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Commonwealth of Kentucky
Supreme Court of Kentucky

No. 2008-SC-965

MICHAEL SHAWN PAYTON **APPELLANT**

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

COMMONWEALTH OF KENTUCKY **APPELLEE**

Brief for Commonwealth

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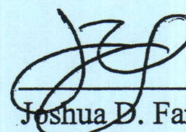
CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 29th day of July, 2010 to Honorable Robert A. Miller, Judge, Grayson Circuit Court, Courthouse, 516 Fairway Drive, P.O. Box 245, Brandenburg, Kentucky 40108-0245; Hon. Kenton R. Smith, Commonwealth's Attorney, 512 Fairway Drive, P.O. Box 249, Brandenburg, Kentucky 40108-0249; Hon. Susan Jackson Balliet, Assistant Public Advocate, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601, Counsel for Appellant.



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INTRODUCTION

The Appellant entered a conditional guilty plea to two (2) counts of Possession of a Controlled Substance in the First Degree, one (1) count of Possession of a Controlled Substance in the Second Degree, one (1) count of Possession of Drug Paraphernalia, and one (1) count of Possession of Marijuana. He received a total of a five (5) year sentence. He appealed the denial of his motion to suppress and the Kentucky Court of Appeals affirmed the denial. This Court granted discretionary review of the Court of Appeals decision.

STATEMENT OF ORAL ARGUMENT

Oral argument is not necessary in this case since the issues may be fairly decided based on the briefs of the parties.

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COUNTERSTATEMENT OF THE CASE

On December 6, 2005, a Grayson County Grand Jury indicted the Appellant on one (1) count of Possession of a Controlled Substance in the First Degree (Methamphetamine), Second or Subsequent Offense; one (1) count of Possession of a Controlled Substance in the Second Degree (Hydrocodone); one (1) count of Possession of a Controlled Substance in the First Degree (Oxycodone); one (1) count of Possession of Drug Paraphernalia; one (1) count of Possession of Marijuana; and one (1) count of being a Persistent Felony Offender in the First Degree. (TR I, 1 - 3). Appellant appeared in court on June 20, 2006, for a suppression hearing, at which time the court overruled his motion for suppression. (Id. at 108 - 112). The trial court set forth the facts surrounding the Appellant's indictment in it's "Findings of Fact, Conclusions of Law and Order":

> After the Cabinet for Families and Children received an anonymous telephone call at their Hardin County office alleging methamphetamine existed and was being made in the home of the Defendants, Sharon Payton (hereinafter "Lee Ann") and Michael Payton (hereinafter "Michael"), at 4119 Sunbeam Road, Grayson County, KY. Secora received the referral at the Grayson County Cabinet for Health and Family Services office at 2:15 p.m. on August 25, 2005. The referral was made to Secora in her official capacity. In compliance with standard procedure, due to the fact it was known there were two children of elementary school age in the home, Secora contacted Deputy Blanton about investigating the allegation for the protection of the children. Secora is not allowed to do searches alone based upon the mention of illegal drugs.
>
> On August 26, 2005, Secora and Deputy Blanton went to the Payton residence. The children were in school at the time at 1:30 p.m. They were due to return after school on the bus. When they arrived, Secora while accompanied by the officers, knocked on the door. Defendant Sharon a/k/a "Lee Ann" Payton answered and opened the door. Secora explained who she was and why she was there. 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.

Deputy Blanton then entered the residence and began their search. No evidence was observed in plain sight in the living room. Secora testified she entered inside the door into the living room. Because she had forgotten some paperwork, Secora then stepped back outside and did not observe the search. She did not smell anything strange while in the residence.

Officer Dave Colson and Grayson County Sheriff David Smith arrived later.

As Deputy Blanton entered the bedroom to the right, (which he believed to be the master bedroom), he first observed three individuals. They were later determined to be Defendant Michael Payton, Jody Mercer and Ralph Meredith. Defendant Payton asked Blanton where his search warrant was. Blanton responded that he did not need a warrant since Mrs. Payton had granted consent to search the residence. Mr. Payton then said "Well, O.K.".

