

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001676-MR

JEANETTE LINDEMAN

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 02-CR-00022-001

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2002-CA-001686-MR

CLIFTON MACHNIAK

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 02-CR-00022-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART and REVERSING IN PART

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER AND TACKETT, JUDGES.
EMBERTON, CHIEF JUDGE. Jeanette Lindeman and Clifton Machniak appeal from the circuit court's denial of their motions to suppress evidence obtained as a result of a warrantless search. The circuit court found that the police officers were lawfully on the premises and the evidence lawfully seized. Lindeman and Machniak entered conditional guilty pleas and both appealed. We affirm in part and reverse in part.

On the afternoon of October 5, 2001, Pike County Sheriff's Deputies Chris Phillips and Bob Wright, while investigating an abandoned four-wheeler, smelled an odor of marijuana. As they exited the patrol car, they observed two juveniles walking toward them. Upon questioning the two, the deputies noticed that one smelled heavily of marijuana and visibly appeared to be under the influence of marijuana. A pat-down search of the juvenile revealed a plastic vial that was determined to contain marijuana.

After the deputies took the juvenile into custody, the deputies and the juvenile proceeded to his residence, a trailer located approximately one-fourth mile from the scene. Upon their arrival, Deputy Phillips escorted the juvenile to the front porch of the trailer. As Deputy Wright entered the yard he smelled a strong odor of marijuana. He walked around the trailer to the backyard, and in six buckets a few feet from the

trailer, in plain view, Wright observed growing marijuana plants.

Upon returning to the front of the trailer he informed Deputy Phillips of his discovery. Lindeman, the mother of the juvenile, answered the door and was immediately arrested. When asked whether anyone else was inside the residence, she acknowledged that her boyfriend, Clifton Machniak, was inside. The deputies knocked on the door and when Machniak opened the door a strong smell of marijuana emerged. From his vantage point on the front porch, Deputy Phillips could see marijuana and a scale on a coffee table. After informing the deputies that he lived at the residence, Machniak was also placed under arrest.

Lindeman and Machniak were placed in the patrol car and Deputy Phillips contacted the drug enforcement agent of the sheriff's office. While waiting for an officer to arrive, Lindeman requested that her son be permitted to enter the residence to retrieve needed medication located in a coffee table drawer. With Lindeman's consent, Deputy Phillips and the juvenile entered the residence. Deputy Phillips testified that upon crossing the threshold, he saw a plant believed to be marijuana located in the kitchen. He then walked approximately fifty feet down a hallway and in plain view observed marijuana

plants in the hallway. Peering into a bedroom he saw additional plants sitting on shelves under grow lights.

While Deputy Phillips was inside, Deputy Wright, who was outside the residence, peered into the window of an outbuilding located within five feet of the residence. The window was partially covered by a shade and the door had a lock inserted through the hasp but was not fully locked. Deputy Wright could see a light through the window and hear a fan operating. He knocked on the door and when no one answered, entered the building. Inside Wright found additional marijuana plants.

Lindeman and Machniak were charged with cultivating more than five plants of marijuana with the intent to traffic.

Our standard of review is set forth in Commonwealth v. Neal:¹

An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law. (Footnotes omitted).

¹ Ky. App., 84 S.W.3d 920, 923 (2002).

Where, as here, the factual findings are undisputed and supported by substantial evidence, the issue presented is whether the "rule of law as applied to the established facts is or is not violated."²

There is no contention by either Lindeman or Machniak that the officers did not have the right to enter onto the property and the front porch. The officers, like any other member of the general public with legitimate business, including the purpose of conducting an interview, can lawfully enter another's property.³ In this case the officers were taking the juvenile, a resident, to the home for the purpose of informing his parents of his illegal conduct. Thus, the initial issue in this case is whether Deputy Wright could lawfully travel beyond the front porch of the residence to the backyard.

The Fourth Amendment protects not only a citizen's physical residence, but also the residence's "curtilage" from unreasonable, warrantless searches and seizures.⁴ Once it is determined that the area falls within the ambit of the Fourth Amendment, a warrantless search or seizure is per se

² Davis v. Commonwealth, Ky. App., 120 S.W.3d 185, 189 (2003) (quoting Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998)).

