SUPREME COURT OF KENTUCKY

2008-SC-965

MICHAEL SHAWN PAYTON — **APPELLANT**

v.

Appeal from Grayson Circuit Court
Hon. Robert A. Miller, Judge
Indictment No. 05-CR-216

COMMONWEALTH OF KENTUCKY — **APPELLEE**

BRIEF FOR APPELLANT PAYTON

Submitted by:

Susan Jackson Balliet
Assistant Public Advocate
Dept. of Public Advocacy
100 Fair Oaks Lane, Ste. 302
Frankfort, Kentucky 40601
(502) 564-8006, Ext. 134

Certificate required by CR 76.12(b):

I certify that this brief was served by U.S. mail, postage prepaid, on the Hon. Robert A. Miller, Judge, Grayson Circuit Court, P. O. Box 147 Hardinsburg, Kentucky, 40143; the Hon. Jessica Brown, Assistant Commonwealth's Attorney, P.O. Box 249, Brandenburg, Kentucky 40108; the Hon. Phillip W. Smith, 127 White Oak Street, Leitchfield, Kentucky 42754; and the Hon. Joshua D. Farley, Assistant Attorney General, 1024 Capital Center Drive, Frankfort Kentucky 40601-8204 and that the record was returned to the Clerk of the Kentucky Supreme Court on March 31, 2010.

Susan Jackson Balliet

INTRODUCTION

Michael "Shawn" Payton conditionally pled guilty and accepted a five-year sentence for possession of methamphetamine, hydrocodone, oxycodone, drug paraphernalia, and marijuana. This discretionary review addresses questions 1) whether evidence that Appellant's wife said "o.k." or "come on in" supported the trial court's ultimate decision that Appellant consented to a search of the entire house; 2) whether under *Georgia v. Randolph*, 547 U.S. 103 (2006) voluntary consent by his wife extended to Appellant, who was present and demanded "Where is your search warrant?" 3) whether police and a child protective services worker created impermissible pressure on Appellant's wife to grant consent; and 4) whether the Court of Appeals applied the wrong appellate standard of review.

STATEMENT REGARDING ORAL ARGUMENT

Counsel requests oral argument to discuss the 4th Amendment issues.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On August 26, 2005, an anonymous tipster called the Hardin County Cabinet for Health and Family Services, said there was meth "being made and used"[1] in the Appellant Shawn Payton's Leitchfield, Kentucky home[2] and two school-age[3] children lived there.[4] Prior to searching the Paytons' residence, neither Family Services nor the police knew ---or tried to find out-- anything about the anonymous tipster, the tip, or the Paytons.[5] Meth was not being made in the house. The evidence indicated drug use. But there is no evidence that Appellant or Mrs. Payton ever abused or neglected their children.

As soon as they got the anonymous tip, Hardin County social workers faxed it to Grayson County Health and Family Services.[6] Grayson County social worker Rebecca Secora "automatically" called the police.[7] That same day Grayson County Sheriff's Detective Terry Blanton and another officer headed with Secora to Appellant's front door.[8] It was a "spur of the moment thing."[9]

Detective Blanton admitted there was no probable cause for a search warrant.[10] He admitted there were no exigent circumstances.[11] The police went to conduct the

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[1] VR 1, 6/20/06, 11:43:08
[2] *Id.*, 11:19:49, 11:24:24
[3] *Id.* 11:27:29
[4] *Id.*, 11:48:15, 11:26:39
[5] *Id.*, 11:19:49, 11:23:22
[6] *Id.*, 11:23:54 et seq.
[7] *Id.*, 11:19:49
[8] *Id.*, 11:20:42
[9] *Id.*, 11:49:06
[10] *Id.*, 12:02:43
[11] *Id.*, 12:03:26

"knock and talk" at the Paytons' "strictly on the request by Secora."[12] Health and Family Services "usually call us...we stand by if they request our assistance."[13]

It was about 1:30 p.m. on a week day, and the Paytons' two children were where they should have been, in school.[14] When Mrs. Payton answered the front door, she faced the child protective services investigator, Secora, plus two police officers, who had arrived in two police cars.[15] Secora told Mrs. Payton she was from "Social Services," that she'd received a complaint that there were drugs in the home and any time there was a complaint about drugs, she would always bring an officer with her.[16]

Blanton did not just stand by. Secora said she and Blanton asked "just to come in."[17] But Blanton took a more aggressive role, asking Mrs. Payton "was it all right if he looked around?"[18] He told Mrs. Payton the police would "like to search [her] residence."[19] Secora asked Mrs. Payton only if "we" could "come in," indicating both herself and the police.[20]

No one brought any consent forms.[21] No one confirmed whether or not the Paytons had children.[22] No one told Mrs. Payton or Appellant that they were free to refuse government entry into their home.[23] No one had a search warrant or arrest