A search of the master bedroom revealed evidence in an ashtray in plain view. Also, methamphetamine was found under the mattress on the bed, a floral tin with powder in it behind the dresser and two straws with residue.

Because he was afraid he might "get shot", Blanton performed a pat down search of the three individuals. A syringe was found in Jody Mercer's sock. He also had burnt foil in his pants' pocket.

Defendant Payton subsequently showed Blanton where some marijuana was located.

A search of the living room subsequently revealed a plastic box with 7 oxycontin tablets and 2 Hydrocodone tablets under a seat cushion on the couch. Mercer claimed

> ownership of the methamphetamine and pills. Mercer was then offered a drug test, it was declined.
>
> No search warrant or written consent to search forms were ever obtained.
>
> Both the Paytons were arrested. The children were placed with the paternal grandmother.
>
> Video statements of the two defendants and Jody Mercer were taken.
>
> Blanton determined after subsequent observations the mental state of the three individuals in the bedroom was "all pretty tore up" meaning under the influence of drugs or alcohol.

Id.

Appellant accepted and entered a conditional plea of guilty on June 5, 2007, and was sentenced according to the Commonwealth's recommendation to a total of five (5) years imprisonment on July 3, 2007. (TR II, 157 - 161). Appellant now appeals from this denial of his suppression motion.

Additional facts will be set forth below if necessary.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS.

A. Standard of Review

Under RCr 9.78, the factual findings of the trial court concerning a motion to suppress shall be conclusive so long as they are supported by substantial evidence, *see* Davis v. Commonwealth, 795 S.W.2d 942 (Ky. 1990). In making its determination as to the substantial nature of the evidence, a reviewing court must look to the totality of the

circumstances presented, Taylor v. Commonwealth, 987 S.W.2d 302 (Ky. 1998); Simpson v. Commonwealth, 834 S.W.2d 686 (Ky. App. 1992). On appeal, legal issues are reviewed *de novo*. That position is supported by the United States Supreme Court: We therefore hold that as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers. Ornelas v. United States, 517 U.S. 690, 699 (1996).

Generally, rulings upon the admissibility of evidence are within the discretion of the trial judge; such rulings should not be reversed on appeal in the absence of a clear abuse of discretion. Freeman v. Commonwealth, 425 S.W.2d 575 (Ky. App. 1967); Commonwealth v. English, 993 S.W.2d 941 (Ky. 1991).

Based on that finding of fact, this court 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. Commonwealth v. Neal, 84 S.W.3d 920 (Ky. App. 2002); Adcock v. Commonwealth, 967 S.W.2d 6 (Ky. 1998).

B. Appellant's Consent to Search the Property Was Voluntary.

Appellant disputes the trial court's finding that consent was given for the search at issue. Because the trial court's finding in this regard is supported by substantial evidence, this finding is conclusive. Neal, 84 S.W.3d at 923.

Appellant argues that consent was not voluntary. (Aplt. Br. at 6 - 11). Appellant also focuses on the scope of the consent. (Id.). The Commonwealth will address the scope of Appellant's consent in Section D herein.

The United States Supreme Court has long held that all searches without a warrant are unreasonable unless the search falls within one of the exceptions to the warrant requirement. *See* Farmer v. Commonwealth, 6 S.W.3d 144, 146 (Ky. App. 1999) (*citing* Coolidge v. New Hampshire, 403 U.S. 443 (1971)). One such exception to the warrant requirement is consent. Id. The question of the voluntariness of a consent to search is to be determined by an objective evaluation of police conduct and not by the defendant's subjective perception of reality. Id.; Cook v. Commonwealth, 826 S.W.2d 329, 331 (Ky. 1992) ("The question of voluntariness turns on a careful scrutiny of all the surrounding circumstances in a specific case"). Factors to be considered in assessing the voluntariness of consent include the following:

(1) the voluntariness of the defendant's custodial status;

(2) the presence of coercive police procedures;

(3) the extent and level of the defendant's cooperation;

(4) the defendant's awareness of his right to refuse consent;

(5) the defendant's education and intelligence; and

(6) the defendant's belief that no incriminating evidence will be found.

