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(FILE NO. 2007-SC-0539-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000491-MR

AUGUST K. WILSON — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 05-CR-00309

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

KELLER, JUDGE: August K. Wilson has appealed from the Henderson Circuit Court's March 6, 2006, judgment convicting him of First-Degree Possession of a Controlled Substance, Possession of Drug Paraphernalia, and Possession of Marijuana. Wilson received a one-year sentence of imprisonment for the felony conviction, two six-month

[1] Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

sentences, all to run concurrently, and a fine of $500 for the misdemeanor convictions. On appeal, Wilson contests the circuit court's denial of his pretrial motion to suppress evidence obtained during the search of his premises. He also raises several trial-related issues, including the circuit court's refusal to exclude one of the Commonwealth's witnesses or to declare a mistrial, the denial of his motion for a directed verdict, as well as a violation of his due process rights. We agree with Wilson that the circuit court should have granted his motion to suppress, as the Commonwealth did not meet its burden of establishing his consent to the search of the entire building. Thus, we reverse and remand.

Wilson is the owner and operator of Heartland Wood Products, Inc., a company that manufactures wood veneers located in Corydon, Kentucky. In 2005, he was in the midst of a divorce from his wife, Lois Wilson. His wife and their son lived in the marital home, while Wilson moved into an efficiency apartment in the upstairs portion of the Heartland building. Wilson kept the door to the upstairs locked, limiting access to that part of the building.

On the morning of June 13, 2005, Kentucky State Police Detective Matt Conley, along with several other law enforcement officers, went to Heartland to follow up with Wilson regarding an anonymous letter the state police post received on May 23, 2005. In the letter, the writer indicated that Wilson and other employees were running a methamphetamine lab in the building. Det. Conley approached Janice Breedlove, the office manager, who told him that Wilson was in Indiana on business, approximately two

hours away. At Det. Conley's request, Breedlove contacted Wilson by telephone. Once she reached Wilson on his cell phone, she handed the phone to Det. Conley. Det. Conley identified himself to Wilson, told him that they had received the anonymous letter, and asked for his consent to search the building. According to Det. Conley, Wilson gave his consent to search the entire building. According to Wilson, he only gave consent to search the business portion of the building, and he specifically withheld his consent to search his personal living quarters upstairs. Det. Conley ended the phone conversation and asked Breedlove if she had a key to the upstairs. She replied that she did not, although she later testified during the suppression hearing that she did in fact have a key, but could not use it without Wilson's permission.

While Det. Conley searched downstairs for weapons, Detective Louis Weber and another officer went upstairs where they encountered the locked door. They noticed a two-foot gap between the eight-foot wall and the ceiling. Det. Weber scaled the wall and landed in a storage area leading to the entrance to Wilson's apartment. After he unlocked the door to allow the other officers in, they all proceeded into Wilson's living area. In the kitchen area, Det. Conley found a cigar box containing two baggies of suspected crystal methamphetamine and methamphetamine. The cigar box also contained marijuana and drug paraphernalia. In addition to the drugs, the officers saw several weapons in the room. At that point, the officers suspended the search and secured the area. Det. Conley left to obtain a search warrant. The affidavit for the search warrant included information from the anonymous letter as well as the discovery of suspected

drugs and weapons in Wilson's apartment. Upon Det. Conley's return with the warrant, the officers continued the search and seized the drugs, drug paraphernalia, and several weapons. The officers did not locate a meth lab.

Wilson returned to Heartland sometime after Det. Conley returned with the search warrant. At the officers' request, Wilson unlocked his office door, where they found more marijuana and a handgun in a desk drawer. Although the record is not clear when this happened, Det. Conley warned Wilson of his *Miranda* rights, which he chose to waive, and Wilson told the officers that the marijuana and guns were his, but that the methamphetamine was not. Det. Conley arrested Wilson on charges of possession of a controlled substance, marijuana, and drug paraphernalia, each with a firearm enhancement. Three months later, the suspected drug evidence was transferred to the Kentucky State Police Western Regional Forensic Laboratory for testing. The testing revealed the substances were marijuana and methamphetamine, both controlled substances, while a third substance was identified as dimethyl sulfone, a non-controlled substance.