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[12] *Id.*, 12:02:43
[13] *Id.*, 11:49:06
[14] *Id.*
[15] *Id.*, 11:19:23, 11:20:42, 11:27:47, and 11:37:38
[16] *Id.*
[17] *Id.*, 11:28:38
[18] *Id.*, 11:23:00
[19] *Id.*, 11:45:14
[20] *Id.*, 11:21:00 et seq
[21] *Id.*, 11:31:31, 11:49:40-11:50:23,
[22] *Id.*, 11:32:56
[23] *Id.*

warrant.[24] No one had any information beyond the anonymous triple/ quadruple hearsay from the tipster, to Hardin County, to Secora, to the police. No one knew who the tipster was. No one had reason to believe the tip was accurate,[25] or that the tipster was reliable.[26] No follow-up investigation was done.[27] The tipster had not alleged child abuse or any danger to the children, apart from the presence of drugs in the house. The children were not present.[28] Officer Blanton didn't see any children.[29]

Appellant's wife consented to entry, only

With three accusatory authority figures --two police officers and a child protective services worker—asking for entry at her door, Mrs. Payton was intimidated.[30] The outer screen door was open all the way, but the main door was just partly open behind her.[31] Officer Blanton was talking about wanting to search. The social worker was asking only to come in. According to Blanton, Mrs. Payton said "o.k." after he said he would like to search her residence.[32] According to Secora, Mrs. Payton threw her hands up, opened the door, and said, only, "Come on in."[33]

Detective Blanton testified that Mrs. Payton did not appear to be "under the influence" to the point that she "didn't understand" what she was doing. But according to Blanton, "you could just tell that [Mrs. Payton] was tore up on some kind of drug."[34] He used the same phrase, "tore up" to describe the Appellant's condition.[35]

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[24] *Id.*, 11:40:45
[25] *Id.*, 11:23;22
[26] *Id.*, 11:23:54
[27] *Id.*, 11:23:22
[28] *Id.*, 11:27:03- 11:27:47
[29] *Id.*, 11:48:15
[30] *Id.*, 11:29:07
[31] *Id.*, 11:29:07
[32] *Id.*, 11:45:14
[33] *Id.*, 11:22:49 et seq.
[34] *Id.*, 12:04:58
[35] *Id.*, 11:59:02

Secora saw nothing, and smelled nothing in the living room.[36] Also seeing nothing in the living room,[37] and without asking further permission, Blanton proceeded to the master bedroom, where he found Appellant with a male friend, Jody Mercer.[38]

Appellant demanded immediately, "Where's your search warrant?"

Seeing Blanton walk into the bedroom and start to look around, Appellant immediately asked, **"Where's your search warrant?"**[39] Blanton responded he didn't have one, but Appellant's wife had given "consent to search the residence."[40] Hearing this, Appellant said, "fine,"[41] or "well, okay."[42] According to Blanton, "when I told him that his wife had given us consent, that was the end of it."

Everything that was found, was found after this exchange. Blanton immediately lifted up the mattress of Appellant's bed, and found a piece of foil containing methamphetamine,[43] and two straws with meth residue.[44] Blanton found an ashtray beside the bed, on top of a baggie with traces of meth residue.[45] Nothing was in plain view, [46] and nothing was found anywhere until after Appellant asked for Blanton's search warrant.[47]

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[36] *Id.*, 11:34:52-11:35:55
[37] *Id.*, 11:54:27
[38] *Id.*
[39] *Id.*, 11:50:23, 11:55:10, and 12:04:19
[40] *Id.*, 12:04:19
[41] *Id.*, 11:55:24
[42] Circuit Court Findings of Fact, Conclusions of Law and Order, TR 109, at Tab 3.
[43] VR 1, 6/20/06,, 11:56:21; Report of Forensic Laboratory Examination (Lab Report), TR 45-46.
[44] *Id.*, 12:00:43; Uniform Offense Report, TR 37-39, and Lab Report, TR 45-46.
[45] Uniform Offense Report, TR 37-39 and Lab Report, TR 45-46.
[46] VR 1, 6/20/06, 11:52:22
[47] *Id.*, 11:59:47

Next, Blanton patted everyone down for weapons, because there were "three of them and one of me."[48] He found nothing on Appellant,[49] or Mrs. Payton.[50] He found a syringe in Jody Mercer's sock,[51] and "burnt foil" in Jody Mercer's pants pocket.[52]

Blanton returned to the living room, and there, hidden under a couch cushion, he found a plastic box with 7 tabs of purported Oxycontin and two brown pills, purportedly Hydrocodone.[53]

Jody Mercer told Blanton the meth and the pills were his.[54] After Blanton ignored his request for a warrant, and the other drugs had been found, Appellant showed Blanton his personal stash of marijuana.[55]

Lab results indicated that the items found under the mattress and next to Payton's bed contained methamphetamine. The marijuana was confirmed as marijuana. The purported hydrocodone and oxycodone pills claimed by Jody Mercer were not tested.[56]

Appellant and his wife lost custody of their children, who were placed in the custody of Appellant's mother.[57]

Circuit Court Findings.

