

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000280-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
CIVIL ACTION NO. 03-CI-01087

HON. ARNOLD B. LYNCH, JUDGE,
CHRISTIAN DISTRICT COURT; and
JEANNETTE QUARLES,
REAL PARTY IN INTEREST

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND VANMETER, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: In December 2002, Christian County Deputy Sheriffs Mike Johnson and Ross Littlepage were investigating a domestic disturbance near Hillwood Circle in Hopkinsville when Scott Luther approached them. Luther spoke

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

with Littlepage telling the deputy that his two pet dogs had died and that he suspected his neighbor, Jeannette Quarles, of poisoning them. Luther, who had noticed several dog bowls in Quarles' backyard, asked Littlepage if he could take samples from the bowls. According to Littlepage's later testimony, he told Luther to do what he had to do.

Luther then entered Quarles' property, obtained samples from the bowls and gave them to Littlepage for testing. Although Littlepage accepted the samples, he never had them tested. Instead, he eventually returned them to Luther who had the samples tested. The tests revealed the presence of antifreeze. Based on the test results, Quarles was charged in Christian District Court with cruelty to animals in the second degree, a Class A misdemeanor.

Quarles moved to suppress the test results from the samples taken by Luther arguing that her rights under the Fourth Amendment to the Constitution of the United States were violated when Luther intruded upon her premises. According to Quarles, when Luther trespassed on her property he was acting as an agent of the sheriff's department because the deputies had either explicitly or implicitly given him permission to search her property.

The district court held an evidentiary hearing at which both Luther and Littlepage testified. Luther told the

court that it was his idea to search Quarles' property and that he never sought permission from the deputies. However, while Littlepage initially testified that he had not given Luther permission to search Quarles' property, he admitted on cross-examination that he had, in fact, done so.

In resolving the issue, the district court relied on United States v. Mekjian² in which the United States Court of Appeals for the Fifth Circuit held that when officers stand by and watch with approval as a private citizen conducts a search, the police are implicated and the search must comply with the requirements of the Fourth Amendment. Applying the holding in Mekjian, the district court found that the deputies were aware of Luther's intention prior to the search; thus, the Fourth Amendment was applicable. Based on this finding, the court granted Quarles' motion and suppressed the evidence.

In response, the Commonwealth sought to prohibit the district court from excluding the test results by filing an original action under Kentucky Rules of Civil Procedure (CR) 81 in Christian Circuit Court. When that court denied the Commonwealth's petition for a writ of prohibition, it appealed to this Court.

As it did below, the Commonwealth argues that the district court erred when it found that Johnson and Littlepage

² 505 F.2d 1320 (5th Cir. 1975).

stood by and watched Luther's activities with approval. Moreover, it insists, the district court erroneously relied on Mekjian since that opinion does not set forth the proper test to determine when a private citizen has acted as an agent of the Commonwealth for Fourth Amendment purposes. According to the Commonwealth, the United States Supreme Court set forth the proper "all circumstances" test in Coolidge v. New Hampshire,³ and it insists that the fact that the deputies were present while Luther searched Quarles' property is not dispositive. The Commonwealth points out that the deputies had been dispatched to investigate a domestic disturbance, not to investigate the death of Luther's dogs; thus, they had no intention of seizing any evidence from Quarles' property. Despite citing Coolidge, the Commonwealth urges us to adopt the test found in United States v. Lambert,⁴ which holds that evidence cannot be excluded unless the authorities instigated, encouraged or participated in a search by a private citizen, and the private citizen conducted the search with the intent to assist the police.

The Commonwealth also argues that the circuit court used the wrong standard when it reviewed its petition. It claims that the circuit court based its decision on the fact that the district court's decision was supported by substantial

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

⁴ 771 F.2d 83, 89 (6th Cir. 1985).

evidence and thus simply deferred to the district court refusing to exercise its discretion when ruling on the petition.

The parties agree that a writ of prohibition is an extraordinary remedy and will not be granted unless the petitioner shows (1) that the lower court is about to act incorrectly but still within its jurisdiction, (2) that great injustice and irreparable harm will result, and (3) that the petitioner does not have an adequate remedy by appeal.⁵ However, even if the petitioner has met these requirements, it is within the circuit court's discretion to grant or deny the writ; furthermore, the circuit court's decision will not be disturbed on appeal unless it has abused its discretion.⁶

As the record reveals, before Luther trespassed on Quarles' property, he told Littlepage about his suspicions regarding Quarles and about his intention to search her property. And, according to Littlepage, Luther asked and received permission to search Quarles' property. In addition, while Luther was searching Quarles' property, Littlepage waited patiently with an evidence bag in hand to receive the fruits of Luther's search. Given these facts, under any of the tests set forth by the Commonwealth, the district court correctly found that Luther acted as an agent for the Christian County Sheriff's

⁵ Sisters of Charity Health Systems v. Raikes, 984 S.W.2d 464, 466 (Ky. 1999).

⁶ Id.

Department, and it appropriately suppressed the fruits of Luther's search. Therefore, the circuit court did not abuse its discretion when it denied the Commonwealth's petition for a writ of prohibition.

The Christian Circuit Court's denial of the Commonwealth's petition for a writ of prohibition is affirmed.

ALL CONCUR.

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