On September 6, 2005, the Henderson County Grand Jury indicted Wilson on one count each of First-Degree Possession of a Controlled Substance, Possession of Drug Paraphernalia, and Possession of Marijuana, all while in possession of a firearm. Soon thereafter, Wilson moved to suppress the evidence the officers seized and the statements he made, arguing that the search was conducted without sufficient probable cause and either without his consent or beyond the scope of the consent he granted, that

the warrant was defective as it was issued without probable cause, and that his incriminating statements were made as a result of illegal police conduct. The circuit court held a suppression hearing on January 10, 2006, where the Commonwealth elicited testimony from Det. Conley. Wilson introduced testimony from himself and Janice Breedlove. While Det. Conley testified that Wilson consented to a search of the entire building, Wilson maintained that he only consented to a search of the downstairs area and specifically stated that he did not want officers looking around his personal space upstairs. Wilson stated that he arrived back at Heartland two hours and fifteen minutes after he spoke to Det. Conley, at which point Det. Conley had obtained the search warrant. Because they had a warrant, Wilson cooperated with the officers by unlocking his office door at their request.

On the basis of Det. Conley's testimony, the circuit court denied the motion to suppress, holding that the Commonwealth proved by clear and positive testimony that the consent was valid. The circuit court specifically stated that "[t]he Commonwealth has produced positive testimony from Detective Conley that Mr. Wilson gave his consent to [the] search of the upstairs living area."

The matter proceeded to trial on February 22, 2006. For its first witness, the Commonwealth called Darrell Owens, the writer of the anonymous letter that started the police investigation. Wilson immediately objected to his being permitted to testify, citing the Commonwealth's failure to produce a copy or transcript of his interview by Det. Conley. Over this objection, the circuit court permitted Owens to testify. His

testimony consisted of information that he was a former Henderson police officer, that he had worked at Heartland on and off for several years until he left his employment on November 8, 2005, and that he had financial problems that led to disagreements with Wilson concerning his wages. In May 2005, Owens wrote an anonymous letter and mailed it to the Henderson Police Department, detailing his belief that Wilson, Breedlove, and another woman were addicted to methamphetamine; that Wilson had weapons and would go into rages; and that he was almost positive that there was a meth lab upstairs. Owens continued to work until early November, when he went to the police department and identified himself as the writer of the anonymous letter.

In addition to Owens, the Commonwealth elicited testimony from Det. Conley; Sergeant Timothy Bailey, the administrative sergeant of the Henderson Post; and Ryan Spencer, a drug chemist from the forensics lab. At the close of the Commonwealth's case, Wilson moved for a directed verdict, arguing that there was no evidence that he was in possession of meth or when he was last in the apartment. The circuit court denied his motion. During his case-in-chief, Wilson called his estranged wife, Lois Wilson, as his sole witness. She testified that the firearms seized from Heartland were those Wilson had been collecting. The circuit court denied Wilson's renewed motion for a directed verdict, and the jury returned a guilty verdict on each possession charge, but without a firearm enhancement. The jury ultimately recommended a one-year sentence on the felony possession conviction, and six-month sentences and a $500 fine on each of the misdemeanor possession convictions, all to be

served concurrently for a total of one year. The circuit court sentenced Wilson in accordance with the jury's verdict, and this direct appeal followed.

MOTION TO SUPPRESS

We shall first address Wilson's argument that the circuit court erred in denying his motion to suppress. Wilson argues that the evidence the officers seized from his personal living area should be suppressed as it was found during a warrantless and non-consensual search. As such, Wilson asserts that the evidence and his incriminating statements must be suppressed as fruits of the illegal search and seizure. On the other hand, the Commonwealth argues that the trial judge was in the best position to determine the credibility of the witnesses and sufficiency of the evidence, and that we are bound by those findings in the absence of clear error.

Our standard of review of the denial of a motion to suppress following an evidentiary hearing is two-fold. First, we must determine whether the findings of fact are supported by substantial evidence. If so, those findings are conclusive. RCr 9.78; *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). If not, the factual findings must be overturned as clearly erroneous. *Farmer v. Commonwealth*, 169 S.W.3d 50, 53 (Ky.App. 2005). Second, we must perform a *de novo* review of those factual findings to determine whether the lower court's decision is correct as a matter of law. *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001); *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky.App. 2000).

