

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-002480-MR

DEDRA HATCHER

APPELLANT

v. APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
INDICTMENT NO. 02-CR-00072

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: COMBS, JOHNSON, and MINTON, Judges.

MINTON, Judge: Dedra Hatcher appeals following a conditional plea of guilty to the charge of possession of drug paraphernalia, entered pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09, prompted by the circuit court's denial of her motion to suppress a pipe found during a warrantless search of her home. The circuit court denied the motion based on its conclusion that the pipe was in "plain view" and, therefore, fit within an exception to the warrant requirement of the Fourth

Amendment to the United States Constitution and Section 10 of the Kentucky Constitution.

The underlying case began when Officer Darryl Carr of the Paducah Police Department responded to a complaint regarding a possibly abandoned minor. When he first knocked on the door to Hatcher's residence, he received no answer. Carr then looked through the side window of the house and saw someone asleep on the couch. He again knocked on the door, this time awakening Hatcher's minor son,¹ who answered the door.

When the door was opened, Carr saw a pipe on a table across the room from where he was standing. Carr described the pipe as being ceramic, having a stem two to four inches long, with a large bowl with a skull on the front of it. During his testimony, Carr held his hands apart in order to approximate the size of the pipe, which approximation appeared more consistent with the larger range described in his testimony. Similarly, in describing the size of the pipe's bowl, he made a circle as large as could be made while maintaining contact between his thumb and fingers.

Upon seeing the pipe, Carr entered the house. He testified that after he picked up the pipe, he detected the odor of marijuana emanating from it. Carr then seized the pipe,

¹ Carr estimated the minor to be approximately twelve years old.

which would serve as the basis for a single charge of possession of drug paraphernalia.² No marijuana, other drugs, or other paraphernalia were discovered in Hatcher's residence.

In its order denying Hatcher's motion to suppress the pipe, the circuit court found that the pipe was observed by Officer Carr while he was in a place he was legally entitled to be and, thus, fit within the "plain view" exception to the prohibition against warrantless searches. While the Commonwealth devotes a great deal of effort on appeal arguing that the pipe was produced as a result of a consensual search, its theory below was one of "plain view" as reflected by the circuit court's order. Therefore, we will not reach its consent argument, it not having been properly presented below.³

The "plain view" exception to the prohibition against warrantless seizure was first articulated by the United States Supreme Court in Coolidge v. New Hampshire.⁴

² See Ky. Rev. Stat. (KRS) 218A.500.

³ See, e.g., Kennedy v. Commonwealth, Ky., 544 S.W.2d 219 (1976); Ky. R. Civ. P. (CR) 76.12(4)(c)(v). Indeed, determining whether the search was consensual would be extremely difficult in that the Commonwealth's theory is that Hatcher's twelve-year-old son gave valid consent for a search of his mother's home and possessions. Even if we assume such a theory to be legally viable, we could not make that determination based on the hearing conducted in this case because the Commonwealth failed to present the testimony of the minor. Without that testimony, no determination can be made as to whether the alleged consent was voluntarily given. See Gallman v. Commonwealth, Ky., 578 S.W.2d 47, 48 (1979).

⁴ 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2 564 (1971).

Several elements must exist for this exception to be allowed. First, the law enforcement officer must not have violated the Fourteenth Amendment in arriving at the place where the evidence could be plainly viewed. Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must have a lawful right of access to the object itself. Finally, the object's incriminating character must also be immediately apparent. Justice Stewart, writing for the majority in Coolidge, added a fourth limitation on the plain view doctrine, but this requirement did not represent the majority view. The "inadvertent discovery" element required the discovery of the evidence in plain view to be inadvertent.

The U.S. Supreme Court recently reiterated the requirements of the plain view doctrine in Horton v. California,^[5] and expressly rejected the "inadvertent discovery" requirement set forth in the plurality opinion of Coolidge. The question of "inadvertent discovery" does not present an addressable issue in this case. Even if it were an issue, the U.S. Supreme Court, after Horton, no longer regards it as a requirement. We shall follow their lead.⁶

In this case, no argument is made regarding the propriety of Carr's approaching the house and knocking on the door. He was not in violation of the Fourteenth Amendment standing in the doorway looking in the house. However, the

⁵ 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

⁶ Hazel v. Commonwealth, Ky., 833 S.W.2d 831, 833 (1992) (internal quotation and citations omitted).

search must fail under the second two elements of the "plain view" analysis.

While we do not have specific findings on this issue from the circuit court, based on the evidence presented, we conclude that Carr did not have a lawful right of access to manipulate the pipe in that his entry into the house was illegal. Carr did not have a warrant authorizing entry into the house so, to be proper, his entrance must have been under some exigent circumstance which allows an exception to the warrant requirement.⁷ However, no such exigency existed. Carr's reason to be at the house was in response to a complaint of an abandoned minor; therefore, he had no reason to believe that his safety was being threatened by an individual hiding in the house.⁸ Similarly, since no one was home and the premises could easily be secured, there was no reason to believe the evidence would be destroyed or disposed of before a warrant could be procured. In that no exigent circumstance justified Carr's entrance into the house, only his perceptions gathered standing at the door may be considered. Under the third prong of the "plain view" analysis, the criminal nature of the pipe must have

⁷ See Texas v. Brown, 460 U.S. 730, 738, 103 S.Ct. 1535, 75 L.Ed.2d 502, 511 (1983).

