

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002344-MR

LAURO E. SALINAS

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 02-CR-00136

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, COMBS, AND DYCHE, JUDGES.

BUCKINGHAM, JUDGE: Lauro E. Salinas appeals from a judgment of the Henderson Circuit Court wherein he was convicted of trafficking in a controlled substance within 1,000 yards of a school and possession of drug paraphernalia and was sentenced to three years in prison. The issue is whether the trial court erred in denying Salinas's motion to suppress evidence. We conclude that the court did not err and thus affirm.

Salinas and his wife, Alicia, leased an apartment in Henderson, Kentucky. Only Alicia's name was on the lease. On

April 18, 2002, they had a domestic dispute, and Salinas ordered Alicia to leave.

Later that evening, Alicia called the police and asked that she be escorted to the apartment by police officers so that she could get her clothing and personal belongings. Officer Greg Durbin met Alicia and accompanied her to keep the peace while she did so. Two other officers met Alicia and Officer Durbin at the apartment.

When the officers knocked on the front door of the apartment, Salinas opened the door and was advised by Officer Durbin that Alicia wanted to get some personal belongings. Salinas agreed and stated that he would stay outside with the officers while Alicia entered the apartment to get her belongings. Officer Durbin accompanied Alicia into the residence and went up the stairs to the bedroom with her so that she could gather her property.

While Alicia was gathering her belongings, Officer Durbin observed a burnt marijuana cigarette on a red container by the bed. He inquired as to who was the lessee of the apartment and then asked Alicia for consent to search the premises. Alicia consented to the search, and she also told the officers that Salinas was wanted on a warrant from Texas. The officers confirmed that Salinas was wanted on a warrant, and he was arrested.

As Officer Durbin was walking down the stairs in the apartment, he spotted a bag of marijuana in plain view beside the couch. A canine unit subsequently arrived, and the entire home was searched. Weighing scales were recovered as well as another bag of marijuana. Also, plastic bags were seized in addition to the marijuana cigarette found earlier in the bedroom and the bag of marijuana spotted beside the living room couch.

Salinas was charged in a grand jury indictment with trafficking in a controlled substance within 1,000 yards of a school, possession of drug paraphernalia, and second-degree persistent felony offender. Pursuant to a plea agreement with the Commonwealth, he entered a conditional guilty plea to trafficking in a controlled substance within 1,000 yards of a school and possession of drug paraphernalia. The persistent felony offender charge was dismissed.

Salinas was sentenced pursuant to the plea agreement to three years on the trafficking charge and twelve months on the drug paraphernalia charge. The two sentences were ordered to run concurrently. This appeal by Salinas challenging the court's denial of his motion to suppress followed.

In its order denying Salinas's motion, the circuit court found that Officer Durbin had entered the residence at Alicia's request. Further, the circuit court found that the marijuana beside the bed and the marijuana bag beside the couch

were in plain view and were admissible as evidence pursuant to the plain view doctrine. Also, the court found that the remaining evidence was seized pursuant to the consent search authorized by Alicia.

The standard of review of a circuit court's decision on a suppression motion has two parts. "First, the factual findings of the court are conclusive if they are supported by substantial evidence. The second prong involves a de novo review to determine whether the court's decision is correct as a matter of law." Stewart v. Commonwealth, Ky. App., 44 S.W.3d 376, 380 (2000). See also Commonwealth v. Neal, Ky. App., 84 S.W.3d 920, 923 (2002).

Salinas first argues that neither he nor Alicia consented to Officer Durbin or any officer entering the apartment. Alicia testified at the suppression hearing that she wanted the officers to accompany her to the apartment but that she never asked them to come inside with her while she got her belongings. She stated that after Salinas stepped outside the apartment, she told the officers to wait there with him while she got her clothes. She further testified that Officer Durbin said, "No, I have to go with you." Salinas testified he stated that Alicia could go in the apartment and get her belongings but that the officers would have to stay outside with him. On the

other hand, Officer Durbin testified that Alicia requested he enter the apartment with her.

The trial court found that “[a]t Ms. Salinas’ request, Durbin escorted her upstairs to the bedroom.” Based on the testimony of Officer Durbin, there was substantial evidence to support the finding of the trial court that the officer entered the residence at Alicia’s request. Thus, the court’s conclusion that Officer Durbin had a legal right to be inside the apartment was not error.