³ See Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964).

⁴ Oliver v. United States, 466 U.S. 170, 180, 104 S.Ct. 1735, 1742, 80 L.Ed.2d 214, 225 (1984).

unreasonable.⁵ In Daughenbaugh v. City of Tiffin,⁶ the court explained the application of the search and seizure warrant requirements to areas outside the residence:

The backyard and area immediately surrounding the home are really extensions of the dwelling itself. This is not true simply in a mechanical sense because the areas are geographically proximate. It is true because people have both actual and reasonable expectations that many of the private experiences of home life often occur outside the house. (quoting Dow Chemical Co. v. United States, 749 F.2d 307 (6th Cir. 1984), *aff'd* 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986)).

However, simply because the yard surrounds a residence does not necessarily bring it within the protection afforded by the Fourth Amendment but instead the courts apply the expectation of privacy analysis. Those areas of curtilage that are impliedly open to the public are open to an officer the same as any other member of the public.⁷ In Cloar v. Commonwealth,⁸ this court had the opportunity to address whether an officer was lawfully within the curtilage of a residence and held:

[W]e hold that a police officer in the furtherance of a legitimate criminal investigation has a legal right to enter those parts of a private residential property which are impliedly open to public

⁵ Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

⁶ 150 F.3d 594, 601 (6th Cir. 1998).

⁷ State v. Crea, 305 Minn. 342, 233 N.W.2d 736 (1975).

⁸ Ky. App., 679 S.W.2d 827, 831 (1984).

use. We limit the permissible scope of this right, however, to driveways, access roads, and as much of the property's sidewalks, pathways, and other areas as are necessary to enable the officer to find and talk to the occupants of the residence. We fail to perceive that such a rule sanctions an unreasonable invasion of privacy. After all, there is nothing unreasonable about a person in broad daylight openly and peacefully walking up to the door of a residence with the honest intent of asking questions of the occupant. Whether that person happens to be "a pollster, a salesman, or an officer of the law" should be of no significance. (Citations omitted.)

The trailer in the present case is surrounded by hills and the front and back yards capable of use by its residents are visibly small. Although there is a gravel drive to the front of the trailer there are no obvious sidewalks or pathways leading to any particular part of the trailer but only a small front porch leading to the front door. Based on the evidence, we conclude that the backyard of the residence was not one open to the public and therefore subject to Fourth Amendment protection; our inquiry, however, does not end.

Deputy Wright, legitimately on the premises for the purpose of informing the parents of the juvenile's illegal activity, testified that upon entering the yard he smelled a strong odor of marijuana. The courts of this Commonwealth and the federal courts have recognized that a warrantless search

could be based on the officer's sense of smell. As stated in Copper v. Commonwealth:⁹

As long ago as 1925, this state's highest court held that a warrantless search could be based on smelling illegal liquor. The federal courts have also recognized a "plain smell" analogue to the "plain view" doctrine. (Citations omitted.)

In Johnson v. United States,¹⁰ the court recognized that an officer's smell of the odor of illegal drugs can support a finding of probable cause if the officer is qualified to know, recognize, and identify the odor and the odor is sufficiently distinctive to identify a forbidden substance.¹¹ If there is probable cause to search, and if exigent circumstances exist, a warrantless entry into a residence and its curtilage is permissible.

Deputy Wright testified that he is qualified to identify the smell of burning marijuana and identified the odor in the yard as burning marijuana. The officer's sense of smell combined with the fact that the juvenile who resided at the residence was found to possess marijuana is sufficient to establish probable cause to believe illegal activity was occurring on the premises. Additionally, where the active

⁹ Ky. App., 577 S.W.2d 34, 36 (1979)(overruled on other grounds Mash v. Commonwealth, 769 S.W.2d 42 (1989)).

