

RENDERED: April 1, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001917-MR

EARL F. HUNT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE MARY C. NOBLE, JUDGE  
ACTION NO. 03-CR-00763

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR JUDGE.<sup>1</sup>

MILLER, SENIOR JUDGE: Appellant Earl F. Hunt (Hunt) brings this appeal from a "Judgment on Conditional Guilty Plea<sup>2</sup> and Sentence of Probation pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)," entered by the Fayette Circuit Court on August 18, 2004. Hunt, originally indicted for felony possession of drug paraphernalia, pleaded guilty to an

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

<sup>2</sup> Kentucky Rules of Criminal Procedure 8.09.

amended charge of misdemeanor possession of drug paraphernalia, reserving his right to appeal the denial of his motion to suppress.<sup>3</sup> His sixty-day jail sentence was probated for one year. Having concluded that the trial court properly denied Hunt's motion to suppress, we affirm.

It is undisputed that, in response to a complaint of crack cocaine activity, the police arrived at Hunt's apartment, Hunt allowed them into the apartment, and in performing a warrantless search, the police found a pouch containing a glass crack pipe in a dresser drawer and charged Hunt with possession of drug paraphernalia. Hunt filed a motion to suppress the evidence, asserting that he did not give consent to search the apartment and thus the search was in violation of the Fourth Amendment to the United States Constitution. At the suppression hearing, Lexington Police Narcotics Sergeant Mark Simmons testified that Hunt gave him permission to search the apartment. In contrast, Hunt testified that he did not give consent and placed the ownership of the crack pipe with his ex-wife, who was also present in the apartment at the time of the police visit and search and who, according to Hunt, had threatened to get him in trouble due to his cheating on her. On the sole question of consent, the trial court chose to believe Sergeant Simmons and denied the motion to suppress.

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<sup>3</sup> Kentucky Revised Statutes 218A.500.

The proper standard of appellate review on a suppression issue is stated in Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002):

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. Kentucky Rules of Criminal Procedure (RCr) 9.78. Based on those findings of fact, we must then 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. Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998); and Commonwealth v. Opell, Ky.App., 3 S.W.3d 747, 751 (1999).

We must, therefore, first address whether the trial court's finding that Hunt consented to the search of the apartment is supported by substantial evidence, defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998) (citing Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972)). The Commonwealth has the burden of proving, by a preponderance of the evidence, that the defendant voluntarily consented to the search, as determined through the specific circumstances of the case. Farmer v. Commonwealth, 6 S.W.3d 144, 146 (Ky.App. 1999) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36

L.Ed.2d 854 (1973)). "The question of voluntariness is to be determined by an objective evaluation of police conduct and not by the defendant's subjective perception of reality." Cook v. Commonwealth, 826 S.W.2d 329, 331 (Ky. 1992) (citing Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)).

As indicated above, the trial court was faced with conflicting evidence as to consent: Sergeant Simmons testified that Hunt consented. Hunt testified that he did not consent, and instead placed blame on his ex-wife, arguing that she was following up on a threat to get him in trouble for cheating on her. The trial court listened to both witnesses and chose to believe Sergeant Simmons's version. In so doing, the court found Sergeant Simmons's version more credible, although indicating that Hunt's version provided a plausible defense should he choose to proceed to trial. "'It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence.'" Cole v. Gilvin, 59 S.W.3d 468, 473 (Ky.App. 2001) (quoting Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 118 (Ky. 1991)). See also Henson v. Commonwealth, 20 S.W.3d 466, 469 (Ky. 1999) ("[w]hen the trial court is faced with conflicting testimony regarding the [issue of] voluntariness ... its evaluation of credibility, if supported by substantial evidence, is conclusive"). We find, therefore, that the trial court's

findings on the issue of consent are supported by substantial evidence.

Having concluded that the trial court's findings are supported by substantial evidence, we next address whether the trial court correctly applied the law. Thus, the question becomes "'whether the rule of law as applied to the established facts is or is not violated.'" Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998) (quoting Ornelas v. United States, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996)). Although the Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution protect citizens from a warrantless search and seizure conducted by the state, the defendant's consent provides an exception to the warrant rule. Farmer, supra at 146 (citing Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) and United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976)). Having already concluded that the trial court's finding of consent was supported by substantial evidence and thus conclusive, we further conclude that the trial court correctly applied the law in denying the motion to suppress.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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