The trial court entered its Findings of Fact, Conclusions of Law, and Order overruling Appellant's motion to suppress on September 22, 2006.[58] The court found that Blanton "requested and was given oral consent to search the residence"

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[48] *Id.*, 11:58:22
[49] *Id.*, 11:58:22
[50] *Id.*, 11:59:47
[51] *Id.*, 11:57:46
[52] *Id.*, 11:58:06
[53] *Id.*, 12:01:01
[54] *Id.*, 11:52:04
[55] *Id.*, 12:01:01, 12:01:19
[56] Lab Report, TR 45-46.
[57] *Id.*, 11:41:37
[58] Circuit Court Findings of Fact, Conclusions of Law and Order, TR 108-112, at Tab 3.

by Mrs. Payton. The court found that when Blanton entered the bedroom, Appellant asked him, "Where is your search warrant?" Blanton told him he did not need a warrant since Mrs. Payton had given him consent to search the residence. Appellant then said, "Well, o.k."[59] Appellant and his wife were "pretty tore up" meaning under the influence of drugs.[60]

Accordingly, Appellant entered a conditional guilty plea to possession of a controlled substance in the first degree (methamphetamine), first offense, possession of a controlled substance in the second degree (hydrocodone), possession of a controlled substance in the first degree (oxycodone), possession of drug paraphernalia, and possession of marijuana. He accepted five years for the meth possession, 12 months for the hydrocodone, five years for the oxycodone, 12 months for drug paraphernalia, and 12 months for possession of marijuana, all sentences to run concurrent for five years.[61]

Court of Appeals Opinion

The Court of Appeals majority concluded that the warrantless search of Appellant's home was valid based on the voluntary consent of Mrs. Payton.[62] The Opinion recites that Mrs. Payton opened the door to find Secora and two deputies, and that Secora told her they had received information that there were "drugs and children in the home."[63] The Court of Appeals notes that Mrs. Payton's exact response was disputed, but all agreed that she threw up her hands, and said, "Come

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[59] *Id.*
[60] *Id.*
[61] Judgment and Sentence on Plea of Guilty, TR 159 at Tab 1.
[62] *Payton v. Commonwealth*, No. 2007-CA-001379-MR,(Ky.App. 2008) at Tab 2.
[63] *Payton v. Commonwealth,* Tab 2, at page 2

on in."[64] The Court of Appeals also states that Appellant, when police entered his bedroom, immediately asked for a search warrant, that police told him they didn't need one based on his wife's consent, and that all drugs were found after that.[65]

ARGUMENT

1. NO ONE CONSENTED TO THIS SEARCH.

Preservation. This issue was preserved for review by the Appellant's pretrial motion to suppress,[66] Appellant's memorandum in support of the motion,[67] the suppression hearing,[68] the court's Order overruling suppression,[69] and the entry of a conditional guilty plea under RCr 8.09, preserving the issue for appellate review.

Standard of review: Appellate review of a question regarding a warrantless search is a two-step process in which the facts are reviewed for clear error, and legal conclusions are reviewed *de novo*. *Ornelas v. United States*, 517 U.S.690 (1996). See also RCr §9.78. Independent appellate review keeps the appellate courts in control and in charge of the legal principles, in order to provide the best guidance to local courts and law enforcement. *Ornelas*, 517 U.S. at 696-698.

Argument.

Like all warrantless searches, this search is presumably invalid. The burden is on the Commonwealth to demonstrate that a "knock and talk" search reflects truly voluntary consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (for warrantless, consensual search to be constitutional, consent must be voluntary). Police can't use their

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[64] *Payton v. Commonwealth*, Tab 2, at page 3.
[65] *Id.*
[66] TR 87-89.
[67] Memorandum in Support of Motion to Suppress, TR 104-105, at Tab 4.
[68] VR 1, 6/20/06, 11:17:05 – 2:05:01.
[69] Circuit Court Findings of Fact, Conclusions of Law and Order, Tab 3.

authority to coerce people into opening the door. If they do, not even evidence in plain view is admissible. *See e.g., United States v. Conner*, 948 F. Supp. 821, 833-35 (N.D. Iowa 1996), aff'd, 127 F.3d 663 (8th Cir. 1997) (resident who opens door to "simple knock" gives consent to public observance of any objects in plain view). Whether the consent is voluntary is determined from the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. at 227; *United States v. Heath*, 58 F.3d 1271, 1275 (8th Cir. 1995). The voluntariness of consent to a police search depends on the element of coercion created by the circumstances. *See United States v. Conner*, 948 F. Supp. 821, 833-35 (N.D. Iowa 1996), aff'd, 127 F.3d 663 (8th Cir. 1997) (officers must be careful to ask for permission to enter, not demand it).

Consent by Appellant's wife was coerced by a show of authority and threat to custody of her children.

