

RENDERED: September 24, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002129-MR

MARCUS CROSBY

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE PATRICIA M. SUMME, JUDGE  
ACTION NO. 02-CR-00016

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: SCHRODER AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>  
EMBERTON, SENIOR JUDGE. Marcus Crosby was convicted of possession of a handgun by a convicted felon and sentenced to eight and one-half years' imprisonment. He alleges that the trial court erred when it denied his motion to suppress a handgun seized as the result of a warrantless search; when it refused to strike the testimony of a witness after she invoked her fifth amendment privilege against self-incrimination; and,

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

it failed to sua sponte inquire into a possible conflict of interest between defense counsel and a witness. We affirm.

On the evening of November 1, 2001, Officer Kane, a Covington police officer responded to a report of gunfire at a Sunoco station on Madison Avenue. When Kane arrived he saw people fleeing and an individual darting up an ally. Witnesses identified the shooter as Crosby who lived one block from the station. Carolyn Hocker rode to the station with two friends, Joy and Robbie Seymore, and stated that she remained in the car while the Seymores exited, a confrontation ensued, and Crosby pulled out a silver object and pointed it at Robbie Seymore. Shots were fired but no one was injured.

Shortly after the incident, police arrived at Crosby's home where he was arrested. His mother was also arrested on an outstanding warrant. Michael Graham, who finally identified himself as Crosby's mother's boyfriend and a resident of the home, was questioned regarding the location of the gun. Graham took the officer into the residence and directed them to a closet used by Crosby's sister and located in a loft area, which was used by all four residents. The police retrieved a silver-toned .22 revolver that matched the description given by Hocker.

Crosby argues that the trial court erroneously denied his motion to suppress the gun seized as a result of the warrantless search. Graham, he contends, had no authority to

give consent to search his bedroom. Consent is an exception to the warrant requirement and may be obtained from a person other than the target of the search if the consenting party possesses common authority over the premises.<sup>2</sup> The burden of proof to show that the consent was valid rests with the Commonwealth.<sup>3</sup> The standard of review of a trial court's decision on a motion to suppress requires that the appellate court determine whether the trial court's findings of fact are supported by substantial evidence. If so, they are conclusive. The appellate court must then conduct a de novo review of the application of the law.<sup>4</sup>

Graham's consent in this case was voluntary. But the question remains whether he had authority to give that consent. In Colbert the court engaged in a lengthy discussion regarding the authority of a parent to consent to the search of a child's room. We find the following relevant to our present discussion:

Both state and federal courts have interpreted search and seizure law to allow third parties to consent to the search of shared common areas. See Morris v. Commonwealth, 306 Ky. 349, 208 S.W.2d 58 (1948) (father's consent to search as "head of household" for incriminating evidence against son valid for evidence found in the kitchen) and Matlock, supra, (consent of a woman who shared a bedroom with her boyfriend in her parents' home valid).

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<sup>2</sup> Colbert v. Commonwealth, Ky., 43 S.W.3d 777 (2001).

<sup>3</sup> Gallman v. Commonwealth, Ky., 578 S.W.2d 47, 48 (1979).

<sup>4</sup> Commonwealth v. Neal, Ky. App., 84 S.W.3d 920 (2002).

Furthermore, in United States v. Hall, 979 F.2d 77 (6<sup>th</sup> Cir. 1992), the Sixth Circuit Court of Appeals held that a homeowner may consent to the search of a tenant's room, even though he never entered it while it was rented to the tenant. In Hall, the homeowner indicated that he had access to the room at all times, and that some of his personal items were stored in an adjacent room which was accessible through Hall's room. If Hall's rental agreement did not provide enough privacy to keep his landlord from consenting to a search of his room and dresser, then surely Appellant in this case can be afforded no more protection from the search to which his mother consented. Appellant never paid rent for his basement bedroom, nor did he present any evidence to indicate that he and his mother had agreed to his exclusive control of it. Like any homeowner, in the absence of an understanding to the contrary, the mother retained the right of entry to all areas of her house including the room Appellant occupied.<sup>5</sup>

Graham was not Crosby's father nor was he married to Crosby's mother, the owner of the residence. But he was a resident of the house. The issue of authority to consent does not necessarily focus on the relationship between the consenting party and the target of the search but the common authority over the premises or "other sufficient relationship to the premises or effects sought to be inspected."<sup>6</sup> We have upheld the consent to search given by a babysitter hired by the owner of the residence. The target of the search was one time a resident of

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<sup>5</sup> Id. at 780-781.

<sup>6</sup> Butler v. Commonwealth, Ky., 536 S.W.2d 139, 140 (1970).

the home but now was only a casual visitor, so the babysitter had the superior right of dominion and control. In Garr v. Commonwealth,<sup>7</sup> the defendant's sister, the court held, could validly consent to the search of her brother's bedroom on the basis that the sister had rights at least co-extensive with her brother.

Graham lived in the residence and, although not Crosby's father, had common authority over the premises and his rights were at least co-extensive with the Crosbys. The gun was found in a common area shared by all four residents of the house and in a closet used by Crosby's sister. We see no cause to distinguish this situation from one where an adult child occupies space in a residence owned by both parents. In today's society where step-parents and unmarried cohabitation are common living arrangements, the burden on an officer to investigate the family relationship between the occupants would be virtually impossible. The search and seizure pursuant to the consent given by Graham was valid.

The remaining issues raised were not preserved for review. After review of the record, we find no palpable error and decline to address the alleged unpreserved errors.<sup>8</sup>

The judgment is affirmed.

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<sup>7</sup> Ky., 463 S.W.2d 109, 114 (1971).

<sup>8</sup> Kentucky Rules of Criminal Procedure (RCr) 10.26

ALL CONCUR.

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