

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000034-MR

MARCUS FRIED

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 06-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** ** *

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

STUMBO, JUDGE: This is an appeal from a conditional guilty plea in which Marcus Fried (Appellant) pled guilty to various drug related charges. On appeal, Appellant argues that the search of his house was unlawful and, therefore, any evidence obtained should have been suppressed. Specifically, Appellant contends that the Commonwealth failed to meet its burden of proof that the police officers had consent to enter his house, that the marijuana stem found in the residence should have been suppressed because it

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

was not immediately incriminating and the seizure of it occurred during a warrantless trespass, that there was insufficient evidence that the stem was in plain view, and that since there was no lawful access to the stem, there was no probable cause to support the search warrant. Following a suppression hearing at which Appellant challenged the validity of the warrant, the trial court upheld the warrant. We affirm that decision.

On November 14, 2005, Detectives Smoot and Hart and Sergeant Ensminger went to Appellant's residence in Lexington, Kentucky. They were acting on information that suggested drugs were being sold from the residence. The tip was that there was heavy traffic to and from the residence and that people would only stay for short periods of time. The three officers performed a knock-and-talk on the residence. Appellant answered the door and it was disputed as to whether or not he allowed the officers to come in. Regardless, the officers entered the home at which point they informed Appellant why they were there and asked if they could search the house. Appellant stated that he would have to call and ask his dad. It is worth noting that during this time, the officers and Appellant remained in the foyer area and did not venture further into the house.

Appellant called his father and put him on the phone with Smoot. The father told Smoot not to search the house and to wait until he arrived. During this conversation, Hart saw a marijuana stem on a table. Hart brought this to the attention of the other officers and proceeded to retrieve the stem. There was some confusion as to

what table the stem was on, but we find, as the trial court did, that this detail is irrelevant. At this point, the officers secured the scene until a search warrant was obtained.

We feel it necessary to dispense with two of Appellant's arguments at the start in order to be able to focus on the primary issue of this appeal. Appellant claims that the Commonwealth did not meet its burden in proving the officers had consent to enter the house and that there was insufficient evidence that the marijuana stem was in plain view. Both of these are questions of fact that the judge decided at the suppression hearing. The judge found that the stem was seen in plain view on a table in the living room and that Appellant had initially given the officers permission to enter. Each of these issues were argued by the parties and boiled down to one person's word against another's. A trial court's findings of fact will not be overturned unless they are clearly erroneous. CR 52.01; *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). We find that the trial judge's findings of fact were supported by substantial evidence and were not clearly erroneous because she was in the best position to decide whose testimony was more reliable and credible.

The primary issue of this appeal is whether the warrant was valid. The only information used to get the warrant was the information about the heavy traffic to and from Appellant's house and the marijuana stem. Without the marijuana stem, there would not have been sufficient probable cause to issue the warrant. Appellant claims that the stem was so far away from the foyer of the house that its incriminating nature was not immediately determinable and that the seizure of the stem was unlawful. The officers

were able to use the fact that a marijuana stem was seen in Appellant's house because, even though they did not have a warrant to be in the house, they were initially invited in and the stem was in plain view. Since the plain view doctrine is an exception to the warrant requirement, the stem could be used as probable cause for a warrant. To satisfy the plain view exception, the Commonwealth must show that the police were lawfully in the position from which they viewed the seized evidence, that the police had the lawful right to access the object itself, and the object's incriminating character was immediately apparent. *Hallum v. Commonwealth*, 219 S.W.3d 216, 223 (Ky.App. 2007). At the suppression hearing, the judge found that all these elements had been met. Although we disagree, we find that it does not affect the warrant. We believe that the actual seizure of the stem may have been unlawful because consent to go further than the foyer was not given. After seeing the stem in the other room, Detective Hart retrieved it. The officers were specifically told they could not search the house, and by implication, not go further than the foyer. If there was no consent to go into the living room, Hart did not have lawful access to the stem. This means that the stem itself could be suppressed as evidence at trial.

However, the stem itself was not used to obtain the search warrant. The affidavit in support of the warrant states that the officers saw the stem in plain view. This observation was legally made. The officers were properly in the foyer and the stem was seen from that vantage point. Also, the trial judge found that Detective Hart's "years of experience with drugs and marijuana in particular" allowed him to immediately

determine the incriminating nature of the stem. These three factors meet the plain view exception. If the stem was unlawfully seized, it could have been suppressed at trial; however, the viewing of the stem was done properly and could be used as support for the search warrant. The information about the heavy traffic at Appellant's house and the identification of the marijuana stem were sufficient enough to satisfy the probable cause requirement for the issuance of a search warrant.

We therefore find that the search warrant was valid and any information used to acquire it was legally obtained. Accordingly, we affirm the trial court and Appellant's conviction and sentence.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Barbara Anderson
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky