

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-000222-MR

PATRICK KELLY

APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT  
HONORABLE SAM H. MONARCH, JUDGE  
ACTION NO. 05-CR-00173

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

STUMBO, JUDGE: Patrick Kelly appeals from a judgment of the Grayson Circuit Court reflecting a conditional plea of guilty on one count each of manufacturing methamphetamine, possession of a controlled substance in the first degree, possession of drug paraphernalia, and tampering with physical evidence. Kelly contends that he was entitled to an order suppressing evidence obtained during a search because the search was conducted without probable cause or a warrant. For the reasons stated below, we affirm the judgment on appeal.

---

<sup>1</sup> 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.

Mark Kelly, brother of appellant Patrick Kelly, rented a house in Grayson County, Kentucky. On August 16, 2005, the landlord's son, Ken Childress, contacted Kentucky State Police Trooper Charles White and told the trooper that he smelled a strong chemical odor coming from the house. Childress believed the odor indicated that Mark was producing methamphetamine in the house. Childress told Trooper White that all of the windows in the house were covered with sheets, that a window fan was blowing air out of the house, and that there was a large pile of burned material in the yard containing lighter fluid containers. Childress also said that Patrick acted "very paranoid" and had been observed sitting on top of the house scanning the horizon with binoculars.

After contacting a drug task force and determining that warrants had previously been issued for Mark's arrest, Trooper White arranged to approach the house with two other troopers and a Grayson County deputy sheriff for the purpose of executing the warrants. As they approached the house, Trooper White noticed surveillance cameras attached to the house. The troopers and deputy sheriff exited their vehicles, with two of them going to the front of the house and two to the rear. Trooper White noticed a slight chemical odor, which he identified from his experience as the smell of ether. The two officers in the rear of the house smelled a strong chemical odor.

Trooper White knocked on the front door. An unidentified individual opened the door, then immediately slammed the door shut when he saw that Trooper White was a law enforcement officer. The officers could see and hear individuals

running inside the house, and one officer observed through an uncovered kitchen window a woman pouring a liquid down a sink.

Based on their belief that evidence of criminal activity was being destroyed, the officers entered the house. Once inside, they noticed a very strong chemical odor, and observed equipment and chemicals which they would later testify were consistent with the manufacturing of methamphetamine. Four individuals found in the house, including Patrick Kelly, were arrested. Mark Kelly was not found in the house, and remained at large. After securing the house, the officers sought and received a search warrant. Evidence of alleged criminal conduct was later removed by officers.

Each of the individuals found in the house were indicted on various drug-related offenses. Patrick Kelly was indicted on one count each of manufacturing methamphetamine enhanced by possession of a firearm, possession of a controlled substance enhanced by possession of a firearm, possession of drug paraphernalia enhanced by possession of a firearm, tampering with physical evidence, and for being a persistent felony offender in the first-degree.

Sometime thereafter, one of Kelly's co-defendants filed a motion to suppress the evidence seized at the house. Kelly joined in the motion. A hearing on the matter was conducted, after which the court rendered a preliminary conclusion of law holding that the law enforcement officers had acted appropriately under the circumstances. The court withheld a final decision on the matter in order to give Kelly

and his co-defendant the opportunity to file a brief or memorandum. After more than three months had passed, neither party filed a brief or memorandum and the preliminary ruling was finalized. As a basis for the ruling, the court found that exigent circumstances existed for the officers to enter the house without a search warrant. Specifically, the court cited the testimony of Officer White, who stated that he believed the safety of the officers was at risk and that the persons inside the house might be destroying evidence. White stated that after entering the residence, it was clear that the occupants had attempted to destroy evidence and clean up the manufacturing operation. For example, a white powder was found on and around the toilet. This powder later proved to be methamphetamine.

Kelly subsequently entered a plea of guilty, with the Commonwealth's recommendation that the firearms enhancements be dismissed and that the PFO I count be dismissed. As part of the plea, Kelly reserved the right to appeal from the adverse ruling on the motion to suppress. He was sentenced to ten years in prison, and this appeal followed.

