

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-000522-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NO. 99-CR-001085

MARJORIE SHAW

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART AND REMANDING

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BEFORE: COMBS, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: The Commonwealth of Kentucky has appealed from an order entered by the Jefferson Circuit Court on February 6, 2003, which granted Marjorie Shaw's motion to suppress the evidence seized from her residence pursuant to a warrantless search and dismissed the indictment against her, with prejudice. Having concluded that the trial court's findings are supported by substantial evidence and that the trial court correctly applied the law to those findings, we affirm the trial court's

ruling on the motion to suppress. Having further concluded that the trial court was required to obtain the Commonwealth's consent prior to dismissing the indictment against Shaw,<sup>1</sup> we reverse in part and remand for further proceedings consistent with this Opinion.

On January 8, 1999, several items of contraband were seized pursuant to a warrantless search of Shaw's residence, which is located at 10004 Lochwick Way in Jefferson County, Kentucky. Shaw was indicted on April 28, 1999, by a Jefferson County grand jury and charged with trafficking in methamphetamine;<sup>2</sup> possession of a controlled substance in the first degree (methamphetamine);<sup>3</sup> possession of drug paraphernalia, while in possession of a firearm;<sup>4</sup> and possession of marijuana, while in possession of a firearm.<sup>5</sup> On May 10, 1999, Shaw entered a plea of not guilty and the case proceeded to trial. After several continuances, the case was set for a jury trial on January 29, 2003. Shortly before the trial was set to begin, Shaw made an oral motion to suppress the evidence

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<sup>1</sup> Shaw has conceded this error.

<sup>2</sup> Shaw was indicted under the former Kentucky Revised Statutes (KRS) 218A.1435. The statute was repealed effective July 14, 2000. See 2000 Ky. Acts. ch. 169, § 2, eff. 7-14-2000. The offense of trafficking in methamphetamine is now punishable under KRS 218A.1412.

<sup>3</sup> KRS 218A.1415.

<sup>4</sup> KRS 218A.500 and KRS 218A.992.

<sup>5</sup> KRS 218A.1422 and KRS 218A.992.

seized from her residence. The trial court decided to entertain the motion, over the Commonwealth's objection,<sup>6</sup> and a suppression hearing was held on January 29, 2003.

Officer Jessie Hayes and Detective Todd Mottley of the Jefferson County Police Department testified on behalf of the Commonwealth at the suppression hearing. Officer Hayes testified that on January 8, 1999, she was responding to a call for assistance from another officer when she noticed two men fighting in front of Shaw's residence. According to Officer Hayes, one of the men took off running in the direction of Shaw's residence as soon as he noticed her. Officer Hayes testified that she immediately called for "back-up" and waited for assistance to arrive. Officer Hayes stated that Officer William Howard, who is also employed by the Jefferson County Police Department, arrived on the scene shortly thereafter. Officer Hayes explained that she then approached Shaw's residence. According to Officer Hayes, she was greeted by Shaw who informed her that the man she was looking for had run around the back of the house. Officer Hayes stated that she obtained permission from Shaw to search her residence for the suspect, whom she found hiding in one of the bedrooms. Officer Hayes explained that she immediately placed the man, who was later identified as Marvin "Glenn" Riggs, under arrest and escorted

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<sup>6</sup> The Commonwealth claimed it was unprepared to proceed with the motion on such short notice, and Shaw had no objection to a continuance.

him to her police cruiser. Officer Hayes stated that she did not reenter Shaw's residence after she escorted Marvin from the house.

Det. Mottley testified that by the time he arrived on the scene Marvin had already been placed under arrest. Det. Mottley stated that Marvin informed him that Shaw sold drugs from her residence and that she had recently sold drugs to his daughter. Det. Mottley testified that he then approached Shaw and asked for permission to search her residence. According to Det. Mottley, Shaw agreed to let him search her residence. Det. Mottley stated that he immediately proceeded to the master bedroom, where he found several items of contraband, namely, a plastic bag containing "white powder", a .38 caliber handgun, three partially burnt marijuana cigarettes, and several items of drug paraphernalia.<sup>7</sup> Det. Mottley stated that Officer Howard then entered the bedroom, placed Shaw under arrest, and removed her from the residence. Det. Mottley testified that he stopped the search at this point and proceeded to obtain a search warrant.<sup>8</sup> Det. Mottley explained that he returned several hours later with a search warrant and continued the search.<sup>9</sup> On cross-

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<sup>7</sup> Det. Mottley stated that Marvin had informed him that Shaw kept her drugs in the bedroom headboard.

<sup>8</sup> Det. Mottley explained that he believed a search warrant was necessary due to the fact Shaw was no longer "available" to revoke her consent.

<sup>9</sup> Unfortunately, we are unable to discern whether any additional evidence was seized pursuant to the second search as the inventory list submitted by Det.

examination, Det. Mottley stated that he never asked Shaw to sign a written consent form. Det. Mottley further stated that he was the only officer present when Shaw consented to the search.

