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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000389-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN K. MERSHON, JUDGE  
ACTION NO. 02-CR-002452

RODERICK D. LITCHFORD  
AND STEPHEN R. PIERCY, JR.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This appeal is by the Commonwealth from an order of the circuit court suppressing evidence seized during the consensual search of a hotel room. The case of United States v. Heath, 259 F. 3d 522 (6<sup>th</sup> Cir. 2001), is dispositive of the issue of whether the search violated the Fourth Amendment to

the United States Constitution. The Court in Heath decided that once the police searched the defendant and his vehicle, and found nothing inherently criminal, the officers were obligated to end their investigation. The subsequent search of the apartment violated the Fourth Amendment, which required the illegally seized evidence to be suppressed. The circuit court was correct in holding Heath governs our case.<sup>1</sup> Hence we affirm.

A confidential informant informed the police that the appellee, Stephen A. Piercy, Jr. (Piercy), was in possession of a large quantity of crack cocaine, that Piercy would normally keep narcotics in a hotel room where he would break it up and distribute it. Piercy was placed under surveillance and was observed entering a hotel room with an unknown male (appellee Roderick D. Litchford (Litchford)). The police confirmed with the hotel that Piercy was the guest registered to that room. Approximately 25 minutes after Piercy and Litchford entered the hotel room, the officers observed Piercy exit the room alone and drive off in his vehicle. One officer followed Piercy for several miles, and then stopped him for an improper turn signal. Piercy consented to a search of his person, and also consented to the dog running around the vehicle. No evidence was found as a result of the search of Piercy with the exception of a key to

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<sup>1</sup> We note in passing that the same police department at issue in this case conducted the search deemed to be illegal in Heath.

Room #307, which was confiscated. Piercy was handcuffed while the police checked on the status of the hotel room.

Meanwhile, back at the hotel room, a couple of officers knocked on the door. The trial court found that "In an attempt to ensure that Mr. Litchford would open the door, Detective Nunn employed a 'ruse,' telling Mr. Litchford that Mr. Piercy had been in a car accident and that they had his keys and belongings." Litchford opened the door. At this point, the police say they asked for permission to search because they were on a narcotics investigation and Litchford consented. Litchford claims that when he opened the door, the police pushed past him and seized the drugs. He denied ever giving consent. The trial court did not make a finding on consent but did find the written consent form was not signed. The police confiscated a half pound of cocaine along with scales and plastic baggies. After the search and seizure were completed, Piercy was brought back to the hotel room where both men were charged. Both were indicted for trafficking in a controlled substance - cocaine - and possession of drug paraphernalia. Piercy was also indicted on the charge of improper turning and PFO 1<sup>st</sup>.

Piercy and Litchford moved the circuit court to suppress the evidence found in the hotel room as violative of the Fourth Amendment to the United States Constitution as well as Section 10 of the Kentucky Constitution. The circuit court

found the case of United States v. Heath, 259 F. 3d 522 (6<sup>th</sup> Cir. 2001), to closely mirror our case and suppressed the evidence as the fruits of an illegal search. The Commonwealth appeals, contending Litchford gave consent and any occupant of a room can give consent.

The Commonwealth misses the point of Heath. The question is not whether Litchford consented, or had the right to consent, but what the police were doing there after they stopped Piercy and found no evidence of drugs. In Heath, a narcotics investigator for the Louisville Police Department had Heath's apartment complex under surveillance based on a confidential informant's tip that Heath was trafficking in cocaine. When Heath left the building, he was carrying a dark-colored bag. The officer followed the vehicle for awhile and then pulled it over. Heath was cuffed although the officer said he was not under arrest. The officer searched the vehicle and found nothing illegal. The officer took Heath's keys with consent. The police transported Heath back to the apartment building and used the keys to gain entrance to the common area of the building and then started trying the other keys on the apartment doors until they got a fit. They knocked on the door and asked the occupant to admit them. They told the occupant they were conducting a narcotics investigation and obtained a consent to search from the occupant. Scales, empty wrappers, and three

kilograms of cocaine were recovered. The occupant and Heath were then both arrested and subsequently indicted. A motion to suppress was denied by the district court, finding that the use of the second key to locate the apartment was proper.

On appeal, the United States Court of Appeals for the 6<sup>th</sup> Circuit reversed, holding that the defendant's Fourth Amendment rights had been violated and that the exclusionary rule required the evidence to be suppressed. Important to our case is the Court's analysis of the defendant's Fourth Amendment rights.

In analyzing the defendants' Fourth Amendment claims, we have divided the events resulting in the defendants' arrests into three distinct episodes: 1) the initial stop of Heath pursuant to the officers alleged reasonable suspicion of criminal activity; 2) the detention of Heath while the officers attempted to allay their suspicions of criminal activity; and 3) the entry and subsequent search of Horton's apartment.

Heath, 259 F. 3d at 528. The Court looked to the initial stop of Heath and decided that a reasonable and articulable suspicion existed. The facts of our case "mirror" the Heath case and so said the circuit court. Both involved a confidential informant's telling the police about a cocaine dealer, with a previous record, dealing out of his room. Both suspects left the room and traveled by vehicle while someone was left in the room. Both vehicles were stopped, and searched without any

evidence of illegal drug trafficking being found. Both defendants were "held" while the police went to the room and requested consent from the occupant. The appellate court approved the initial stop because of the reasonable and articulable suspicion. Our case would have to be decided likewise.

The second part of the test involves the detention - "whether [the] stop, valid at its inception, ripened into an arrest before the cocaine was found and, therefore, was an arrest without the benefit of probable cause." Id. at 529. The Court decided that, "once these officers used all of the appropriate means available to them to allay their concerns of criminal activity, they were required to release Heath." Id. at 530. The police in our case readily admit they were stalling while the other officers attempted to get a consent to search from the person left in the room.

The government in Heath contended that reasonable suspicion arose from Heath's false statements regarding ownership of the keys (like Piercy saying he did not know whose key he had when the police searched him). The appellate court ruled otherwise. "Heath made the statements prior to the officers' search of the vehicle. As noted above, the search produced nothing illegal and, consequently, Heath's statements cannot be used to breathe life into a dying investigation." Id.

at 531. Heath was no different than Piercy. The transportation of Piercy back to the room and the length of stop were violative of his Fourth Amendment right to be free of unreasonable searches.

Because the police should have released Piercy and did not, the third factor of the Heath test does not come into play - the entry and subsequent search of the room. Because the police were required to release Piercy and they did not, they were not allowed to go search the room. The consent of the occupant becomes immaterial because the defendant had a subjective expectation of privacy, and any entry without probable cause, without a warrant, or without permission is an illegal entry. Id. at 533. The occupant's consent to a search (if given) is not an act of consent because "the taint of the illegal arrest and entry into the apartment building was not purged by Horton's intervening consent to the search and, thus, the fruits of the consent should have been suppressed. . . ." Id. at 534. Likewise, Piercy's illegal detention tainted the subsequent search, and even if Litchford did consent, the consent did not "purge the taint" of the illegal conduct. Accordingly, the evidence seized in the apartment should be suppressed as obtained in violation of Piercy's Fourth Amendment rights to be free from illegal searches and seizures.

For the foregoing reasons, the order of the Jefferson  
Circuit Court is affirmed.

ALL CONCUR.

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