

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000092-MR

ESTHER PANGBURN

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE LEONARD L. KOPOWSKI, JUDGE  
ACTION NO. 01-CR-00247

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, McANULTY, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: As a result of an incident which occurred on April 29, 2001, Esther Pangburn entered a conditional guilty plea in the Campbell Circuit Court to the charge of trafficking in marijuana, a misdemeanor. She was sentenced to twelve months in jail, but the sentence was probated for a two-year period on various conditions. In Pangburn's conditional guilty plea she reserved the right to appeal the trial court's ruling on a

suppression of evidence issue.<sup>1</sup> Her appeal from the final judgment followed, and we affirm.

On April 29, 2001, three police officers, including Sergeant Bill Birkenhauer, went to Pangburn's residence to relate to her that she was suspected of selling drugs from her apartment. The testimony indicated that Pangburn invited the officers into the residence. Once inside, Sergeant Birkenhauer spotted a marijuana cigarette roller in plain view. He seized the roller and noted that it smelled of marijuana. Sergeant Birkenhauer then left the residence in order to procure a search warrant.

Sergeant Birkenhauer signed the affidavit in support of the search warrant, and the affidavit contained the aforementioned information. Sergeant Birkenhauer also made mention in his affidavit of a phone call that was made to Pangburn within the month preceding that date. He stated that he had an informant make a phone call to Pangburn to set up a purchase of marijuana from the residence but that Pangburn advised the informant that she was out of marijuana and for the informant to check with her at a later date. Sergeant Birkenhauer noted in the affidavit that he was present during the phone call and that he listened to the conversation. However, the marijuana transaction never took place. Sergeant

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<sup>1</sup> See Kentucky Rules of Criminal Procedure (RCr) 8.09.

Birkenhauer also stated in the affidavit that he had received information from another officer that Pangburn was a suspect in an investigation of marijuana sales in previous years.

Based on the affidavit, a district judge signed the search warrant for the Pangburn residence. Marijuana, scales, and baggies were found in the search of the residence.

Marijuana residue was also found.

A felony indictment was issued, but pursuant to a plea bargain agreement, Pangburn pled guilty to a single misdemeanor count of trafficking in marijuana. Prior to the entry of her guilty plea, Pangburn moved the court to suppress the evidence. A suppression hearing was held, but Pangburn's motion was denied. This appeal followed the entry of the final judgment in the case.

Pangburn's first argument is that the search warrant was invalid on its face. In support of the argument, Pangburn raises several points. First, she asserts that the affidavit does not state that the informant was a "reliable informant." However, it was not necessary for the affidavit to state whether or not the informant was reliable because the officer was not acting on information from the informant but was acting on his listening to the conversation between the informant and Pangburn and on his observations of the marijuana cigarette roller in plain view in the residence.

As further support for her argument that the search warrant was invalid on its face, Pangburn contends that there was apparently a discrepancy in Sergeant Birkenhauer's testimony and his affidavit in regard to exactly what the informant asked Pangburn during the phone conversation. Pangburn asserts that, had the taped conversation not been taped over by the law enforcement officers, the discrepancy could have been cleared up and the exact content of the conversation could have been determined.

We see no problems with the search warrant or the affidavit supporting it. The affidavit stated that on that day the affiant saw a marijuana cigarette roller in plain view in Pangburn's residence and that the roller smelled of marijuana. Further, the affidavit referred to a phone conversation in which Pangburn indicated she was out of marijuana but that the caller should check back at a later date. The affidavit stated that the conversation took place within the month preceding that day, and we conclude that the evidence was not stale. Furthermore, the fact that the marijuana transaction never took place does not defeat probable cause for the issuance of the warrant.

Pangburn's second argument is that the plain view doctrine does not apply to facts of this case. "The rule which has evolved is that, if a police officer is lawfully engaged in an activity in a particular place and inadvertently observes an

object in plain view that he or she has probable cause to associate with criminal activity, the officer may seize the property without a warrant." Cloar v. Commonwealth, Ky. App., 679 S.W.2d 827, 829-30 (1984). Further, "the 'plain view' exception validates searches and seizures when evidence is visible to the officer, provided the officer has not violated the constitution in getting to where he can view the evidence; the officer has lawful access to the object itself; and the object's incriminating character is immediately apparent." Clark v. Commonwealth, Ky. App., 868 S.W.2d 101, 106 (1993), citing Hazel v. Commonwealth, Ky., 833 S.W.2d 831, 833 (1992). In arguing that the plain view doctrine was not applicable to the facts of this case, Pangburn raised three separate arguments.

First, Pangburn argues that the officer, specifically Sergeant Birkenhauer, had no right to enter her apartment. We reject this argument for two reasons. First, the officers had reasonable suspicion, based on the prior phone conversation between the informant and Pangburn, which justified their approaching the residence to question Pangburn. See United States v. Tobin, 923 F.2d 1506 (11<sup>th</sup> Cir. 1991). In fact, Pangburn apparently does not question the officers' right to approach her residence to question her. Second, Pangburn

consented to the officers' entry into her residence.<sup>2</sup> Thus, we conclude that the officers had the right to be where they were.

Second, Pangburn argues that Sergeant Birkenhauer "deliberately scouted the area for any type of item he could use for a further search" and that the marijuana cigarette roller was not in plain view. The testimony at the suppression hearing was to the contrary. Sergeant Birkenhauer testified that he saw the roller in plain view shortly after entering the residence.

Third, Pangburn argues that the marijuana cigarette roller was not "immediately apparent" as drug paraphernalia and should not have been seized pursuant to the plain view doctrine. Sergeant Birkenhauer, who had been a police officer for thirteen years and was assigned to the Northern Kentucky Drug Task Force, testified that based on his experience he had never seen this type of roller used in any other capacity except for rolling marijuana cigarettes. After seizing the roller, Sergeant Birkenhauer certainly had the right to smell it. Having obtained this evidence, there was probable cause for the issuance of a search warrant of the residence.

The judgment of the Campbell Circuit Court is affirmed.

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<sup>2</sup> Pangburn maintains that the officers gained entry into her residence by "trickery," but she cites no authority to support this argument. We discern nothing improper in the manner in which the officers gained entry, and we conclude that entry was consensual.

ALL CONCUR.

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