⁸ Carr testified that he did not believe anyone was home other than the minor.

been immediately apparent to Carr based on his perceptions while standing at the door.

The meaning of "immediately apparent" has been the subject of much litigation. We find helpful the analysis of the United States Court of Appeals for the Sixth Circuit in United States v. McLevain,⁹ a case in which drug paraphernalia was discovered during the execution of a warranted search for an escaped fugitive.

The factors include 1) a nexus between the seized object and the items particularized in the search warrant, 2) whether the "intrinsic nature" or appearance of the seized object gives probable cause to believe it is associated with criminal activity, and 3) whether the executing officers can *at the time* of discovery of the object on the facts then available to them determine probable cause of the object's incriminating nature.¹⁰

Indeed, the police may not rely on the "plain view" exception if they entertain a level of suspicion less than probable cause.¹¹

Unlike McLevain, there was no warrant involved here. Therefore, the Sixth Circuit's first analytical factor is irrelevant.

⁹ 310 F.3d 434 (6th Cir. 2002).

¹⁰ *Id.* at 441, *citing*, United States v. Beal, 810 F.2d 574, 576-577 (6th Cir. 1987) (internal quotation marks omitted)(original emphasis).

¹¹ Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987).

Moving to the second and third factors, we must consider whether the intrinsic nature or appearance of the pipe gave probable cause to believe it was associated with criminal activity and whether Carr could, at the time of the pipe's discovery, determine probable cause of its incriminating nature. Because Carr relied exclusively on the pipe's appearance in making his determination, we may analyze these factors concurrently.

A review of the relevant statutes is informative in determining whether Carr had probable cause to believe the pipe constituted illegal drug paraphernalia. Kentucky Revised Statutes (KRS) 218A.500 provides in relevant part:

As used in this section and KRS 218A.510:

(1) "Drug paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. It includes, but is not limited to:

. . . .

(1) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body,

such as: metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls; water pipes; carburetion tubes and devices; smoking and carburetion masks; roach clips which mean objects used to hold burning material, such as marijuana cigarettes, that have become too small or short to be held in the hand; miniature cocaine spoons, and cocaine vials; chamber pipes; carburetor pipes; electric pipes; air-driven pipes; chillums;¹² bong; ice pipes or chillers.¹³

¹² Internet research revealed the following answer to the question of what is a chillum:

The Chillum is a kind of narrow funnel made of clay and other materials. The funnel can only be used for smoking when it has a filter stone inside it or the smoking substance will fall right into your mouth. To avoid burning your hands the Chillum is being smoked [sic] through a cloth.

Originally the Chillum was made from fired clay but they also exist in wood, stone and glass. It is thought to originate in India, although they [sic] were also found in South America. The Chillum is special as its origin is purely spiritual. The holy men from India, the Sadhu (Hindu Priests), have been smoking their Chillums for thousands of years. Smoking a Chillum for a Sadhu is like drinking red wine for a catholic [sic] priest. In the Sixties the Chillum started being used in Europe and America by the Hippie movement.

[Http://www.easybongs.com/shop/easybongs/chillum.html](http://www.easybongs.com/shop/easybongs/chillum.html) (last visited 1/14/04).

¹³ An "ice pipe" is a cylindrical glass pipe with one end shaped like a glass bulb, used to smoke crystal methamphetamine, a/k/a "ice."

The methamphetamine is placed in the bulb end of the glass pipe, heated by a cigarette lighter or butane lighter. The heated "ice" turns into a vapor which is inhaled by the user. After the methamphetamine is smoked by a user a milky white residue remains on the inside of the bulb. This residue is methamphetamine.

- (2) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia for the purpose of planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packing, repacking, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter.

As is obvious from even the most cursory reading of the statute, any conceivable object could be considered "drug paraphernalia" if it is used or intended to be used in a manner associated with a controlled substance. To assist in the determination, KRS 218A.510 provides:

In determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

- (1) Statements by an owner or by anyone in control of the object concerning its use;
- (2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;
- (3) The proximity of the object, in time and space, to a direct violation of KRS 218A.500(2), (3) or (4);

[Http://www.honoluluupd.org/meth.htm](http://www.honoluluupd.org/meth.htm) (last visited 1/14/04).

- (4) The proximity of the object to controlled substances;
- (5) The existence of any residue of controlled substances on the object;
- (6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of KRS 218A.500(2), (3) or (4); the innocence of an owner, or of anyone in control of the object, as to a direct violation of KRS 218A.500(2), (3) or (4) shall not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia;
- (7) Instructions, oral or written, provided with the object concerning its use;
- (8) Descriptive materials accompanying the object which explain or depict its use;
- (9) National and local advertising concerning its use;
- (10) The manner in which the object is displayed for sale;
- (11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
- (12) Direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;
- (13) The existence and scope of legitimate uses for the object in the community;
- (14) Expert testimony concerning its use.