Baltimore, 119 S.W.3d 532, 540 n. 34 (Ky. App. 2003) (*citing* United States v. Portillo-Aguirre, 311 F.3d 647, 658-59 (5th Cir. 2002)). Whether a consent to search was

voluntarily given is a question of fact to be determined by a preponderance of the evidence, which burden is to be borne by the Commonwealth. Talbott v. Commonwealth, 968 S.W.2d 76, 82 (Ky. 1998); Farmer, 6 S.W.3d at 146.

In this instance, the Appellant's wife and co-defendant was informed by both Ms. Secora from the Cabinet for Health and Family Services and Deputy Blanton that a complaint had been filed with the Cabinet for Health and Family Services that methamphetamine was being used in the home around children and that Ms. Secora and the police would like to come in and search the home for evidence of drug use. (VR I, 6/20/06; 11:27:47, 11:37:38, 11:44:50). Appellant readily acknowledges that in response, his wife, co-habitant, and co-defendant fully cooperated with Deputy Blanton and consented to his request by throwing up her arms and stating, "Come on in." (Aplt. Br. at 4). Further, there is absolutely no evidence to suggest that Appellant's wife was in police custody during this exchange, feared that she would be placed in custody if she did not cooperate, that she was uneducated or otherwise lacked the intelligence necessary to understand what was occurring, or that she did not know she was free to refuse Deputy Blanton's request for consent to conduct a search. *But see* Cook, 826 S.W.2d at 331 ("The law does not require that Cook be advised of his *Miranda* rights or that he had a right to refuse the search"). Appellant argues that his wife's consent was coerced; however the record does not reflect that at any time Deputy Blanton's gun was drawn while speaking with Appellant; that he threatened, forced, or coerced her into giving her consent; or that he threatened to have her children removed from her custody in order to gain her consent. (Aplt. Br. at 7). While Deputy Blanton did testify that it appeared

Appellant was under the influence of illegal narcotics that evening, he believed and also testified that both the Appellant's wife and the Appellant could understand what was being said to them and respond appropriately. Deputy Blanton did not feel that they were incapable of consent and therefore had a reasonable belief that such consent was valid. (VR I, 6/20/06; 12:04:58). *See* State v. McDowell, 407 S.E.2d 200, 207-08 (N.C. 2001) (consent by defendant's mentally retarded girlfriend deemed valid due, in part, to fact officers acted in good faith without any knowledge of any possible mental limitations that [she] might have"). Further, Deputy Blanton offered uncontradicted testimony that Appellant's wife was not so intoxicated that her consent was not free and voluntary, and that he believed she knew what she was doing at the time she gave her consent. (Id.) Appellant's argument that Appellant's wife threw up her arms in intimidation and that her vulnerable state due to her voluntary intoxication made her susceptible to coercion and intimidation cannot stand for the reasons discussed above. (Aplt. Br. at 9). Also it should be noted that the Appellant's statements concerning the coercive nature of the police and Health and Family Services are illogical and exaggerated at best. It may be true that the police can arrest you and Health and Family Services can take your children away; however these facts do not in and of themselves make any interaction with either of these entities coercive in nature. Nor does the Appellant's wife's intoxication enhance any intimidation offered by either of these entities, otherwise every drunk driving arrest would be considered unduly coercive. Certainly there would be no intimidation or coercion if no laws had been broken.

Considering all of the surrounding circumstances in this case, there is no question that the Commonwealth demonstrated by a preponderance of evidence that Appellant's wife's consent was given freely and voluntarily. Talbott, 968 S.W.2d at 82. Similarly, an objective evaluation of the officers' conduct in this case yields the same irrefutable conclusion. Farmer, 6 S.W.3d at 146. As such, the trial court's finding that Appellant's wife gave her free and voluntary consent without actual, implied or direct force, coercion or duress was supported by substantial evidence and is therefore conclusive. Because Appellant's wife's consent was indeed voluntary and she clearly had the authority to consent to the search, such consent was valid and the search conducted by Deputy Blanton was proper. Gallman v. Commonwealth, 578 S.W.2d 47, 48 (Ky. 1979) ("The burden is on the prosecution to show the search comes within an exception [to the rule that all warrantless searches are unreasonable]").

