

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002092-MR

FREDERICK "FRITZ" CARL KRAUSE, III

APPELLANT

v. APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 03-CR-00162

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND TACKETT, JUDGES.

TACKETT, JUDGE: Fredrick Krause III appeals from an order of the McCracken Circuit Court denying his motion to suppress evidence seized from his residence without a search warrant. At issue is whether an officer who uses a ruse can obtain valid consent to search, thus negating the requirement of a search warrant. We find that the search did not violate Krause's rights to be free from unreasonable search and seizure because the officer's deception as to the intent of the search did not

coerce Krause or his roommate, Joe Yamada, into giving consent to search.

Krause was indicted on charges of first-degree possession of a controlled substance (cocaine), possession of drug paraphernalia second offense, and possession of marijuana. The evidence which led to charges against Krause was gathered during a warrantless search of the home he owned and shared with Yamada. Krause moved the trial court to suppress the evidence, arguing that the officers did not have valid consent to search the house. At the suppression hearing, Krause testified that he answered the door on March 18, 2003, and found three uniformed police officers on his doorstep. Kentucky State Police Trooper Jason Manar informed Krause that a young girl had accused Yamada of sexually assaulting her that evening inside the residence. Krause told the officers that he was not Yamada, but that he would go and get Yamada from inside the house. He testified that, even though he shut the door behind him, the officers followed him into the house where they encountered Yamada. After hearing the fabricated assault accusation, Yamada gave police permission to search the house, and they found a controlled substance and drug paraphernalia in Yamada's bedroom. Additional drug paraphernalia were located in the living room. Krause testified that police searched his bedroom without his

consent and found a controlled substance. Police then arrested both Krause and Yamada.

Manar also testified at the suppression hearing. According to the trooper, he arrested an unknown person earlier in the day who was found to be in possession of a quantity of cocaine. The arrestee stated that he had purchased the cocaine from Yamada and gave the trooper the address of the residence where the transaction occurred and a description of the vehicle in front of the house. Instead of obtaining a search warrant, Manar went to the residence in the middle of the night accompanied by another trooper and a McCracken County Sheriff's Deputy. Manar testified that he thought it unlikely that Yamada would consent to a warrantless search for drugs so he invented an alleged sexual assault and asked whether he could look at the furniture and bedding to determine whether it matched the description given by his fictitious victim.

Although Manar was uncertain, he testified that he thought Yamada himself answered the door. He testified that Yamada and Krause consented to the officers entering the house. Manar stated that he obtained consent to actually search by telling the occupants the fabricated assault story. According to Manar, after drugs were found in Yamada's bedroom, Krause gave consent for a search of his own room. He admitted that he

did not tell Yamada and Krause that he was searching for drugs until after he had actually carried out the search.

The trial court found that, although Manar unquestionably lied in obtaining it, Yamada and Krause gave voluntary consent to the search of their residence. After the trial court denied his motion to suppress the evidence seized from the warrantless search of his house, Krause entered a conditional guilty plea to the charges against him subject to his right to appeal the trial court's ruling on the suppression issue. Krause was sentenced to five years on each of the felony charges and twelve months on the misdemeanor with the felonies to run consecutively for a total of ten years probated for two and one-half years. This appeal followed.

Although he phrases it as several different issues, Krause's basic argument is that Manar did not obtain valid consent to search the home he shared with Yamada because the trooper lied about the type of evidence he was seeking. Kentucky Rule of Criminal Procedure 9.78 addresses the procedure for suppressing evidence as follows:

If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and

at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

In addition, the question of whether consent to search is voluntary must be determined by a careful examination of the all of the facts in a specific case. Cook v. Commonwealth, Ky., 826 S.W.2d 239 (1992). The trial court's order denying Krause's suppression motion contained the following findings of fact and conclusions:

. . . Trooper Manar arrested a person for possession of cocaine. The person, who was not identified at the hearing, was unknown to Trooper Manar. The person stated to Trooper Manar that he purchased the cocaine from Defendant Yamada at his residence at 523 South 19th St. in Paducah. Trooper Manar believed that he did not have probable cause for a search warrant and decided to go to the residence to see if the occupant(s) would consent to a search. [Trooper] Manar did not believe they would consent to a search for drugs.

Trooper Manar proceeded to the residence several hours later, in the very early morning hours. He was accompanied by one or two other policemen. One of the defendants, most likely Krause, answered the Trooper's knock at the door. Believing that the residents would not consent to a search for drugs, the trooper fabricated a false story that he believed would more likely result in the residents' consent to search. Trooper Manar stated that a young female had reported being assaulted by Yamada and asked if they could search the residence for evidence of the assault. Contrary to

Defendants' positions, the Court finds that the police were given consent to search. Pursuant to the consent, cocaine, marijuana, and paraphernalia were found and the Defendants arrested.

Defendants argue that if consent was given it was not valid consent because of the ruse which the police used to gain entry. . . . The Court finds that the ruse employed raises serious Constitutional rights questions and is not an appropriate police practice. After much thought and perusal of the relevant cases, however, the Court finds that, given these facts, the ruse did not improperly coerce or otherwise result in other than a constitutionally valid consent to search.

A primary concern is whether the police action here used might be used to randomly search a person's home with nothing more than curiosity or unsupported suspicion. Trooper Manar's suspicion that criminal activity was afoot in the residence was supported by more than mere conjecture. Hours earlier, he had arrested a person in possession of cocaine. The person related that he had purchased the cocaine from the Defendants' residence. There was, therefore, reasonable suspicion that illicit drugs would be found in the residence.

A second concern is whether Defendants' consent to search was . . . voluntary so as to be an exception to the Constitutional requirement of a search warrant. . . . The issue is: When the police falsely tell a resident that they wish to search for evidence which they know does not exist, in order to search for evidence they have a reasonable suspicion does exist, is the resident's consent based upon the subterfuge a . . . voluntary consent?

. . .

The Court finds that Defendants voluntarily consented to a search for evidence of an assault. The fact that the actual police intent was to search for drugs

did not render the consent Constitutionally invalid.

One search was no more intrusive than the other. It was the stated purpose that was the difference. Police deception did not coerce them into consenting to a search. Defendants could have refused consent for a search of whatever nature, but chose not to.

We agree with the trial court's factual finding that Manar did obtain consent to search the residence shared by Yamada and Krause. Moreover, since that consent was obtained without any threat or express or implied coercion, it was valid. Cook At 331. Thus, the trial court was correct in denying Krause's request to suppress the evidence against him as the product of a warrantless search.

For the foregoing reasons, the decision of the McCracken Circuit Court is affirmed.

BUCKINGHAM, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS.

COMBS, CHIEF JUDGE, DISSENTING: There was no legitimate reason (*i.e.*, no exigent circumstances or any other exception to the warrant requirement) to justify the decision of the officers not to have obtained a search warrant prior to this middle-of-the night search. The police received an uncorroborated tip at night. There was no likelihood that the evidence was in any jeopardy of being destroyed before they could have obtained a search warrant.

The fact that the police concocted a ruse involving a false accusation of sexual assault in order to obtain consent severely vitiates the requisite voluntariness of the consent under the extreme circumstances of this case. Therefore, I would hold that the consent was not valid and that a warrant should have been sought.

The trial court struggled with the disturbing "constitutional rights questions" in this case. I cannot resolve those concerns merely because criminal activity was found after the fact of the search. The deceptive inducement to coerce consent in this case is a disturbing and precedentially dangerous threat to the essence and integrity of the Fourth Amendment. It is the very kind of intrusion for which the Fourth Amendment requires a warrant.

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