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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2005-CA-000344-MR

JOHN SENSLEY, JR. — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 03-CR-002371

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND JOHNSON, JUDGES.

COMBS, CHIEF JUDGE: John Sensley appeals from a judgment of the Jefferson Circuit Court convicting him of possession of a firearm by a convicted felon and possession of drug paraphernalia while in possession of a firearm. Sensley entered a conditional guilty plea to these charges pursuant to RCr[1] 8.09,

[1] Kentucky Rules of Criminal Procedure.

reserving the right to appeal the circuit court's ruling on his motion to suppress evidence. Finding no error, we affirm.

Sensley was released from prison on parole in November 2002. On June 10, 2003, his parole officer, Jill Williams, made a visit to his residence. With the assistance of several law enforcement officers, Williams conducted a search of the house, which yielded a firearm and contraband as described on the Uniform Citation detailing the results of the search:

> Detectives assisting Probation & Parole found that John Sensley, a known convicted felon, was found to have a loaded Ruger Security Six 357 w/4" barrel (S/N 160-24879) and ammunition in his bedroom (dresser). Subject also had 2 rounds in his left pocket. Rolling papers & suspected marij. Residue was also located with marijuana & a set of digital scales. $2,163.00.

Sensley was placed under arrest, and a search of his person revealed two rounds of ammunition in a shirt pocket. After he was informed of his *Miranda*[2] rights, he admitted to having possessed –- and to having recently used -- the firearm.

On July 1, 2003, a preliminary parole revocation hearing was conducted at the Jefferson County Jail. The Administrative Law Judge (ALJ) concluded that there was sufficient evidence to believe that Sensley had violated the conditions of his parole. The ALJ summarized the evidence as follows:

[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

> Testimony from PO Williams established that during a visit to Sensley's home on 6/10/03 she detected the odor of alcohol from Sensley. Sensley's father gave her permission to search the home. She found a loaded .357 handgun in a drawer in a common area, and two bullets in Sensley's pocket. In Sensley's bedroom officers found a small quantity of marijuana, scales, and $2,163 in cash. PO Andrew Hamilton stated that Sensley admitted to him that he had recently fired the weapon. Sensley's father, who uses a wheelchair, denied that the gun was his.

(Record on appeal at page 34.)

Sensley's parole was revoked, and he was returned to the Kentucky State Reformatory. He was subsequently indicted for the crimes of possession of a firearm by a convicted felon, trafficking in a controlled substance within 1,000 yards of a school while in possession of a firearm, possession of drug paraphernalia, and being a first-degree persistent felony offender (PFO).

On March 24, 2004, Hensley filed a motion to suppress the evidence. As grounds for the motion, he alleged in general terms that the search of his residence and person was unlawful. A hearing on the motion to suppress was continued several times.

Prior to the trial, Sensley accepted a plea agreement with the Commonwealth by which he pled guilt to possession of a firearm by a convicted felon and to illegal use or possession of drug paraphernalia while possessing a firearm. In exchange, the

Commonwealth agreed to dismiss the trafficking and PFO charges and to allow him to appeal the suppression issue.

On January 19, 2005, the parties informed the trial court that Sensley desired to enter a plea of guilty. A colloquy between the court and the parties then followed:

> Judge Clayton: So, the suppression issue at this time is moot and is not being addressed?
>
> Defense Counsel Lee: Your honor, I believe, we had discussed this earlier, that we would stipulate at this time to the facts that [are] listed in the discovery and ask that a ruling, in fact, be made on the suppression issue. Mr. Sensley does intend to appeal the suppression issue, and I believe Mr. Butler has, in fact, agreed to allow him to do that as a condition of the plea, your honor.
>
> [At this juncture, the judge looked through the record.]
>
> Judge Clayton: And let me state for the record my understanding of the facts that are listed in the discovery: that Mr. Sensley, at the time of this search, was on parole; that he was staying at the home of his father; that he was – a visit was made by parole officers. Within the house, they found some items and later found items on his person and in his room; and, that the defendant also voluntarily made the statement to the police regarding, I think, the ammunition?
>
> I think, is that the facts of this?

Prosecutor Butler: The statement was in regards to handling the gun in the two days prior to the day in question.

Judge Clayton: All right. That's reflected within the discovery. Let me first state that, as it relates to the search of the home, the court finds that Mr. Sensley did not have standing to contest the search of the home, and therefore, then the search – the finding of the illegal items would lead to a proper search incident to – search incident to the arrest. Additionally, the statements made by Mr. Sensley being voluntary will not also be suppressed. So the court would deny the suppression motion of the defendant based upon the facts as stated in the record, for the reasons stated by the court.

