidence and the denial of his motion to suppress. The trial court denied Penebaker's post-sentence motion on September 8, 2010, and this timely appeal followed.

Penebaker filed a timely concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b), and subsequently petitioned the trial court for permission to file an amended concise statement. The trial court granted that petition, and on December 8, 2010 Penebaker filed an amended concise statement alleging after-discovered evidence based on

Simon's arrest for official corruption. Penebaker appended two newspaper articles to his amended concise statement detailing Simon's arrest for fabricating evidence of an alleged drug transaction. The trial court took the matter under advisement and issued a Pa.R.A.P. 1925(a) opinion on February 6 2012. In that opinion, the trial court concluded that none of Penebaker's appellate issues was meritorious. The trial court noted that it presided over Simon's criminal trial stemming from the alleged fabrication of evidence, and that a jury acquitted Simon on all charges.

On June 13, 2012, Penebaker petitioned this Court for a remand to the trial court for a hearing on the after-discovered evidence issue. On June 19, 2012, this Court issued an order denying that request. We now turn our attention to the issues Penebaker raises in this appeal:

1. Whether the trial court erred in ruling that the evidence would not be suppressed when the consent of [Penebaker's] mother was involuntarily given pursuant to the Fourth Amendment of the United States Constitution as well as Article 1, Section 8 of the Pennsylvania Constitution?
2. Whether a new trial should be granted based upon after-discovered evidence?

Penebaker's Brief at 4.

We first consider Penebaker's argument that the trial court erred in denying his motion to suppress the evidence obtained during the search of his bedroom. Penebaker argues that neither he nor Suber gave voluntary consent to the search.

The following standard governs our review of the trial court's denial of Penebaker's motion to suppress evidence:

We may consider only the Commonwealth's evidence and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

An appellate court, of course, is not bound by the suppression court's conclusions of law. However, it is within the suppression court's sole province as factfinder to pass on the credibility of witnesses and the weight to be given their testimony.

Commonwealth v. Davis, 17 A.3d 390, 393 (Pa. Super. 2011), *appeal denied*, 611 Pa. 678, 29 A.3d 371 (2011).

The Fourth Amendment of the United States Constitution and Article 1, § 8 of the Pennsylvania Constitution both prohibit warrantless searches of a person's home. *Commonwealth v. Acosta*, 815 A.2d 1078, 1083 (Pa. Super. 2003). A warrantless search is permissible, however, if the person with proper authority consents to the search. *Id.* Valid consent must occur during a lawful police interaction, and it must be "the product of an essentially free and unconstrained choice – not the result of duress or coercion, express or implied, or a will overborne – under the totality of the circumstances." *Id.*

We conclude that the trial court did not err in denying Penebaker's motion to suppress, albeit on different grounds than those offered by the

trial court or the Commonwealth.² To have standing to assert a violation of his constitutional right to be free of unlawful search and seizure, the subject of the search must establish a constitutionally protected privacy interest in the area to be searched. ***Commonwealth v. Millner***, 585 Pa. 237, 256-57, 888 A.2d 680, 692 (2005). “[T]his Court has specifically rejected the notion that Article I, Section 8 should be construed as permitting the vicarious assertion of the privacy interests of others in order to, inter alia, dissuade intentional, intrusive police conduct.” ***Id.*** “[A] defendant cannot prevail upon a suppression motion unless he demonstrates that the challenged police conduct violated his own, personal privacy interests.” ***Id.***

Where, as here, the defendant lives in a residence with other inhabitants, he assumes the risk that another resident may consent to a search of the common area within the residence. ***Commonwealth v. Hughes***, 575 Pa. 447, 459-60, 836 A.2d 893, 900 (2003). The defendant may, however, retain a reasonable expectation of privacy in a bedroom. ***Commonwealth v. Hunter***, 963 A.2d 545, 553-54 (Pa. Super. 2008), *appeal denied*, 602 Pa. 663, 980 A.2d 605 (2009). “In general, to have a reasonable expectation of privacy, one must intend to exclude others and must exhibit that intent.” ***Id.***

² This Court may affirm the trial court on any valid basis. ***Commonwealth v. Janda***, 14 A.3d 147, 161 n.8 (Pa. Super. 2011).

In this case, we will assume *arguendo* that Penebaker retained a privacy interest in the bedroom. That privacy interest does not avail him in this case because he told Officers Simon and Finney that they could check his bedroom, as he had nothing to hide in there. The trial court specifically found that Penebaker consented to the search of his bedroom, and Penebaker does not challenge the legal or factual validity of that conclusion in this appeal. N.T., 3/29/10, at 115 (“In this instance, the Court finds the consent to search the room was given by the defendant himself.”)

Regardless of Penebaker’s consent, the police needed Suber’s permission to enter the house, and get to Penebaker’s bedroom, inasmuch as she was the homeowner. Penebaker has no standing to challenge the validity of Suber’s consent to enter the home, because the record fails to establish that he had any reasonable expectation of privacy in any part of the home other than his bedroom. Indeed, Penebaker was unable to gain entry to the home at the conclusion of his flight from Simon and Finney, as the door was locked and apparently he had no key. When Simon and Finney apprehended Penebaker, he was yelling for Suber to open the door and let him in. Thus, even if we assume that Penebaker exhibited an intent to exclude others from his bedroom sufficient to give rise to a privacy interest therein, he clearly had no intent or ability to exclude anybody from the home.

As a result, Penebaker has no standing to challenge the validity of Suber's consent for the police to enter her home. We conclude that Penebaker's first argument appeal lacks merit. The trial court did not err in denying Penebaker's motion to suppress evidence.

For his second argument, Penebaker asserts that he is entitled to a new trial based on the alleged official misconduct of Simon. Penebaker asserts that Simon's account of his interaction with Suber is not to be trusted, given Simon's alleged fabrication of evidence in a subsequent case. In light of our conclusion that Penebaker lacks standing to challenge the validity of Suber's consent to enter her home, the nature of Simon's interaction with Suber is simply irrelevant. ***See Millner***, 585 Pa. at 256-57, 888 A.2d at 692 (noting that the constitutional protection against illegal searches and seizures does not permit "vicarious assertion of the privacy interests of others in order to, inter alia, dissuade intentional, intrusive police conduct."). Penebaker cannot obtain relief on his second argument.

Since we have concluded that neither of Penebaker's arguments merits relief, we affirm the judgment of sentence.

Judgment of sentence affirmed.