Appellant also argues that his wife's consent was ineffective as to him, because he was present and objected. (Aplt. Br. at 13). However this argument also fails. It is clear that Appellant's wife also had the requisite authority to consent to the search of the property (including the residence, garage, and curtilage) since she was a resident of same. Sanders v. Commonwealth, 609 S.W.2d 690, 691 (Ky. 1980) (co-tenant may authorize search of apartment); Commonwealth v. Sebastian, 500 S.W.2d 417, 419 (Ky. 1973) (generally, wife may consent to search of residence). Moreover, Appellant clearly had the apparent authority to authorize the search. *See* Colbert v. Commonwealth, 43 S.W.3d 777, 784 (Ky. 2001). Appellant's argument that he should have been given a greater privacy interest than his wife, simply because he was in the bedroom, "the most

private room in the house" is illogical and unsupported by established Kentucky law. (Aplt. Br. at 13). As discussed above and below Appellant's wife had every right to grant Deputy Blanton consent to search the Appellant's entire residence.

C. <u>Appellant and His Wife Did Not Revoke Their Unrestricted Consent to Search</u>.

Appellant's claims that he objected to the search of his residence are unfounded. Appellant asked Deputy Blanton where his search warrant was upon his entrance to the Appellant's bedroom; however when Deputy Blanton told him that his wife had given him consent to search the residence Appellant stated, "fine," or "well, okay." (VR I, 6/20/06; 11:55:24). This statement was a direct waiver of the need for a search warrant and explicitly gave the Appellant's consent to search his residence. It should also be noted that later during the search the Appellant willingly showed Deputy Blanton where his personal stash of marijuana was hidden. (Id. at 12:01:01).

Once given, a defendant's consent to search may be withdrawn or limited prior to the completion of the search. *See, e.g.*, <u>Commonwealth v. Fox</u>, 48 S.W.3d 24, 28 (Ky. 2001) ("a reasonable person would have understood that Fox was terminating the consent to search when he closed the bag and put it in the back of the truck"). *But see* <u>Smith v. Commonwealth</u>, 197 Ky. 192, 246 S.W. 449, 451 (Ky. 1923) (once a consent search has begun, defendant may not withdraw consent to prevent discovery of contraband). In order to be effective, the withdrawal "must be made by unequivocal act or statement." *See, e.g.*, <u>United States v. Gray</u>, 369 F.3d 1024, 1026 (8th Cir. 2004); <u>United States v. Alfaro</u>, 935 F.2d 64, 67 (5th Cir. 1991) ("His conduct falls far short of an

unequivocal act or statement of withdrawal, something found in most withdrawal of consent cases").

Although Appellant did ask Deputy Blanton about a search warrant, it appears that once he explained the implications of his wife's previous voluntary consent, Appellant fell silent and neither revoked his consent nor otherwise questioned the continuance of the search. Indeed, there is nothing in the record suggesting that Appellant protested the continuance of the search or directed the search be stopped subsequent to his exchange with Deputy Blanton. Under these circumstances, a reasonable person would have understood Appellant's silence to mean that his wife's previous consent was still valid, particularly since he could have easily manifested a desire to withdraw such consent by telling Deputy Blanton to stop the search. *See* Fox, 48 S.W.3d at 28. Instead, however, Appellant did nothing and allowed the search to continue.

D. The Police Officers' Search of Appellant's Residence Was Within the Scope of Appellant's Consent.

According to the United States Supreme Court, the standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "'objective' reasonableness–what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, 500 U.S. 248, 251 (1991). *See Fox*, 48 S.W.3d at 28 (pursuant to Jimeno, consent is assessed by asking what a reasonable officer would have understood in the circumstances). Indeed, the scope of a search is generally defined by its expressed object. Jimeno, 500 U.S. at 251; Estep v.

Commonwealth, 663 S.W.2d 213, 215 (Ky. 1984) ("The scope of a warrantless search is defined by the object of the search and the places in which there is probable cause to believe it may be found").