Mr. Sensley: Your honor, may I speak, please?

Judge Clayton: Yes, sir.

Mr. Sensley: I would ask the court to consider the Coleman versus the Commonwealth[3] to apply that to this case, as you make a decision, please, so that will be noted for my appeal.

Judge Clayton: You have cited that now to the court, sir, and you can certainly cite that in your appeal.

Mr. Sensley: Okay.

[3] Sensley was apparently referring to Coleman v. Commonwealth, 100 S.W.3d 745 (Ky. 2002). He has not cited the case in his brief on appeal.

Following this exchange, the trial court engaged Sensley in a formal *Boykin*[4] colloquy. It accepted his guilty plea and sentenced him to serve two concurrent terms of five years in prison. This appeal followed.

Our standard of review of the decision of a trial court on a motion to suppress evidence is dual in nature. First, we must first determine whether the court's findings of fact are supported by substantial evidence. If so, they are deemed to be conclusive. RCr 9.78. Second, we conduct a *de novo* review of the trial court's application of the law to those facts. Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky.App 2000), citing Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

On appeal, Sensley argues that the court's findings are clearly erroneous. He contends that there is no evidence to support the finding that the house where he was staying belonged to his father or that his father had given permission for the search. However, the report resulting from the parole revocation proceedings (see infra at p. 3) provided adequate evidentiary support for the court's findings with respect to Sensley's living arrangements as well as the voluntariness of his father's consent to the search.

[4] Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Sensley argues that the court erred in relying on that report in making its factual findings. He alludes to certain discrepancies between the report and the Uniform Citation, contending that they must be resolved against the Commonwealth. He also argues that any information contained in the ALJ's report that is not also reflected in the Uniform Citation "must be excluded from consideration." (Appellant's brief at p. 6.)

Sensley's arguments on this issue have not been preserved for review. See, Regional Jail Authority v. Tackett, 770 S.W.2d 225 (Ky. 1989). Both Sensley and the Commonwealth stipulated that the facts relevant to the suppression issue could be found in the discovery materials contained in the record. The document generated by the ALJ at the conclusion of the revocation hearing was included in those materials as it had been filed in the record by the Commonwealth in response to the court's pretrial discovery order. At no time did Sensley seek to eliminate any discovery materials from the court's consideration, nor did he suggest that the trial court was confined to considering only those facts outlined in the Uniform Citation. Thus, he waived any complaint about the competency of the discovery materials relied upon by the trial court in formulating its findings of fact. See, Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1976).

Sensley next argues that even if the evidence would support the court's finding concerning ownership of his residence, the trial court erred as a matter of law in relying on his father's consent to validate the search of his bedroom:

> [T]here was no legitimate basis to look in the dresser. Necessarily, the seizure of the pistol and ammunition was unlawful. The motion to suppress should have been granted as to these items.

(Appellant's brief at p. 10.)

The trial court did not make a finding citing the exact location of the loaded gun in the house when it was seized by the police. Nevertheless, we conclude that it does not matter whether the gun was found in Sensley's bedroom dresser (as noted in the Uniform Citation) or in a common area of the house (according to the testimony of the parole officer at the revocation hearing).

In Colbert v. Commonwealth, 43 S.W.3d 777, 779-780 (Ky. 2001), our Supreme Court recognized that a valid consent to search (which is a recognized exception to the warrant requirement) may be obtained from the "target of the search, **or from a third party who possesses common authority over the premises.**" (Emphasis added; citations omitted.)

> Both state and federal courts have interpreted search and seizure law to allow third parties to consent to the search of shared common areas. See, Morris v.

> Commonwealth, 306 Ky. 349, 208 S.W.2d 58 (1948) (father's consent to search as "head of household" for incriminating evidence against son valid for evidence found in the kitchen) and [United States v.] Matlock, [415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974)], supra, (consent of a woman who shared a bedroom with her boyfriend in her parents' home valid). Furthermore, in United States v. Hall, 979 F.2d 77 (6th Cir.1992), the Sixth Circuit Court of Appeals held that a homeowner may consent to the search of a tenant's room, even though he never entered it while it was rented to the tenant. . . . Like any homeowner, in the absence of an understanding to the contrary, the mother retained the right of entry to all areas of her house including the room Appellant occupied.

Id., at 780-781.

There is no evidence in the record that Sensley had exclusive control over any portion of his father's house -- including his own bedroom. Accordingly, the trial court did not err in determining that his father, as the owner of the house, was legally authorized to permit the officers to search the room for evidence that Sensley was in violation of the terms of his parole. Id.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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