In the present case, we are concentrating on one of the exceptions to the warrant requirement; namely, consent. As a general matter, "warrantless searches are deemed unreasonable unless they fall within an enumerated exception to the rule that all searches must be performed pursuant to a warrant." *Anderson v. Commonwealth*, 902 S.W.2d 269, 271 (Ky.App. 1995). The Supreme Court of Kentucky addressed the issue of warrantless searches in *Colbert v. Commonwealth*, 43 S.W.3d 777, 779-80 (Ky. 2001), stating:

> In *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), the United States Supreme Court recognized that there is a heightened privacy interest in one's own home and that the Fourth Amendment generally prohibits warrantless entry, whether to search for objects or to make an arrest. This general prohibition may be overcome by any of the valid exceptions to the warrant requirement, including consent to search . . . . The burden of proof to show an exception rests with the government. (Citations omitted.)

Regarding the Commonwealth's burden of proof, this Court held, "[t]he Commonwealth has the burden of showing by a preponderance of the evidence, through clear and positive testimony, that valid consent to search was obtained." *Farmer*, 169 S.W.3d at 52. To determine whether a search is voluntary, "the trial court must look to the circumstances of each case in drawing its conclusion." *Anderson*, 902 S.W.2d at 272. The *Farmer* court also addressed the scope of a consensual search:

> Even when a search is authorized by consent, the scope of the search is limited by the terms of its authorization. (Citation omitted.) "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness-what would the typical reasonable person have understood by the exchange between the officer

> and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 1804, 114 L.Ed.2d 297, 302 (1991) (quoting *Illinois v. Rodriguez*, 497 U.S. 177, 183-189, 110 S.Ct. 2793, 2798-2802, 111 L.Ed.2d 148 (1990)).

169 S.W.3d at 52.

Turning to the case before us, we must first determine whether the circuit court's findings of fact are supported by substantial evidence. The circuit court entered rather extensive findings, which we shall set forth below:

> This case concerns a warrantless search that took place on the morning of June 13, 2005 at Heartland Wood Products, 4652 Highway 145, Corydon, Kentucky. The Kentucky State Police had received an anonymous note that people were using methamphetamine at that location and might be manufacturing it upstairs. The police decided to investigate the note. Detective Matt Conley and other officers went to Heartland Wood Products on June 13, 2005. Detective Conley made no observations at the exterior of the premises that indicated the manufacture of methamphetamine.
>
> Heartland Wood Products is owned by August Kent Wilson. On the morning of June 13, Kent Wilson was in Jasper, Indiana, meeting a client. Det. Conley spoke to the office manager Janice Breedlove. Conley identified himself as a police officer and told Ms. Breedlove the reason for their visit.
>
> Breedlove called Kent Wilson on his cell phone, and Wilson and Conley spoke. Although Wilson did not know any of the officers when he spoke to Conley on the phone, he testified he had no reason to dispute that they were in fact the police. It is undisputed that Mr. Wilson gave the police permission to search downstairs. However, Wilson testified that he told Conley that he was living in the upstairs area and did not want them to search upstairs. According to Conley, Wilson told him that they could search the entire building. Wilson told Conley that he was coming back from Jasper, approximately a two hour drive.

> Conley asked Breedlove for a key to the upstairs door, but she said she did not have one. The police went upstairs. There was a gap between the wall and the ceiling. One of the officers climbed over the wall into the living area and unlocked the door for the other officers. Conley found a cigar box on a counter top. The box contained two plastic baggies of what appeared to be controlled substances. The police decided to stop their search at that point, and Conley left to obtain a search warrant.
>
> The police executed the warrant and found in the upstairs area the apparent drugs they had discovered previously, scales, several firearms (both rifles and handguns), and ammunition. In a downstairs office they also found marijuana, other paraphernalia, and another handgun. Kent Wilson returned from Jasper while the warrant was being executed. Wilson was advised of his Miranda rights and made statements to the police.

Our review of the record, including the suppression hearing, confirms that the circuit court's findings are based upon some facts contained in the record which are conflicting and therefore not substantial enough to elude review.

We shall next perform a *de novo* review of the circuit court's application of the law to ascertain whether the circuit court properly denied Wilson's motion to suppress. Based upon the totality of the circumstances surrounding the search, we hold that the circuit court should have suppressed the evidence seized by the officers.