When Deputy Blanton approached Appellant's residence and knocked on the door, Appellant's wife answered and Deputy Blanton, as well as Ms. Secora informed Appellant's wife of the drug use allegations, why they were there, and asked if they could come in and search the residence for drug use. (VR I, 6/20/06; 11:27:47, 11:37:38, 11:44:50). According to the uncontradicted testimony at the suppression hearing, Deputy Blanton asked Appellant's wife if he could conduct a search and Appellant's wife consented. (Id.).

Although Appellant's wife was free at the time to limit the scope of or even refuse to give consent, she did no such thing. Jimeno, 500 U.S. at 252 ("A suspect may of course delimit as he chooses the scope of the search to which he consents"). Rather, Appellant's wife gave her unrestricted consent to Deputy Blanton to conduct a search by stating "Come on in." (VR I, 6/20/06; 11:22:49).

Based on this exchange, Deputy Blanton's belief that Appellant's consent to search encompassed the entire residence was objectively reasonable. By Deputy Blanton asking to "look around" and "search the residence", along with Appellant's wife saying, "Come on in," with no restrictions, it was objectively reasonable for the officers to look wherever evidence of drug use may be found, including Appellant's bedroom and entire residence. (Id. at 11:45:14, 11:22:49). Indeed, the commonly used phrase "look around" is one that is by its very nature without restriction and implies the right to search

where the officers saw fit to locate evidence of drug use. *See, e.g.*, United States v. Coffman, 148 F.3d 952, 953 (8th Cir. 1998) ("typical reasonable person" would not have understood defendant's consent for officers to "go ahead and look around" as permitting only limited search; consent properly found to be "broad and unlimited"). Further, in light of where this exchange took place (at the doorway of Appellant's residence), the expressed purpose of Deputy Blanton's search (to search for evidence of drug use), the fact that evidence of such drug use may be found anywhere in the residence, and Appellant's wife's lack of restriction on her consent naturally led Deputy Blanton, as it would have any reasonable person, to believe that Appellant's wife had consented to the search of the entire residence. Similarly, Appellant's wife's and Appellant's apparent indifference to the officers' search of the bedroom confirms that the scope of her consent included these areas. *See* Section C, *supra*. Accordingly, the trial court's determination that the scope of Appellant's wife's unrestricted consent to search included the entire residence was proper.

As the United States Supreme Court made clear in Jimeno, the scope of the consent is not to be determined on the basis of the subjective intentions of a consenting party, but rather the standard is that of "'objective' reasonableness." 500 U.S. at 251. Even if it were proper to consider Appellant's subjective intentions, Appellant and his wife failed to testify at the suppression hearing and therefore never offered any testimony as to what either understood their consent to mean.

Appellant also maintains that his inquiry about a search warrant supports the premise that his consent was somehow restricted or recalled. (Aplt. Br. at 11 - 16). As

the record reflects, however, Appellant's inquiry was not posed until long after his wife had given her voluntary and unrestricted consent to search and his situation had seriously worsened (i.e., the imminent discovery of evidence of methamphetamine in the bedroom). (VR I, 6/20/06; 11:50:23).

When Deputy Blanton spoke with Appellant's wife, he gave her clear notice that he was searching for evidence of drug use. (VR I, 6/20/06; 11:27:47, 11:37:38, 11:44:50). Considering Appellant's wife's unrestricted consent and the expressed object of the search, Deputy Blanton was permitted to search wherever such evidence of drug use might be found or hidden. *See* United States v. Ramstad, 308 F.3d 1139, 1146-47 (10th Cir. 2002) ("The expressed purpose of the search, to which Mr. Ramstad consented, was to look for drugs or contraband. That certainly implies that the officer could look wherever drugs might be hidden."); Estep, 663 S.W.2d at 215 ("A lawful search of a fixed premises generally extends to the entire area in which objects may be found and is not otherwise limited"). Under the circumstances, this would reasonably include not only Appellant's bedroom, but also his residence and those places therein where such evidence is likely to be found or hidden, and not what is merely open and obvious as Appellant seems to maintain.

For these reasons, the trial court's determination that the scope of Appellant's unrestricted consent to search included her entire residence was proper.

E. Georgia v. Randolph, 547 U.S. 103 (2006) was properly applied by the Kentucky Court of Appeals.

Appellant argues that the Kentucky Court of Appeals misapplied Georgia v. Randolph; however this argument is without merit (Aplt. Br. at 14-15).