Kelly's sole argument on appeal is that the trial court erred when it overruled the motion to suppress the evidence obtained when the police entered the residence. He maintains that the initial entry and search of the residence were illegal, and as such the evidence of alleged criminal conduct subsequently found by officers should be suppressed. Kelly contends that but for the officers' warrantless, unlawful entry into

the house, the evidence of alleged criminal conduct would not have been discovered and as such should have been held inadmissible.

He requests an order reversing the judgment reflecting the conditional guilty plea, and remanding the matter with instructions to suppress the evidence at issue and to dismiss the charges.

Having studied the written arguments, the record and the law, we find no basis for concluding that the circuit court erred in denying Kelly's motion to suppress. "It is fundamental that all searches without a warrant are unreasonable unless it can be shown that they come within one of the exceptions to the rule that a search must be made pursuant to a valid warrant." *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992), citing *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In keeping with this notion, "[A]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter [a] dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

It is uncontroverted that several valid arrest warrants had been issued against Mark Kelly. The record also indicates that the KSP troopers and the deputy sheriff went to Mark Kelly's residence for the purpose of executing those warrants. In its order overruling Patrick Kelly's motion to suppress, the court noted that, "[T]rooper White confirmed that the arrest warrants for Mr. Mark Kelly were still outstanding and

had not been recalled,” and found further that the officers went to Mark Kelly’s residence for the purpose of executing the warrants. Trooper White also had information from Childress that Mark Kelly rented the residence and lived there.

Based on *Payton, supra*, we must conclude that the existence of the valid arrest warrants against Mark Kelly, coupled with the officers’ knowledge that Mark Kelly rented the residence from Childress’s mother, gave the officers the lawful authority to enter the residence for the purpose of locating and arresting Mark Kelly. Once inside, the evidence at issue was in plain view of the officers. The circuit court found that after securing the residence and insuring that all of its occupants had been removed, the officers exited the house and obtained a search warrant from District Judge Embry prior to searching the residence and collecting the evidence. The record supports this finding. Since the officers possessed valid arrest warrants issued against Mark Kelly, their entry into the residence does not run afoul of the Fourth Amendment’s prohibition against warrantless searches, and the circuit court properly so found.

The circuit court’s primary basis for denying the motion to suppress, however, was its finding that exigent circumstances existed to support the officers’ entry into the residence. Though the existence of the arrest warrants - taken alone - justifies the officers’ entry, *Payton, supra*, it is worth noting that evidence exists in the record which reasonably supports the circuit court’s finding of exigent circumstances. The officers smelled a strong chemical odor which Trooper White identified from his experience as

ether; they observed a window fan removing air from the house, surveillance cameras attached to the house, windows that were covered on the inside with sheets, and burned cans of lighter fluid in the yard. The officers also observed one individual slam the door upon seeing the officers, one or more individuals running through the house, and a woman pouring a liquid down the drain. Given the totality of the circumstances and everything known to the officers, we cannot conclude that the circuit court erred in determining that exigent circumstances existed to support the officers' lawful entry into the home to prevent destruction of evidence

When examining an order denying a motion to suppress, the appellate court first determines whether the trial court's findings of fact were clearly erroneous.

*Commonwealth v. Banks*, 68 S.W.3d 347 (Ky. 2001). The underlying question of law may be reviewed *de novo*. *Id.* The record supports the Grayson Circuit Court's factual findings in support of its order, and *Payton* establishes that Trooper White and the other officers acted properly in entering the residence to execute the arrest warrants against Mark Kelly. *Arguendo*, even if the arrest warrants did not support the officers' entry, the officers' observation of the home's occupants running through the house and pouring a liquid down the drain - when taken in the context of everything the officers knew and observed at the time - support the conclusion that exigent circumstances existed in support of the officers' actions. Accordingly, we find no error.

For the foregoing reasons, we affirm the order of Grayson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Linda Roberts Horsman  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Michael L. Harned  
Assistant Attorney General  
Frankfort, Kentucky