James Riggs also testified at the suppression hearing. James explained that Marvin is his cousin. James stated that he was fighting with Marvin in front of Shaw's residence on January 8, 1999. James further stated that Marvin jumped up and ran into Shaw's residence shortly after two police officers arrived on the scene. According to James, one of the officers stayed with him while the other officer pursued Marvin. James stated that he was taken into Shaw's residence shortly thereafter and handcuffed to the kitchen table. James testified that one of the officers also handcuffed Shaw to the kitchen table. James stated that Shaw was in his presence from the time Marvin was found until James was placed under arrest and escorted off the premises. James stated that he never heard any of the officers ask Shaw for permission to search her residence. According to James, Det. Mottley entered the residence only after several other officers had already proceeded to search Shaw's home for drugs.

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Mottley fails to indicate which items were seized pursuant to the initial search and which items were seized pursuant to the second search. We are aware, however, that at some point, approximately 19.53 grams of methamphetamine was seized from Shaw's residence.

Shaw was the last witness called to testify at the suppression hearing. Shaw claimed she was unaware that Marvin and James were fighting in her front yard on January 8, 1999. Shaw stated that she was in the kitchen tending to her plants when Officer Hayes entered her home and informed her that Marvin had just entered her residence. Shaw further stated that James and Officer Tim Brown, who is also employed by the Jefferson County Police Department, entered her residence shortly thereafter. According to Shaw, both officers then proceeded to search for Marvin. Shaw stated that Officer Hayes never asked for permission to search her residence. In fact, Shaw testified that Officer Hayes told her that she did not need her permission since she had witnessed Marvin enter the residence. Shaw stated that the officers found Marvin hiding in her son's bedroom. According to Shaw, the officers placed Marvin under arrest and removed him from her residence. Shaw claims that several officers then came back into her home, handcuffed her to the kitchen table, and proceeded to search her residence for contraband. Shaw stated that she never granted any of the officers permission to search her residence. Moreover, Shaw claimed that she never spoke with Det. Mottley.

At the conclusion of the suppression hearing, the trial court granted Shaw's motion to suppress the evidence seized from her residence. Pursuant to Shaw's request, the

trial court also dismissed the indictment against her.<sup>10</sup> On February 6, 2003, the trial court entered a written order summarizing its ruling, which states, in relevant part, as follows:

The Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution require that all searches and seizures be conducted either pursuant to a warrant supported by probabl[e] cause, or when an exception to the warrant requirement exists. Consent is a waiver of the right for the police to proceed by a search warrant. To establish consent, the Commonwealth has the burden of proof to show by a preponderance of the evidence that the consent was obtained freely and voluntarily without any threats or express or implied coercion. All of the factual circumstances must be analyzed to determine whether the consent was voluntary or coerced. In this case, Detective Mottley testified that he obtained Marjorie Shaw's consent to search her residence during a knock-and-talk pertaining to a drug complaint. Detective Mottley did not have Ms. Shaw sign a written consent form documenting her consent to the police search. Nevertheless, Detective Mottley testified that after finding various illegal drugs in Shaw's residence, Shaw was placed under arrest and taken into custody. Detective Mottley further testified that only then did he obtain a search warrant from a District Court Judge based upon the drugs seized pursuant to the consent search.

Having heard the testimony of the witnesses and having considered the arguments of counsel, the Court finds that the Commonwealth failed to meet its burden of proof to show by a preponderance of the

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<sup>10</sup> The Commonwealth objected to the indictment being dismissed.

evidence that consent was obtained from Marjorie Shaw prior to the warrantless search being conducted. The Court finds that officers of the Louisville Division of Police performed a warrantless search, without consent, of the premises at 10004 Lochwick, Louisville, Kentucky, and said search and seizure was in violation of the Fourth Amendment to the United State[s] Constitution and Section 10 of the Kentucky Constitution.

This appeal followed.

The Commonwealth claims the trial court erred by granting Shaw's motion to suppress the evidence seized from her residence. The Commonwealth's argument in this respect is two-fold. First, the Commonwealth contends the trial court's findings of fact are clearly erroneous. Second, the Commonwealth claims the trial court's legal conclusions are incorrect. In addition, the Commonwealth asserts that the trial court erred by dismissing the indictment against Shaw without its consent.

We begin our analysis by setting forth the proper standard of review. As this Court stated in Commonwealth v. Neal:<sup>11</sup>

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

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<sup>11</sup> Ky.App., 84 S.W.3d 920, 923 (2002).

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 [footnote omitted].<sup>12</sup>

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]"<sup>13</sup> This constitutional right, like all others, may be waived by voluntary consent.<sup>14</sup> When the Commonwealth seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving, by a preponderance of the evidence, that the defendant voluntarily consented to the search in question.<sup>15</sup> Moreover, "[t]he question of whether consent has been given is a question of fact for the trial court to determine in accordance with the foregoing accepted principles of law and subject to appellate review within the 'clearly erroneous' rule" [footnote omitted].<sup>16</sup>

As previously discussed, the trial court in the case sub judice found that the Commonwealth had "failed to meet its

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<sup>12</sup> Id. (citing Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998); and Commonwealth v. Opell, Ky.App., 3 S.W.3d 747, 751 (1999)).