When police enter property and erroneously advise that they have a search warrant, this Court has held that "there can be no consent under such circumstances" due to the coercive situation. *Middleton v. Commonwealth*, 502 S.W.2d 517, 518 (Ky. 1973); see also *Bumper v. North Carolina*, 391 U.S. 543, 548-549 (1968) (the prosecution burden of proving consent cannot be discharged by showing mere acquiescence to a claim of lawful authority). *Middleton* involved obvious police coercion. But obvious coercion is not required. Even the most subtle, implied coercion renders consent involuntary:

> But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, **no matter how subtly the coercion was applied**, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.
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> The problem of reconciling the recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity. Just as was true with confessions, the requirement of a 'voluntary' consent reflects a fair accommodation of the constitutional requirements involved. In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, **account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.**

Schneckloth v. Bustamonte, 412 U.S. at 228-229 (emphasis added).

There is nothing subtle in a situation involving police and child protective services workers showing up at your door, accusing you of having drugs in the home, and suggesting a threat to your continued custody of your children. Any normal parent would feel threatened. Any normal parent would want to behave, under such threatening circumstances, in the most polite, accommodating way possible, to assuage the authorities and to avoid arousing further suspicion.

There were no drugs in plain view in the living room. Mrs. Payton said, "Come on in," and invited the police and Secora to enter her living room. But Officer Blanton's entry *beyond* the living room exceeded the scope of Mrs. Payton's permission, and was not executed with Mrs. Payton's consent.

The circuit court's "fact-finding" that there was consent to search the entire residence is clearly erroneous.

The circuit court "found" that Appellant's wife (Sharon, aka "Lee Ann" Payton) consented to a search of the entire residence:

> Deputy Blanton requested and was given oral consent by Lee Ann to search the residence. The outer screen door was open the width of Lee Ann's body. Lee Ann opened the entrance door, threw up her hands and said,

"come on in." No written consent to search was obtained by Secora or the officers prior to entry.[70]

To say that this was a consent to a search of the entire residence is a conclusion of law, not a fact-finding. As such it is reviewable *de novo* and should be overturned. Insofar as this is a fact-finding that Mrs. Payton consented to a search of her entire residence, it is clearly erroneous.

Mrs. Payton consented to entry only, not to a search.

Mrs. Payton consented to police entry into her home, but she never consented to any search beyond (implied) consent to a plain view search of the living room. Prior to Mrs. Payton's statement, "Come on in," the police had said they wanted to search her residence, but social services had said, only, that they were seeking permission to "come in." The only words Mrs. Payton spoke were "Come on in." It is reasonable to assume that by saying, in this context, "Come on in," Mrs. Payton meant what she said, that the people at her front door had permission to come in. It is unreasonable to assume anything further. It is unreasonable to assume, for instance, that by saying Come on in, she actually meant Come on in and search my entire residence.

If Officer Blanton had abided by the scope of Mrs. Payton's invitation, he and Secora would have entered her living room and stopped there. Had they done that, Blanton would not have entered or searched Appellant's bedroom, and would not have found any drugs. There would have been no probable cause to search any further. Liberally construing the constitutional provisions protecting the security of person and property, as required by *Bustamonte*, requires strictly construing Mrs. Payton's words. She was facing two requests, one to come in and one to search. She said "Come on in."

[70] Circuit Court Findings of Fact, Conclusions of Law and Order, TR 109, at Tab 3.

She did not say, "Come on in and search." She did not say, "Come on in, and look around." She did not say, "Come on in and search my conjugal bedroom."

Arguably, suppression should be granted because police failed to inform either of the Paytons they could refuse consent.

Arguably, prior to a search based on a "knock and talk," police should be required to perform the effective equivalent of a *Miranda* warning. At a minimum, "the behavior by police [conducting a "knock and talk"] should be deemed inappropriate if they do not give out information, or if they provide incomplete or deceptive information in pursuit of consent."[71] Arguably, consent to search obtained during a knock and talk should not be upheld as constitutional unless the citizen has received the equivalent of a *Miranda* warning providing information regarding the right to refuse to allow the government to enter one's home or search.

Schneckloth v. Bustamonte does not go this far, and does not require police to warn anyone prior to finagling their consent to a search of their home. But certainly under *Bustamonte*, Mrs. Payton's consent here was subtly coerced. She faced tremendous coercion because –with not just the police, but also child protective services standing there-- she was faced not only with potential arrest, but also potential loss of her children. She threw her hands in the air because she was intimidated. She was intimidated and she submitted to a two-fold show of authority. It is impossible to justify the validity of a "consent" search when no warning has been given, on the one hand, and to disallow the results of police interrogation without warning, on the other hand, because "[b]oth confessions and consent searches involve a suspect agreeing to forego rights guaranteed

[71] Marc L. Waite, *supra*, at 1368.

by the Bill of Rights...."[72] Miranda warnings given mid-interrogation, after a defendant gives an unwarned confession, are considered ineffective, and an unwarned confession – even though repeated after warnings are subsequently given-- is inadmissible. *Missouri v. Seibert*, 542 U.S. 600 (2004)

Just like the "question first" technique allows police to get around the need for a preliminary *Miranda* warning, the "knock and talk" technique allows police to get around the need for a search warrant. As such, knock and talk is a "legal short-cut" that renders the Fourth Amendment ineffective. This Court should suppress this search because the Paytons weren't told they had a right to refuse a warrantless entry. The Court should at least agree to strictly scrutinize Mrs. Payton's purported consent to a broad search, given in a "knock and talk" situation. An ambiguous, at best partial consent like Mrs. Payton's, given under "knock and talk" circumstances, should not be automatically construed as consent to search of an entire house.

