

RENDERED: OCTOBER 1, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-001669-MR

WILLIAM THOMAS SHIPMAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 03-CR-00439

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND KNOPF, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

EMBERTON, SENIOR JUDGE. William Thomas Shipman entered a conditional plea of guilty to receiving stolen property, reserving the right to appeal the denial of his motion to suppress the evidence against him. Because the record of the hearing on the suppression motion contains sufficient evidence to support the trial court's ruling, we affirm.

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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.

The indictment against appellant stemmed from his arrest shortly after midnight on February 27, 2003, after police found him to be in possession of several items of personal and government property which had been stolen from automobiles of firefighters assigned to the Leestown Road Fire Station in Lexington, Kentucky. At the hearing on appellant's motion to suppress evidence seized at the time of his arrest, appellant alleged that the seizure of the evidence against him was the product of an illegal search. The arresting officer testified at the hearing as to the investigation which led up to appellant's arrest.

In the course of a separate investigation, an individual named Robert Gamble told police detectives that he had just helped appellant remove stolen items from a black Chevrolet Cavalier at a residence on 7<sup>th</sup> Street in Lexington. Because Gamble had been unsure of the exact address, Officer Jared subsequently drove the length of 7<sup>th</sup> Street looking for a car that matched Gamble's description. Officer Jared stated that sometime after midnight he located a black Cavalier parked in a driveway at 434 7<sup>th</sup> Street, near the front of the property just inside the public sidewalk. As he approached the vehicle, Officer Jared stated that he shined his flashlight into the interior of the car and observed several items of firefighter's equipment in plain view. After Officer Jared's superior officer

arrived at the scene, they opened the unlocked car in order to search it.

Officer Jared also testified that as he then walked to the back of the residence to insure that no one was behind the house, he noticed that the back door of the residence was ajar. Because of the fact that it was the middle of the night, the temperature was in the twenty-degree range and it was about to snow, the open door was sufficiently suspicious to warrant further investigation. In view of the fact that there were no lights on in the house, Officer Jared suspected a burglary might be in progress. Upon approaching the door and announcing their presence, the officers could see two paramedic trauma bags just inside the doorway. They then entered the house and found firefighter equipment which had been reported stolen and other items strewn throughout the house, along with a social security card with appellant's name on it.

Although they did not remove any items from the house at that time, the officers did remove stolen items from the car. They later learned that the black Cavalier belonged to Juan Cruz who, when contacted, informed the officers that he had lent the car to appellant. Cruz also consented to a full search of the vehicle. The officers subsequently learned from appellant's relatives that he lived with his girlfriend and a Mr. Roberts at the residence at which the Cavalier had been located. Returning

to the residence, appellant's girlfriend answered the door and allowed the officers to come into the house. Appellant was inside, along with the stolen items the officers had seen on the previous visit. Mr. Roberts told the officers that he had seen appellant and Gamble in possession of stolen items, including a chainsaw and handgun.

Appellant offered no evidence at the suppression hearing but argued after Officer Jared's testimony that he had no right to enter the curtilage of the property to look into the black Cavalier. Appellant also argued that mere suspicion of a burglary in progress was not an exigent circumstance sufficient to overcome the warrant requirement for entry into the residence. The trial court disagreed, stating in detail its reasons for denying the motion to suppress the evidence. As to the vehicle, the trial court stated that appellant had no standing to object the search of the vehicle as he asserted no ownership rights to the vehicle or its contents. Concerning the residence, the trial court found that the officers had reason to believe a burglary might be in progress given the fact that the back door was open late at night in bad weather conditions. Furthermore, because the building was a residence, the officers were acting not only to protect property but any individuals who may have been present in the residence.

Appellant's first challenge to the trial court's denial of his motion focuses upon his expectations of privacy in the Chevrolet Cavalier, citing Cormey v. Commonwealth,<sup>2</sup> and United States v. Aguirre,<sup>3</sup> to support his contention that he had a reasonable expectation of privacy in the vehicle. Despite appellant's protestations to the contrary, we are convinced that, as was the case in Aguirre, appellant failed to establish any legitimate expectation of privacy in the Cavalier at the time of the suppression hearing, a pre-requisite to mounting such an argument on appeal:

Before embarking upon the merits of a suppression challenge, a criminal defendant must show that he had a reasonable expectation of privacy in the area searched and in relation to the items seized. This burden must be carried at the pretrial hearing and on the record compiled at that hearing. Unless and until the "standing" threshold is crossed, the bona fides of the search and seizure are not put legitimately in issue.<sup>4</sup> [Citations omitted.]

As previously noted, appellant offered no evidence whatsoever at the suppression hearing, failing to avail himself of the opportunity to demonstrate that he "enjoyed the requisite standing to savage the search of the car. . . ."<sup>5</sup> Although

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<sup>2</sup> Ky. App., 943 S.W.2d 629 (1996).

<sup>3</sup> 839 F.2d 854 (1<sup>st</sup> Cir. 1988).

<sup>4</sup> 839 F.2d at 856.

<sup>5</sup> Id. at 857.

appellant makes strenuous arguments in support of his privacy expectations in his brief, we, like the Aquirre court, are in no position to assess evidentiary matters not first presented to the trial court. Thus, we find no error in the determination that appellant lacked standing to challenge the search of the vehicle.

Next, appellant complains that the search of the residence was improper. We disagree. The trial court found on the basis the Officer Jared's testimony that there was a reasonable basis for suspecting a burglary might be in process and that the officers entry into the residence was for the protection of persons as well as property. No contradictory evidence was offered.

However, we are convinced that the fatal flaw in appellant's argument regarding the initial entry into the residence lies in the fact that no items were seized from the residence at the time of the search of which he complains. Upon their return to that residence after having established that appellant lived there, the officers were given access to the premises by appellant's roommate, at which time the stolen property was still in plain sight. Thus, we agree with the Commonwealth that appellant has failed to establish a sufficient nexus between their original entry into the residence (the

allegedly illegal search) and the subsequent seizure of items stolen from the firefighters.

Any information garnered in the initial entry into the house was at best supplemental to information the officers already possessed, having seen stolen items in the car and in plain view through the open door. The evidence sought to be suppressed in this case falls clearly within the rationale set out in Hughes v. Commonwealth,<sup>6</sup> concerning the admissibility of evidence that would have inevitably been discovered by lawful means. In other words, the prosecution was put in no better position by the initial entry into the residence than had they remained outside the residence.<sup>7</sup>

In sum, the trial court's denial of appellant's motion to suppress the evidence is supported by the record and cannot be set aside as clearly erroneous. We therefore affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gene Lewter  
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BRIEF FOR APPELLEE:

Gregory D. Stumbo  
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<sup>6</sup> Ky., 87 S.W.3d 850 (2000).

<sup>7</sup> Id.