The circuit court relied solely upon the testimony of Det. Conley in reaching the conclusion that Wilson consented to a search of the entire building. However, the evidence does not support this conclusion. First, although Wilson gave at least a limited consent to search the building, there were no exigent circumstances (such

as an odor emanating from a possible meth lab) necessitating an immediate search while he was on his way back from his business trip. Certainly there were no circumstances that would justify scaling a wall to obtain access to Wilson's personal space upstairs. Second, there was no other proof or confirmation regarding the scope of Wilson's consent, either from another police officer or from a signed consent form. Third, if Wilson had consented to a search of the entire building over the telephone, there would have been no need for Det. Conley to obtain a search warrant once they found the suspected drugs and paraphernalia in the cigar box in Wilson's living area. While Det. Conley testified that consent is sometimes withdrawn, necessitating a search warrant, it is undisputed that Wilson was not there to withdraw his consent. Therefore, there was no need to seek a warrant at that particular time. The Commonwealth's argument that Wilson was cooperative upon his return has no bearing on the extent of his initial consent, as the police had obtained a warrant by that time and Wilson was complying with the terms of the warrant.

Based upon the totality of the circumstances, it is clear that the Commonwealth did not prove by a preponderance of the evidence that Det. Conley obtained a valid consent to search the entire building. It is this Court's belief that the warrantless search of Wilson's living area was conducted without his consent and therefore the evidence obtained during that search must be excluded as fruit of the poisonous tree. *Commonwealth v. Elliott*, 714 S.W.2d 494 (Ky.App. 1986). Additionally, as the affidavit for the search warrant was based upon only the anonymous

letter and the evidence discovered in the illegal search, the evidence seized during the later search pursuant to the warrant and the statements Wilson made must also be excluded.

For these reasons, the circuit court erred in denying Wilson's motion to suppress, and we must reverse the judgment of conviction. As this holding is determinative of the appeal as a whole, we need not address Wilson's remaining arguments related to the trial of this matter, which we deem moot.

For the foregoing reasons, the judgment of the Henderson Circuit Court is reversed and this matter is remanded for further proceedings in accordance with this opinion.

COMBS, CHIEF JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, DISSENTS.

BUCKINGHAM, SENIOR JUDGE, DISSENTING: Because I believe the majority has not followed the applicable law concerning the appellate review of the denial of a motion to suppress evidence resulting from an alleged consent search, I respectfully dissent. I believe the majority has substituted its judgment for that of the trial court on the essential fact finding of consent. Thus, I would affirm the denial of the suppression motion.

RCr 9.78 states in relevant part that the factual findings of the trial court are conclusive if supported by substantial evidence. The trial court in this case made a fact finding that Wilson gave his consent for the officers to search the upstairs living area as

well as the downstairs business area of the building. That fact finding was supported by substantial evidence, that being the testimony of the police officer. Pursuant to RCr 9.78, that fact finding is conclusive and binding on this court.

The majority acknowledges that the trial court's findings are based upon facts in the record. However, the majority further states that some of the trial court's findings are based on conflicting evidence and are thus not substantial enough to elude review. In my view, the fact that there is conflicting evidence does not mean that the evidence is not substantial enough to support a fact finding being held to be conclusive upon the appellate court. Since the trial court's finding of consent was, in my opinion, based on substantial evidence (the testimony of the officer) and is thus conclusive, this court may not substitute a different finding for the finding of the trial court.

Where a trial court denies a suppression motion, the appellate court should consider the evidence "in the light most favorable to the government." *U.S. v. Carter*, 378 F.3d 584, 587 (6th Cir. 2004). The majority has not done that. Rather, the majority has reviewed the evidence in a light most favorable to Wilson and has substituted its judgment that Wilson did not give his consent to the search of his living quarters.

The majority apparently believes that the testimony of a police officer to whom the defendant gave consent is not substantial evidence to support the denial of a suppression motion when other circumstances may support the defendant's position that he did not give consent. In *Leavell v. Commonwealth*, 737 S.W.2d 695, 697 (Ky. 1987), the case relied upon by the trial court in its order denying Wilson's suppression motion, it

was the officer's word against the defendant's word. Likewise, in *United States v. Burns*, 298 F.3d 523 (6th Cir. 2002), cited by Wilson in his brief, it was the officer's word against the defendant's word. *See* 298 F.3d at 541. In each case, the trial court's order denying the suppression motion was affirmed.