The Court of Appeals erred by failing to "take account" of Mrs. Payton's vulnerable state and the subtly coercive police tactics.

The police employed "subtle coercion" against Mrs. Payton at a time when –they admitted—she was intoxicated, i.e., in a "possibly vulnerable subjective state," as discussed in *Bustamonte*. Detective Blanton testified that he could see Mrs. Payton was "tore up" on drugs when she came to the front door. Thus Blanton knew Appellant's wife was in a "possibly vulnerable state" as described in *Bustamonte*.

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[72] Marc L. Waite, *Reigning in "Knock and Talk" Investigations, using Missouri v. Seibert to Curtail an End-Run around the Fourth Amendment"* Valparaiso University Law Review, 41 VALULR 1335, Spring 2007. at 1336 and fn. 181, *citing* Ric Simmons, Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine, 80 IND. L.J. 773 (2005); *See also* Rebecca Strauss, Note, *We Can Do this the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches*, 100 MICH. L. REV. 868, 871 (2002).

Additionally, two police officers arriving in two police cars with a child protective services worker was a coercive show of force. Police can arrest you. Child protective services can take your children away. The combined forces standing at Mrs. Payton's doorway would have intimidated any parent. As pointed out by Judge Thompson in dissent in the Court of Appeals, an official investigation of a non-criminal matter like child neglect should not be used as an excuse to "search every crevice of the residence...." to support a separate, *criminal* prosecution.[73]

In reviewing a search pursuant to a knock and talk, "account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Schneckloth v. Bustamonte*, 412 U.S. at 229. Under the circumstances, Secora's and Blanton's questions, which combined an accusation about drugs and children in the house, and simultaneously requested entry, were subtly coercive. Appellant's wife's gesture in throwing up her hands, and her assent to government entry into her home, demonstrated her intimidation.

Under *Seibert,* the Paytons should have been informed of their right to refuse a warrantless police entry. In any event, suppression should be granted because the Paytons were subtly coerced into granting what sparse consent was granted here, to "come in." *Bustamonte* prohibits even subtle coercion, and two police cars, two officers and a child protective services worker arriving en masse, accusing Mrs. Payton of harboring drugs, specifically mentioning her children, and requesting entry into her home was not subtle.

Under *Georgia v. Randolph*, 547 U.S. 103 (2006), argued below, Appellant had his own, separate right to object to the search, and he did object. But to introduce the fruits

[73] *Payton v. Commonwealth*, Tab 2, page 14.

of this search based on Mrs. Payton's subtly coerced consent should no more be considered constitutional than introduction of Seibert's unwarned confession. Regardless of *Seibert*, the fruits of this search should be suppressed. Both Appellant's and his wife's rights were violated under *Schneckloth v. Bustamonte,* under the 4th, 5th, 6th, and 14th Amendments to the United States Constitution, and §§ 1, 2, and 10 of the Kentucky Constitution.

2. APPELLLANT'S WIFE'S CONSENT WAS INEFFECTIVE AS TO APPELLANT BECAUSE HE WAS PRESENT AND OBJECTING IN PERSON; APPELLANT RESCINDED HIS WIFE'S CONSENT.

Preservation. This issue was preserved for review by Appellant's pretrial motion to suppress,[74] Appellant's memorandum in support of the motion,[75] the suppression hearing,[76] the court's Order overruling suppression,[77] and the entry of a conditional guilty plea under RCr 8.09, reserving the issue for appellate review.

Standard of review. The standard of appellate review for warrantless searches is a two-step process in which the facts are reviewed for clear error, and legal conclusions are reviewed de novo. *Ornelas v. United States*, 517 U.S.690 (1996); RCr §9.78. Independent appellate review keeps the appellate courts in control and in charge of the legal principles, in order to provide the best guidance to local courts and law enforcement. *Ornelas*, 517 U.S. at 696-698.

Mrs. Payton's consent was ineffective as to Appellant, because he was physically present and challenged the lack of a search warrant.

As pointed out in Judge Thompson's dissent in the Court of Appeals, this Court has not addressed the impact of *Georgia v. Randolph*, 547 U.S. 103 (2006), which holds

[74] TR 87-89.
[75] Memorandum in Support of Motion to Suppress, TR 104-105, at Tab 4.
[76] VR 1, 6/20/06, 11:17:05 – 2:05:01.
[77] Circuit Court Findings of Fact, Conclusions of Law and Order, Tab 3.

that voluntary consent by one tenant does not extend to a co-tenant who is present and objects to the search. The Court of Appeals erred in applying *Randolph* because –as held by the 11th Circuit-- Payton's demand "Where is your search warrant?" demonstrated his lack of consent. *Shepard v. Davis*, 300 Fed.Appx. 832 (11th Cir. 2008) (asking "Where is your warrant?" implied a lack of consent). [78] Moreover, when Blanton told Appellant that his wife had consented to a search of the entire residence, that was a deception. Appellant's wife had said, only, "Come on in." Telling Payton that his wife had consented to a search of the entire residence was a form of subtle coercion prohibited in *Middleton* and *Bustamonte*.