At the time he viewed the pipe, Carr had not spoken with Hatcher. He therefore had no knowledge of any statements by her concerning the pipe's use.¹⁴ Though Hatcher had previously been convicted of possession of drug paraphernalia, we have been pointed to nothing in the record to suggest that Carr was aware of this conviction at the time.¹⁵ Furthermore, there were no controlled substances in the house, nor was any residue of a controlled substance visible on the pipe. There were no descriptive materials, advertising, or directions found regarding the pipe.

Carr testified that although this pipe could be used for smoking tobacco, he associated it more with marijuana. He also stated that this pipe was more like something one would find at a headshop than a tobacconist. When questioned why he was of this opinion, Carr offered no objective reason based on the characteristics of the pipe itself, instead offering that his conclusion was based on his experience. However, he gave no explanation regarding what characteristic(s) of the pipe led him to that conclusion.

¹⁴ That he spoke with her regarding the pipe after it had already been seized is irrelevant to determining whether he initially had probable cause.

¹⁵ Though we need not address it here, there exists a potential conflict between KRS 218A.510(2) and Ky. R. Evid. 404(b).

In United States v. Search of Music City Marketing, Inc.,¹⁶ the Sixth Circuit discussed at length the characteristics of several seized items which supported the conclusion that those items were drug paraphernalia in violation of 21 U.S.C. § 863. In affirming the district court's determination that several pipes and other items were indeed prohibited drug paraphernalia, the Court related the evidence below as follows:

After conducting a two day evidentiary hearing, the district court individually evaluated each item at issue in detail. The court considered: descriptive material included with some of the seized items, the fact that Music City's retail stores sold legitimate tobacco products, testimony from multiple witnesses, advertised and actual uses of the items in the community, a treatise defining slang terms, and expert testimony concerning the items' uses. With regard to the pipes, the court credited Custom Agent Mangione's expert testimony as to their use in the community and their design characteristics. Agent Mangione had been involved with drug paraphernalia investigations since 1989 and had extensive training and experience dealing with drug paraphernalia. The court observed that Agent Mangione testified as to the various pipes' design characteristics that were more consistent with marijuana than tobacco use, including an invariably small bowl size, bowl covers without holes, lack of traditional mouthpieces and stems, lack of filters, and the fact that the pipes were constructed of material that would become too hot to hold in one's mouth if

¹⁶ 212 F.3d 920 (2000).

smoked for any length of time. [] With respect to the metal screens, the court noted that Agent Mangione testified that they were commonly used in small marijuana pipes to keep seeds and stems from being sucked into the smoker's throat, but were not used in traditional tobacco pipes.¹⁷

In this case, Carr testified that the pipe had none of the characteristics outlined above which would indicate it was designed to be used with marijuana rather than tobacco. In fact, its large bowl, long stem, lack of a screen, and lack of any carburetion or cooling mechanism indicate more that it is designed to be used with tobacco. While it is, of course, true that a tobacco pipe can be used as drug paraphernalia, there was no evidence presented from which Carr could have had probable cause to believe this pipe was being used to smoke marijuana. He testified that the pipe had a skull on the front, but that at most makes the pipe unusual.¹⁸ "[T]he police are not authorized to seize odd items."¹⁹ That an object appears out of place does not automatically create probable cause to believe the item is contraband or stolen.²⁰ Therefore, the criminal nature of the

¹⁷ *Id.* at 928.

¹⁸ See, e.g., <http://www.pipes2smoke.com> (last visited 1/14/04) for a display of highly unusual and often highly ornate collector pipes. It is common, especially for meerschaum pipes, to have some sort of face or figure adorning the bowl.

¹⁹ *U.S. v. McLevain*, *supra*, at 442.

²⁰ *Arizona v. Hicks*, *supra*.

pipe was not "immediately apparent" in satisfaction of the requirements for its discovery in "plain view."

Even were we to assume for the purpose of argument that Carr's entry into the house was not illegal, he still lacked probable cause to believe the pipe was drug paraphernalia. He testified that only upon picking up the pipe did he smell marijuana. His picking up and handling the pipe is analogous to the actions of the officers in Arizona v. Hicks, *supra*, in picking up and manipulating the out-of-place stereo equipment in order to discern its serial numbers. The Supreme Court in Hicks found the manipulation of the equipment to be a second search which, therefore, precluded the incriminating nature of the equipment from having been in plain view.

Here, Carr's picking up and smelling of the pipe is exactly the type of second search condemned in Hicks. For the pipe to have been in plain view, its incriminating nature must have been immediately apparent before being manipulated, which Carr clearly testified it was not. Therefore, even if we had not found Carr's entry into the house to have been illegal, we would nevertheless be required to suppress the pipe because it was not discovered pursuant to the "plain view" exception to the warrant requirement.

In sum, there was not substantial evidence to support a finding that Officer Carr had probable cause to believe that

the pipe in question was illicit drug paraphernalia. As such, the circuit court erred when it refused to suppress the pipe. Its judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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