¹⁰ 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

¹¹ Id. at 13, 68 S.Ct. at 369.

ingestion of narcotics that can be easily destroyed is suspected, exigent circumstances justify a warrantless entry. Deputy Wright smelled the odor of marijuana in the yard. Not being able to see anyone in the front of the yard, it was clearly reasonable for him to go to the back of the trailer. A police officer's plain view observations from a vantage point where he has a lawful right to be do not implicate the Fourth Amendment and he may rely on such observations made while in a constitutionally protected area.¹² We find no error in the circuit court's refusal to suppress the marijuana plants found in plain view in the back of the trailer.¹³

It is also contended that Deputy Phillips, after obtaining consent from Lindeman to escort her son into the residence to retrieve her medication, went beyond that consent when he ventured into parts of the trailer other than immediately inside the front door. Consent to enter a residence does not extend consent to search the residence.¹⁴ Deputy Phillips testified that he saw a marijuana plant in the kitchen and marijuana on a coffee table as soon as he entered the residence. Again, an officer is not required to ignore illegal

¹² Daughenbaugh, supra, at 601.

¹³ See Gillum v. Commonwealth, Ky. App., 925 S.W.2d 189 (1995).

¹⁴ Neal, supra.

items that are in plain view from a lawful vantage point.¹⁵ However, Deputy Phillips went beyond the purpose for which Lindeman gave consent to enter the residence. The medication was located in a drawer only a few feet from the door. Instead of merely escorting the juvenile into the residence, Deputy Phillips left the juvenile alone and ventured some fifty feet down a hallway. Although he did not open any drawers or doors, he exceeded the scope of Lindeman's permission.

Deputy Phillips contends that he walked through the residence as a measure of protection to assure that no one else was in the residence. A protective sweep can justify a warrantless intrusion into a residence only when the police have "articulable facts which, taken together, with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."¹⁶ A mere apprehension for personal safety is insufficient to create an exception to the warrant requirement.¹⁷

Applying the standard for a protective sweep it is apparent that it cannot justify Deputy Phillips' uninvited tour

¹⁵ See Gillum, supra.

¹⁶ United States v. Colbert, 76 F.3d 773, 776 (6th Cir. 1996) (quoting Maryland v. Buie, 494 U.S. 325, 335, 100 S.Ct. 1093, 108 L.Ed.2d 276 (1990)).

¹⁷ Commonwealth v. Johnson, Ky., 777 S.W.2d 876 (1989). See also Davis, supra.

of the residence. The two adult suspects were outside the residence and there was no information that a dangerous person or anyone was still in the residence. Neither Lindeman nor Machniak had ever threatened the officers or found to have been in possession of any weapons. If there were an actual fear of danger, it would have been reasonable for the officer to remain with the juvenile at the front of the trailer and after retrieving the medication, to exit the residence. Instead, Deputy Phillips went wandering through the residence and discovered the marijuana plants. While certainly there was sufficient evidence to obtain a warrant, the warrantless intrusion into areas of the residence other than in the immediate vicinity of the juvenile was illegal and the evidence seized should have been suppressed.

Finally, we can find no exception to the warrant requirement for the entry into the outbuilding. Located only within feet of the residence with partially covered windows and a visible lock, it is reasonable that the residents had an expectation that the inside of the building was not open to public view. Deputy Wright's explanation that he believed the building was occupied and its occupant a danger again seems to be only a pretext for a warrantless search. There was no evidence that anyone on the property posed a danger. In fact, it appears that at some time all the suspects were, at one time

or another, left unguarded. Based on the testimony at the suppression hearing there was no articulable fear for the officer's safety or that contraband would be destroyed. Instead, while waiting for the drug enforcement agent to arrive, the officers, to put it simply, went snooping.

The circuit court properly found that the marijuana plants seized in the backyard were discovered as the result of a warrantless search based on probable cause and exigent circumstances. The plants found within plain view upon the consensual entry into the residence are also admissible. Any evidence seized as a result of the warrantless intrusion into the hallway and the bedroom of the residence must be suppressed as well as that found in the outbuilding.

ALL CONCUR.

BRIEF FOR APPELLANT JEANETTE
LINDEMAN:

Christopher N. Lasch
GOODWIN & LASCH
Louisville, Kentucky

BRIEF FOR APPELLANT CLIFTON
MACHNIAK:

Lisa Clare
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Anitria M. Alo
Assistant Attorney General
Frankfort, Kentucky