Under *Randolph,* even if Appellant's wife's words had granted consent to search the rest of the house, Appellant's demand for a warrant at the threshold of his bedroom was effective to stop a search, *at least* a search of that room. When police and social services arrived at Appellant's front door, he was "nearby but not invited to take part in [that] threshold colloquy." Arguably, Appellant's demand, "Where is your search warrant?" challenged the search of his entire house. At a minimum, it challenged a search of the bedroom. Appellant was present at the threshold colloquy related to the search of his bedroom, and he flatly objected at least to that search by demanding, "Where is your search warrant?" *Cf., U.S. v. Ayoub*, 498 F.3d 532, 537 (6th Cir. 2007), quoting *Randolph,* 547 U.S. at 121. Payton's rights were violated under the 4th 5th, 6th, and 14th Amendments to the United States Constitution, and §§ 1, 2, and 10 of the Kentucky Constitution.

"[A] physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." *Georgia v.*

[78] This Opinion is not published in West's Federal Reporter. See copy attached, at Tab 5.

Randolph, 547 U.S. 103, 106 (2006) Appellant was physically present at the threshold of his own bedroom, and his unequivocal demand to see Blanton's search warrant –"Where is your search warrant""-- must be liberally interpreted –under *Bustamonte*—as a challenge to the search. By challenging the search, Appellant rescinded any consent to search the residence, or *at least* to search the bedroom. At least as to Appellant, the warrantless search was unreasonable and invalid.

If Appellant's wife gave consent to search, Appellant rescinded it. Rescinding consent can be inferred from circumstances as well as from words:

> ... Fox originally expressed a consent to the search, however, he rescinded that consent when he took the bag and pushed it back up to the front where the officer could not see it. The arrest occurred only after the consent to search had been rescinded.
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> The trial judge indicated that the police probably needed a search warrant once the bag was closed by Fox and put in the back of the truck. We agree.

Commonwealth v. Fox, 48 S.W.3d 24, 27 (Ky. 2001) There is no way Blanton could possibly have been unaware that Appellant was challenging this search. When someone asks "Where is your search warrant?" there is no other interpretation. But instead of honoring Appellant's right to challenge the entire search, to challenge the search of the bedroom, and to rescind any consent given by his wife, Blanton subtly coerced Appellant with a lie, or half-truth.

Because "the Fourth Amendment protects people, not places," *Katz v. United States*, 389 U.S. 347, 349, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), it "provides sanctuary for citizens wherever they have a legitimate expectation of privacy," *Minnesota v. Olson*, 495 U.S. 91, 96 n. 5, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990), and there can be no dispute that –regardless of his wife's rights in the matter-- Appellant was separately, and

personally entitled to Fourth Amendment protection while in his own home, and in his master bedroom.

When Appellant asked, "Where is your search warrant," Blanton effectively told him police didn't need a warrant because Appellant's wife had given them consent to search the entire residence, implicitly including the bedroom. Appellant cannot be deemed to have consented to a search based on a false claim of lawful authority. *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788 (1968). In *Bumper* four police officers came to defendant's house and were met by his grandmother. One of the officers said, "I have a search warrant to search your house," and defendant's grandmother said, 'Go ahead.' She was not threatened, but the Supreme Court held that no proper consent had been given, reasoning that:

> 'When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion- albeit colorably lawful coercion. Where there is coercion there cannot be consent.'

Bumper v. North Carolina, 391 U.S. at 550, 88 S.Ct. at 1792. In *Bumper* the false claim of authority was a false claim that a warrant existed. Here the false claim was that Appellant's wife had given her permission to search the entire residence. Appellant cannot be deemed to have consented to any search based on this colorably lawful coercion.

As noted by Appellant's trial counsel, this was an administrative health and safety inspection under *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967) and a warrant would have been required even if the social worker Secora had come alone, without the police. Given the police presence, and Blanton's separate request to enter and search, this was a combined police and health & safety search.

Lacking a warrant, and lacking exigent circumstances, true consent to search was required.

There was no consent to search by Mrs. Payton because she consented only under the intimidation of a two-fold show of authority and threat against her children, and even then what she said, at most, was "Okay," under ambiguous circumstances in which Officer Blanton was asking one thing, and Secora another. Arguably all Mrs. Payton consented to was to allow Secora and the police "come in." There was no consent by Appellant, because he squarely objected to the entire search by demanding a search warrant and consented only when told (erroneously) that it didn't matter that police had no warrant because his wife had consented to a search of the entire residence.