<sup>13</sup> U.S. Const. amend. IV. Section 10 of the Kentucky Constitution accords the same rights.

<sup>14</sup> Wren v. United States, 352 F.2d 617, 618 (10th Cir. 1965) (citing Thomas v. United States, 154 F.2d 365 (10th Cir. 1946)).

<sup>15</sup> Anderson v. Commonwealth, Ky.App., 902 S.W.2d 269, 271-72 (1995) (citing Cook v. Commonwealth, Ky., 826 S.W.2d 329 (1992)).

<sup>16</sup> Wren, 352 F.2d at 618-19.

burden of proof to show by a preponderance of the evidence that consent was obtained from Marjorie Shaw prior to the warrantless search being conducted." The trial court based its finding in large part on Shaw's testimony at the suppression hearing. Shaw testified that she never granted any of the officers permission to search her residence. Moreover, Shaw stated that she never spoke with Det. Mottley. When the trial court is faced with conflicting testimony regarding whether consent was obtained from a defendant seeking to suppress evidence seized pursuant to a warrantless search, "its determination, including its evaluation of credibility, if supported by substantial evidence, is conclusive."<sup>17</sup> Simply stated, "[i]t is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence."<sup>18</sup> We conclude that the trial court's finding that the Commonwealth failed to establish by a preponderance of the evidence that Shaw consented to the search of her residence is supported by substantial evidence. Consequently, the question now becomes, "whether the rule of

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<sup>17</sup> Henson v. Commonwealth, Ky., 20 S.W.3d 466, 469 (2000). See also United States v. Fierro, 38 F.3d 761, 771 (5th Cir. 1994); United States v. Hernandez, 5 F.3d 628, 632-33 (2nd Cir. 1993); and United States v. Kimball, 741 F.2d 471, 474 (1st Cir. 1984).

<sup>18</sup> Cole v. Gilvin, Ky.App., 59 S.W.3d 468, 473 (2001) (quoting Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116, 118 (1991)).

law as applied to the established facts is or is not violated.'"<sup>19</sup>

"It is fundamental that all searches without a warrant are unreasonable unless it can be shown that they come within one of the exceptions to the rule that a search must be made pursuant to a valid warrant."<sup>20</sup> The exceptions to the warrant requirement include: (1) automobile searches;<sup>21</sup> (2) consent searches;<sup>22</sup> (3) searches incident to a lawful arrest;<sup>23</sup> (4) limited searches and seizures under the stop and frisk doctrine;<sup>24</sup> (5) searches and seizures in hot pursuit of a fleeing felon,<sup>25</sup> and (6) searches and seizures to prevent the loss or destruction of evidence.<sup>26</sup> The Commonwealth failed to establish that the warrantless search in the case sub judice fell within any of the recognized exceptions to the warrant requirement.

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<sup>19</sup> Adcock, 967 S.W.2d at 8 (quoting Ornelas v. United States, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)).

<sup>20</sup> Cook, 826 S.W.2d at 331 (citing Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)).

<sup>21</sup> United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

<sup>22</sup> Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

<sup>23</sup> United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

<sup>24</sup> Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

<sup>25</sup> Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990).

<sup>26</sup> Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970).

Thus, the trial court's legal conclusions are correct as a matter of law.<sup>27</sup>

The Commonwealth further contends that the trial court erred by dismissing the indictment against Shaw without its consent. Shaw concedes this point and we agree. In Commonwealth v. Isham,<sup>28</sup> the Supreme Court of Kentucky recently discussed the power of a trial court to dismiss an indictment against a criminal defendant. The following language is particularly relevant for purposes of this appeal:

The Commonwealth also contends that the Court of Appeals erred by concluding that the district court had the authority to dismiss the criminal complaint against Isham. It is argued that the authority to dismiss a criminal complaint before trial may only be exercised by the Commonwealth, and the trial court may only dismiss via a directed verdict following a trial. We agree.

RCr 9.64 provides that "[t]he attorney for the Commonwealth, with the permission of the court, may dismiss the indictment, information, complaint or uniform citation prior to the swearing of the jury or, in a non-jury case, prior to the swearing of the first witness." . . .

Only the Commonwealth had the ability, with the permission of the trial court, to

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<sup>27</sup> The Commonwealth contends the trial court based its decision to suppress the evidence seized from Shaw's residence "entirely on the fact that no written consent to search was executed." Without belaboring the point, we note that this contention lacks merit as a clear reading of the trial court's order demonstrates that the trial court based its decision to suppress the evidence in large part on Shaw's testimony that she never granted any of the officers permission to search her residence.

<sup>28</sup> Ky., 98 S.W.3d 59 (2003).

dismiss the complaint against Isham. However, the Commonwealth never sought a dismissal of the complaint. The district court simply lacked the authority to dismiss the complaint prior to trial.<sup>29</sup>

In the case sub judice, the Commonwealth never sought a dismissal of the indictment. In fact, the Commonwealth objected to the indictment being dismissed. Thus, the trial court lacked the authority to dismiss the indictment against Shaw.

Based on the foregoing reasons, the order of the Jefferson Circuit Court is affirmed in part and reversed in part, and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

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<sup>29</sup> Id. at 62.