In Georgia, the defendant's estranged wife granted police entry into his home, in the face of, and immediately following the defendant's express denial of consent. (Georgia at 107). Georgia deals with concurrent and "express" denials of consent.

> This case invites a straightforward application of the rule that a physically present inhabitant's *express* refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. Scott Randolph's *refusal is clear*, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent.

(Id. at 122-123)(emphasis added).

In contrast to Georgia, Appellant did not expressly or unequivocally deny or revoke consent for a police search of his home. On the contrary, after being informed that his wife had consented to a search of his home he acquiesced and even presented evidence to the officers. As discussed previously, Appellant's actions did not expressly deny consent to search his home[1].

Appellant's contention that the Kentucky Court of Appeals misapplied Georgia is lacking merit. The Kentucky Court of Appeals properly applied Georgia and found that the Appellant did not expressly revoke his consent, as is required under Georgia. (Slip Op. at 5-6). As such, no error occurred.

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1 It should be noted that evidence of drug use was found in plain view in an ashtray in the bedroom. This same evidence would have been seen once the officer entered the Appellant's bedroom, regardless of Appellant's consent. Thus, even if it were determined that the Appellant had revoked consent to search his home, this evidence would have been seen in plain view, since Appellant would not have revoked consent until after entry into the bedroom.

II.

APPELLANT NEED NOT BE INFORMED OF A "RIGHT TO REFUSE" CONSENT.

In challenging the trial court's opinion denying his suppression motion, Appellant attacks the validity of the police officers' presence at their house to conduct the "knock and talk."

The general rule of a "knock and talk" encounter has been articulated as follows:

> [a]bsent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof whether the questioner be a pollster, a salesman, or an officer of the law.

United States v. Cormier, 220 F.3d 1103, 1109 (9th Cir. 2000), *citing* Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964.) In Cloar v. Commonwealth, 679 S.W.2d 827, 831 (Ky. App. 1984), the Court of Appeals held "that a police officer in the furtherance of a legitimate criminal investigation has a legal right to enter those parts of a private residential property which are impliedly open to public use."

Courts have recognized the "knock and talk" strategy as a reasonable investigative tool when officers seek to gain an occupant's consent to search the premises. United States v. Chambers, 395 F.3d 563, 568 n. 2 (6th Cir. 2005) ("Courts generally have upheld [the knock and talk] investigative procedure as a legitimate effort

to obtain a suspect's consent to search."); Ewolski v. City of Brunswick, 287 F.3d 492, 504-05 (6th Cir. 2002) (concluding that it was reasonable to approach a suspect's home to attempt to learn more through consensual questioning."). The authority of police to conduct a "knock and talk," that is, to approach a residence and knock on the front door or otherwise seek to speak to the inhabitants, is recognized in a series of cases. *See e.g.* United States v. Jerez, 108 F.3d 684 (7th Cir. 1997); United States v. Taylor, 90 F.3d 903 (4th Cir. 1996); People v. Frohriep, 247 Mich.App. 692, 697, 637 N.W.2d 562, 566 (Mich.App. 2001) ("We decline defendant's request to hold that the knock and talk procedure is unconstitutional because defendant points to no binding precedent, nor have we found any, prohibiting the police from going to a residence and engaging in a conversation with a person."); State v. Smith, 346 N.C. 794, 488 S.E.2d 210, 214 (N.C. 1997).

The United States Supreme Court has held that the police may request consent to search an individual's property with absolutely no ground for believing that the person has committed any wrongdoing. *See*: Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 2382, 115 L. Ed 2d 389 (1991). In Baltimore v. Commonwealth, 119 S.W.3d 532, 537 (Ky. App. 2003) the Court of Appeals explained that, "[a] police officer is fully authorized to approach a person, identify himself as a police officer and ask a few questions without implicating the Fourth Amendment." As noted by the Sixth Circuit in United States v. Thomas, 430 F.3d 274 (6th Cir. 2005), "Consensual encounters do not lose their propriety, moreover, merely because they take place at the entrance of a citizen's home."