In Appellant's absence his wife had authority to allow police to enter the house that Appellant shared with her. *United States v. Matlock*, 415 U.S. 164 (1974). Arguably, she consented only to allow entry, not to search. When the police exceeded his wife's invitation to "Come on in," and entered Appellant's bedroom, and started to look around, Appellant immediately demanded "Where is your search warrant?" Liberally construing these words --as required by *Bustamonte*-- can lead to only one fair conclusion, and that is that Appellant was demanding a search warrant, and challenging the police right to search his residence, and his bedroom, without a warrant.

Detective Blanton admitted Appellant, like his wife, was visibly "tore up" on drugs. The Court of Appeals erred by failing to take into account the "possibly vulnerable subjective state" of both Appellant and his wife. But far more importantly, the Court of Appeals erred by failing to apply *Bustamonte* and *Randolph* and overlooking the obvious intent and meaning of Appellant's separate challenge and demand for a search warrant.

Georgia v. Randolph, 547 U.S. 103 (2006) holds that voluntary consent by one tenant does not extend to a co-tenant who is present and objects to the search. Even before *Randolph* some courts had held that if the person whose property is to be searched is present, police must request his or her consent for the search instead of simply relying on the consent of another. *See State v. Leach*, 782 P.2d 1035 (Wash. 1989) Police may not deny any present cohabitant's Fourth Amendment rights for the mere sake of expediency. *See also Hembree v. State*, 546 S.W.2d 235 (Tenn. Cr. App. 1976).

The circuit court's legal conclusion/fact-finding that Appellant's wife possessed a superior privacy interest is clearly erroneous.

The circuit court's finding that Mrs. Payton possessed a superior privacy interest over her husband in the family home and conjugal bedroom because she was less intoxicated than he was is a legal conclusion. As a legal conclusion it is reviewable *de novo*. Insofar as it might be considered a fact-finding, it is clearly erroneous. Blanton described both Appellant and his wife as "tore up." There was no evidence than one was more "tore up" than the other. This conclusion is also wrong as a legal conclusion, because the law grants equal authority to husband and wife over the family home, regardless of who is, at any given moment, more intoxicated.

There is no authority for the proposition that authority over the privacy of the family home waxes and wanes with ones sobriety. Indeed, more logically, the more intoxicated spouse would probably desire greater privacy. Absent any evidence to support the court's "finding" that Appellant had actually ceded any authority to his wife, the finding to that effect cannot stand. The fact that Appellant immediately objected and asked for a search warrant is compelling evidence to the contrary. If anyone had a

greater privacy interest in the home, and particularly in the bedroom at that moment, it was Appellant.

Mrs. Payton had an inferior privacy interest in the bedroom.

Arguably, Mrs. Payton had an *inferior* privacy interest in the conjugal bedroom because Appellant was *in the bedroom* at the time of the search, and Mrs. Payton was not. The Ninth Circuit has held that "[w]here a suspect is present and objecting to a search, implied consent by a third party with an inferior privacy interest is ineffective. *United States v. Impink*, 728 F.2d 1228, 1234 (9th Cir. 1984). Mrs. Payton consented only to allow police to "come in," and not to search the entire residence. Appellant was present in the conjugal bedroom. He objected to the search, and any mere "implied" consent by his wife was ineffective as to him. As to anything in the bedroom, at the time of the search, Appellant's privacy interest was much greater than his wife's.

Any consent to search the conjugal bedroom based on the bare words at the front door, "Come on in," must be implied. Under *Impink*, this is an "implied consent" case, not an express consent case. As to Appellant, Mrs. Payton's consent, because only implied, was ineffective. Under *Georgia v. Randolph*, as well as *Impink*, and *Commonwealth v. Fox*, there was no effective consent to search the bedroom, as to Appellant. As *Leach* states, "the consent of both [parties] is required when both are present because "ordinarily, persons with equal 'rights' in a place would accommodate each other by not admitting persons over another's objection while he was present." *State v. Leach*, 782 P.2d at 1038, *citing* 3 W. LaFave, *Search and Seizure*, Section 8.3(d), at 251-252 (2d ed. 1987).

Under *Georgia v. Randolph*, as well as all the other authorities cited here, Appellant cannot be deemed to have consented to the search of his house or his bedroom. The Court should reverse and remand with instructions to suppress the fruits of the search.

3. The question whether Appellant "consented" to this search should be reviewed *de novo*.

As pointed out by Judge Thompson in dissent, the Court of Appeals majority opinion overlooks *Commonwealth v. Neal,* 84 S.W.3d 920 (Ky.App. 2002), which holds that "consent given to enter the house does not extend to consent to search the premises." 84 S.W.3d at 925. To the contrary, the trial court found, and the Court of Appeals majority agreed, that Mrs. Payton's words, "Come on in" should be interpreted as legal consent to search the entire residence.