Once inside the apartment, Officer Durbin observed the burnt marijuana cigarette by the bed and the bag of marijuana beside the couch in plain view. “[T]he ‘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). We agree with the trial court that these two items of evidence were admissible in light of Officer Durbin lawfully being in the residence and the bedroom at the request of Alicia and seeing the items in plain view.

Salinas next argues that even if Alicia did consent to the officer entering the apartment and did consent to a search of the premises, she had no authority to do so because she had abandoned the premises. He also argues that it was improper for the officers to rely on her consent when he was present at the apartment and refused to give his consent. In support of his argument, Salinas cites Illinois v. Rodriguez, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990), and Roberts v. United States, 332 F.2d 892 (8th Cir. 1964).

In Illinois v. Rodriguez, the U.S. Supreme Court agreed that a former live-in girlfriend who had moved out nearly a month before the search, who was neither on the lease nor paid any rent, and who had limited authority to enter or have guests in the apartment did not have actual common authority over the premises so as to give consent for law enforcement officers to search the premises. 497 U.S. at 180-82. In Roberts v. United States, the 8th Circuit upheld the consent search on the ground that Mrs. Roberts exercised joint control over the residence with her husband and had thus consented voluntarily to the search of the home. 332 F.2d at 896-97.

In Commonwealth v. Sebastian, Ky., 500 S.W.2d 417 (1973), the court addressed the issue of who could consent to the entry into the residence and search of the premises by law enforcement officers where the wife lived in the home. The

court held that "a wife's voluntary consent to a search of a home makes admissible as evidence against a husband the fruits of a search." Id. at 419. Further, in McQueen v. Commonwealth, Ky., 669 S.W.2d 519 (1984), the Kentucky Supreme Court upheld a search pursuant to the consent of the defendant's live-in girlfriend. Id. at 523. The court stated that "[c]onsent may be given by anyone who has 'common authority over or other sufficient relationship to the premises . . . sought to be inspected.'" Id., citing Sanders v. Commonwealth, Ky., 609 S.W.2d 690 (1980).

In the Sanders case the police were given permission to search by Sanders's mother-in-law. The mother-in-law, who was a co-tenant sharing the apartment with Sanders and his wife, gave her consent while Sanders was present at the apartment. In U.S. v. Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), the Supreme Court upheld the consent to search a bedroom given to police by a girlfriend who shared the room in her parents' home with the defendant. 415 U.S. at 166. At the time the consent to search was given by the girlfriend to the police, the defendant was in police custody in the front yard of the home. It is important to note that in both the Sanders and the Matlock cases, the police officers relied on the consent of a third party while the defendant was present. In other words, the focus is not on whether the defendant was or was not

present, but the focus is on whether the third party had common authority over or other sufficient relationship to the premises to be searched. If so, then the issue becomes whether the consent was voluntarily given.

In the case *sub judice*, Alicia was a lessee of the apartment. She resided in the apartment with Salinas and had equal rights of access to it. The fact that Salinas had ordered her out of the apartment earlier in the day does not mean that she did not have common authority over it. The facts are distinguishable from the facts in Illinois v. Rodriguez where the girlfriend had moved out nearly a month before the search. Therefore, we conclude that Alicia had the authority to consent to the search of the apartment.

Next, Salinas contends that any consent given by Alicia was not voluntarily given but was obtained by coercion. In this regard he asserts that Officer Durbin did not request Alicia to sign the consent to search form until after the search had been completed. In support of his argument, he cites Thomas v. Commonwealth, 226 Ky. 101, 10 S.W.2d 606 (1928), and Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968). Salinas cites the Thomas case for the premise that for consent to be valid it must precede the allegedly illegal police conduct. Id. at 607. He argues that consent cannot apply in this case because Officer Durbin never had permission

to enter the residence much less the bedroom. Thus, he maintains that the illegal conduct occurred prior to any consent.

We have already rejected Salinas's argument that the officer was in the apartment illegally; thus, the Thomas case has no application to the facts of this case. The Bumper case is also not applicable. In the Bumper case the officers procured consent to search based on their claim that they possessed a valid search warrant. In fact, the officers did not have a valid warrant. The court held that the consent to search was not valid under those circumstances. That case has no application to this case because the officers here never claimed to have had a warrant.

The circuit court did not err in denying Salinas's suppression motion. The judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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