It has been specifically stated by the courts that neither reasonable suspicion nor probable cause are necessary to justify a "knock and talk." Cormier, *supra*. ("no suspicion needed to be shown in order to justify the 'knock and talk.' ") As noted by the 10th Circuit in United States v. Cruz-Mendez, 467 F.3d 1260, 1264 (10th Cir. 2006):

> Mr. Cruz-Mendez first contends that the officers lacked reasonable suspicion for the initial approach to the apartment to conduct a so-called 'knock and talk' investigation. But reasonable suspicion was unnecessary. As commonly understood, a 'knock and talk' is a consensual encounter and therefore does not contravene the Fourth Amendment, even absent reasonable suspicion.
>
> . . .
>
> [t]he officers in this case did not need reasonable suspicion before knocking on Ms. Armento's door with the intent to ask her questions.

See also: United States v. Waldon, 206 F.3d 597, 602 (6th Cir. 2000) ("[T]he consensual encounter may be initiated without any objective level of suspicion."); People v. Rivera, 41 Cal. 4th 304, 159 P.3d 60 (Cal. 2007) ("Consensual encounters require no articulable suspicion of criminal activity.") Gompf v. State, 120 P.3d 980 (Wyo. 2005) ("There is no requirement that law enforcement have probable cause or reasonable suspicion before they may approach a home and ask for permission to enter."); Scott v. State, 347 Ark. 767, 67 S.W.3d 567 (Ark. 2002) ("the police did not need a reasonable suspicion in order to approach Mr. Scott's residence and request his assistance in a criminal investigation."); State v. Cothran, 115 S.W.3d 513, 522 (Tenn. Crim. App. 2003) ("Officer Thompson was engaged in a consensual encounter, which requires no basis for suspecting a crime is being committed.").

Further, the officers' motivation when seeking a consent to search from someone not in custody is irrelevant. Commonwealth v. Kelly, 180 S.W.3d 474 (Ky. 2005); Wilson v. Commonwealth, 37 S.W. 3d 745, 749 (Ky. 2001). As noted by the United States Supreme Court in Whren v. United States, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed 2d 89 (1996), '[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." See also: United States v. Rose, 889 F.2d 1490,1493 (6th Cir. 1989); United States v. Liss, 103 F.3d 617, 621 (7th Cir. 1997).

Appellant takes opposition to the "knock and talk" procedure, because he nor his wife were informed of their right to refuse consent; however, the Supreme Court of Kentucky has stated that whether a defendant has been informed of his Miranda rights is a factor in determining whether his consent was voluntarily given. Talbott v. Commonwealth, 968 S.W.2d 76, 82 (Ky. 1998) (*citing* Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854 (1973); Cook v. Commonwealth, 826 S.W.2d 239 (Ky. 1992)). However, there is no requirement that a person be informed of his right to refuse consent. Schneckloth, 412 U.S. at 231-32, 93 S.Ct. at 2049-50; Hohnke v. Commonwealth, 451 S.W.2d 162, 168-69 (Ky. 1970). A person who is in custody or being detained is still capable of consenting. Talbott, *supra*; Commonwealth v. Erickson, 132 S.W.3d 884 (Ky. App. 2004). Appellant's contentions that he and his wife should have been informed that they could refuse consent is in contrary to the well-established law as discussed above.

There is no requirement that Appellant be informed of a right to refuse consent. The United States Supreme Court stated, "In short, neither this Court's prior

cases, nor the traditional definition of 'voluntariness' requires proof of knowledge of a right to refuse as the sine qua non of an effective consent to a search." Schneckloth at 234. This Court adopted the same reasoning in Hohnke v. Commonwealth, stating, "the trial court had adequate basis for ruling that the admitted failure to advise appellant of her right to refuse consent to a warrantless search was not 'decisive' as to whether the consent was coerced." Id. at 168-169. There is no requirement to inform a person that they have the right to refuse consent. Appellant's contentions are contrary to well-established law.

CONCLUSION

For the above stated reasons, the decision of the Kentucky Court of Appeals should be affirmed.

Respectfully submitted,

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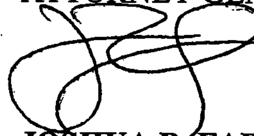

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