The majority acknowledges that "as commonly used, the phrase 'come on in' is understood as an invitation to enter a residence, and not as permission for the invitee to have access to the entire residence."[79] If it had reviewed the issue of "consent" *de novo*, the Court of Appeals apparently would have concluded that Mrs. Payton **did not consent** to this search. The majority felt that it "must defer" to the trial court's "fact-finding" that these words were the equivalent of oral consent to search the whole house.[80]

Payton argued that regardless whether the court's "finding" of consent –is considered a legal conclusion or a fact-finding, it is in error:

> ...a conclusion of law, not a fact-finding. As such it is reviewable *de novo* and should be overturned. Insofar as the court made a fact-finding that Mrs. Payton consented to a search, it is clearly erroneous.[81]

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[79] *Payton v. Commonwealth*, Tab 2, page 7.
[80] *Payton v. Commonwealth*, Tab 2, page 8.
[81] *Payton v. Commonwealth*, Tab 2, page 14.

The decision that Payton's wife "consented" to a search *of the entire house* is an odd duck that falls somewhere betwixt and between a fact-finding and a legal conclusion. In dealing with a similar issue –whether a suspect is "in custody"--this Court has used the term "ultimate decision" to describe such a decision, and has applied *de novo* review:

> The factual findings made by the trial court on this issue are conclusive if they are supported by substantial evidence. But the determination of whether a defendant is in custody is a mixed question of law and fact, meaning that we review de novo the trial court's ultimate decision on that point.

Beckham v. Commonwealth, 248 S.W.3d 547, 551 (Ky. 2008) (internal citation omitted) The question whether the defendant was in "custody" was the "ultimate decision" in *Beckham*. Here the ultimate decision was the question whether Payton's wife granted "consent" to a search of her entire house. This Court should grant review to clarify that the ultimate decision regarding "consent" in a suppression context must be reviewed *de novo*. The Court should review the circuit court conclusion finding "consent" *de novo*, and should overturn it.

Other courts treat "consent" as an ultimate decision and review *de novo*.

Other courts apply *de novo* review to the ultimate decision regarding consent:

> Because we do not determine credibility, our de novo review of reasonable suspicion, probable cause, consent, and mixed questions of law and fact become a de novo review of legal questions.

Magana v. State, 177 S.W.3d 670, 672 -673 (Tex.App., 2005), *see also, Ornelas v. United States*, 517 U.S. 690, 697-99 (1996). Many states, including Texas, Florida, Wisconsin, and Rhode Island treat "consent" by applying the same approach adopted by this Court in *Beckham* regarding "in custody," and apply *de novo* review:

> Because the consent issue is often a mixed question of law and fact, two standards must be utilized on review. With respect to the historical facts

> surrounding consent, the record must support a trial court's determination that a defendant has voluntarily consented to a search.
>
> ***
>
> The trial court should evaluate the totality of the circumstances before deciding whether consent was freely and voluntarily given. On review, the appellate court's application of the law to those facts, is de novo.

Blake v. State, 939 So.2d 192, 196 -197 (Fla.App., 2006); *see also, State v. Texter*, 923 A.2d 568, 576 -577 (R.I.,2007) (determination of voluntary consent involves mixed question, reviewed de novo); *Reyes-Perez v. State*, 45 S.W.3d 312, 316 (Tex.App. 2001) (The voluntariness of a consent to search is a mixed question of law and fact); *State v. Vorburger*, 255 Wis.2d 537, 648 N.W.2d 829 (Wis. 2002) (Voluntariness of consent to search raises a mixed question of fact and law). Consistent with *Beckham*, this Court should consider "consent" to be an "ultimate decision," requiring *de novo* review.

Under any standard, there was no "consent" to search the entire house.

The Court of Appeals' decision to uphold the invasive search of an entire residence based on a mere "Come on in" at the front door is in error regardless what standard is applied. The facts here are that the police requested permission to come in and to search the residence, but Mrs. Payton gave permission only to "come on in." As just argued, if the court's decision on this issue was an "ultimate decision" applying law to fact, it was in error. This Court's decision in *Beckham* takes the right approach and applies the correct standard of review in dealing with an "ultimate decision" as opposed to a fact finding.

If this was a fact-finding, it was also clearly erroneous. Scope of consent is measured objectively by what a reasonable person would have understood by the exchange between the police and the suspect. *State v. Mitzel*, 685 N.W.2d 120, 124 (N.D. 2004) As the Court of Appeals acknowledged, "as commonly used, the phrase

'come on in' is understood as an invitation to enter a residence, and not as permission for the invitee to have access to the entire residence."[82] Appellant's and his wife's rights were violated under the 4th, 5th, 6th, and 14th Amendments to the United States Constitution, and §§ 1, 2, and 10 of the Kentucky Constitution.

CONCLUSION

Appellant respectfully submits that the evidence against him was obtained in violation of his rights under the 4th, 5th, and 14th Amendments of the United States Constitution and under §§ 1, 2 and 10 of the Kentucky Constitution. Accordingly, the circuit court order denying suppression of the evidence should be reversed, and this case should be remanded with directions that all evidence obtained from the search must be suppressed. Appellant should be offered an opportunity to withdraw his guilty plea, and re-negotiate a settlement, or proceed to trial.

Respectfully submitted,

SUSAN JACKSON BALLIET

March 31, 2010

[82] *Payton v. Commonwealth*, Tab 2, page 7.