I believe the majority has misconstrued the law concerning a *de novo* review of the trial court's determination. The majority bases its claim to a *de novo* review on the *Ornelas*, *Banks*, and *Stewart* cases.[2] I agree that there is a *de novo* review by this court. When the findings of fact are supported by substantial evidence, "the question necessarily becomes, 'whether the rule of law as applied to the established facts is or is not violated.'" *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998), *quoting Ornelas*, *supra*.

In this case, there was substantial evidence (the officer's testimony) to support the trial court's finding that Wilson consented to a search of the upstairs quarters. Applying the rule of law to that fact does not violate any rule of law. *See Adcock, supra*.

The majority bases its *de novo* review upon what it perceives to be the totality of the circumstances. I have no quarrel with the majority's view that consent must be determined by the trial court based on the totality of the circumstances. However, this court does not conduct a *de novo* review of the issue by rendering our own interpretation of what we believe the totality of the circumstances to be. Rather, this court simply determines whether the trial court's decision is supported by substantial evidence. *See*

[2] Those three cases all involve the appellate review of reasonable suspicion and probable cause in stop-and-frisk cases.

Talbott v. Commonwealth, 968 S.W.2d 76, 82 (Ky. 1998). Furthermore, I believe the majority has wrongly decided to render its own interpretation of the circumstances, and it has done so in a light favorable to Wilson. The result is a substitute of our judgment for that of the trial court and a reversal of the conviction.

The majority cites several examples of why it believes that the evidence does not support a fact finding of consent. First, the majority states there were no exigent circumstances. Exigent circumstances are circumstances of such urgency that there is insufficient time to procure a warrant. To support a warrantless search of a private residence based on exigent circumstances, there must also be probable cause. *See Southers v, Commonwealth*, 210 S.W.3d 173, 176 (Ky.App. 2006). The officers in this case did not have probable cause to get a warrant. Their only hope in their investigation of the anonymous letter was to go to Wilson's business and attempt to procure Wilson's consent, which they did. In short, the absence of exigent circumstances is not relevant to the circumstances of this case.

The majority also states that there were no circumstances that would justify an officer scaling a wall to enter Wilson's personal living quarters. The fact is, the court found that Wilson had given his consent to the search, the door to the residence was locked, and the officers could either scale the wall or remove the door in some manner in order to enter. Entrance by key was also an option, but the office manager did not disclose to the officers that she had a key. I submit that entrance by scaling a wall was more appropriate than breaking the door down or otherwise removing it.

Next, the majority cites the fact that there was no proof of Wilson's consent other than the officer's testimony. While that is true, such testimony alone may be substantial evidence to support the trial court's finding in this regard. *See Leavell, supra, and Burns, supra.* The majority suggests that proof from another police officer or proof of a signed consent form would have been appropriate corroborating evidence. Certainly, additional proof would have assisted the court in its fact findings. However, Wilson gave his consent over the telephone, and only the officer listening could have heard it. Additionally, a consent form was not procured because Wilson was a two-hour drive from his business/residence when he gave his oral consent. Had the officers decided to wait for two hours until Wilson arrived from Indiana so as to procure his written consent, then they ran the risk that Wilson would revoke his consent once he arrived. It is understandable that the officers would not want to take that risk but would want to search immediately.

Finally, the majority refers to the fact that the officers procured a warrant after discovering illegal drugs and drug paraphernalia in the residence. The majority concludes that this indicates the officers never had consent to enter the living quarters in the first place. In my opinion, it is just as logical to conclude that the officers obtained a warrant out of an abundance of caution. Police officers, although trained in law enforcement, should not be expected to have the knowledge or expertise of an attorney or judge on difficult issues of search and seizure. While the officers actions in procuring the warrant were unnecessary, it may just as easily be concluded that they did so out of

ignorance or an abundance of caution rather than out of a desire to validate what the majority has concluded was an improper and illegal search.

In each of the three circumstances cited by the majority, the majority has chosen to render its own interpretations of the evidence. Again, I believe this court's role is not to judge or interpret the evidence *de novo* but to determine whether there is substantial evidence to support the trial court's ruling. That the majority is substituting its view of the evidence for that of the trial court is clearly stated when the majority states that its "belief" is that the search was without Wilson's consent. I conclude that we should affirm the trial court's denial of the suppression motion because its finding of consent was supported by substantial evidence.

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