Commonwealth of Kentucky
Supreme Court of Kentucky

Case No. 2013-SC-00681
(2012-CA-00739)

DAVID ZAC MILAM — **APPELLANT**

v.

Appeal from Fayette Circuit Court
Hon. Martin J. Sheehan, Judge
Indictment No. 2011-CR-0030

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief for the Commonwealth was mailed 1st class U.S. mail, postage pre-paid this 21st day of October, 2014, to: Hon. James D. Ishmael, Judge, Fayette Circuit Court, 9th Division, 120 North Limestone, Lexington, KY 40507; to: Hon. Fred E. Peters and Rhey Mills, Fred Peters Law Office, 226 East High Street, P. O. Box 2043, Lexington, KY 40588 and electronically mailed to: Hon. Ray Larson, Commonwealth's Attorney, 116 North Upper Street, Lexington, KY 40507.

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INTRODUCTION

David Milam, hereinafter "Appellant," appeals from the Fayette Circuit Court's final judgment of conviction for trafficking in a controlled substance within 1000 yards of a school, for which Appellant received a sentence of one (1) year, probated for three (3) years. The Court of Appeals affirmed his conviction and this Court granted discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth believes that the issues raised on appeal may be adequately addressed by the parties' briefs. The Commonwealth does not request oral argument.

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COUNTERSTATEMENT OF THE CASE

In the fall of 2010, the Appellant trafficked marijuana out of the Delta Tau Delta fraternity house, where he was a member, on the campus of the University of Kentucky. He admitted to police that he had approximately thirty (30) clients, and that most of those were his "in house" fraternity brothers.

Appellant was indicted on several charges by the Fayette County Grand Jury on January 10. 2011. (TR, 20-21). The only charge relevant to the instant case is that of trafficking in a controlled substance within 1000 yards of a school.

Following his indictment, the Appellant filed a motion to suppress the evidence seized against him. (TR, 33-34). A suppression hearing and two (2) supplemental suppression hearings were held at the request of Appellant. As the suppression hearings comprise the underlying factual predicate of Appellant's assignments of error on appeal, an in-depth discussion of the evidence taken is proper.

At the primary suppression hearing, held on August 12, 2011, the Commonwealth presented one (1) witness. Detective Jason Beetz was with the University of Kentucky Police Department on November 30, 2010. (VR, 8/12/11, 2:57:33). On that day he had received a tip that Appellant was selling high grade marijuana out of the Delta Tau Delta house on the university campus. (Id., at 2:58:19). Beetz and two (2) other police officers met at the fraternity house to conduct a knock and talk with the Appellant. (Id., at 2:58:36).

They approached the door of the house that faced Nicholasville Road.[1] (VR, 8/12/11, 2:59:04). They rang the door bell, and knocked, but no one came to answer the door. (Id., at 2:59:42). The door was ajar, and they entered through the door into a breezeway with a stairwell. (Id., at 3:00:12). They shouted to see if any one was home, and a fraternity member came to them from an interior room, through another set of double doors that led to a common area of the house. (Id, at 3:00:33, 3:22:54). Once one entered the breezeway, there was a stairway to the right, and ahead was another set of doors, that were open on that night, and led into the main fraternity house common area. The officers identified themselves as police according to Beetz, and stated that they were looking for Appellant. (Id. at 3:00:37). The young man[2] said that Appellant did in fact live in the house. (Id., at 3:00:59). Beetz told him that they were there to speak to the Appellant. They ask if the man could show them Appellant's room, and the man replied "I know where he is" and then led them up the stairs located in the breezeway. (3:23:04, 3:37:06).

As Beetz and the other officers went up the stairs, they could smell burnt marijuana in the air. (VR, 8/12/11, 3:01:37, 3:27:13). Upon reaching the second floor, the fraternity member opened the stairwell fire door. (Id., at 3:49:40). The room of the Appellant, #204, was pointed out to the officers. (Id., at 3:01:48). Beetz testified that he

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[1] Officers believed that this was the front door of the fraternity house, as there were large greek letters above the door and it faced Nicholasville Road.

[2] This person was later found to be Matthew Neagli, another fraternity member.

then went and knocked on the Appellant's door, and Appellant answered the door, opening it fully. (Id., at 3:02:06). As the door opened, the smell of marijuana was overwhelming. (Id., at 3:03:05). After Appellant opened the door, Beetz testified that he could see a jar full of marijuana sitting on the coffee table. (Id., at 3:02:36). Beetz ask if the could enter the Appellant's room, and Appellant invited them in. (Id., at 3:03:29). There were six (6) other people in room, and they were asked to leave. (Id., at 3:03:36). Appellant was then advised of his Miranda rights. (Id., at 3:03:58).

Appellant admitted to the officers that he was in fact selling marijuana out of the fraternity house. (VR, 8/12/11, 3:04:08). Appellant told Beetz that he had thirty (30) clients, and most of those were in-house fraternity brothers. (Ibid.). Appellant stated that he bought his supply in Louisville, Kentucky. Appellant consented to a search of his side of the room. In addition to marijuana, $1,700, Aderal pills, scales, pipes, rolling papers, grinders and zip loc bags were found. (Id., at 3:05:59). Appellant's cell phone, which was later subject to a warrant, revealed numerous buyer/seller communications. (Id., at 3:07:00). Appellant also had a fake driver's license. (Id., at 3:08:07).

The Appellant called two (2) witnesses. Detective John McBride, Lexington Police Department, Narcotics Section, testified that he was with Beetz and another officer that night. (VR, 8/12/11, 3:52:11). His testimony was substantially the same as Beetz's. The entry door into the fraternity house was ajar, cracked about an inch. (Id.,a t 3:54:30). The Appellant gave limited testimony that the fraternity house, including the breezeway was not open to the public. (Id., at 4:03:29). He testified that signs outside identified the area as private property. (Id., at 4:03:43). Further, he testified that door that

officers entered through was locked, and required the use of a numeric key pad to gain access. (Id., at 4:04:01). He further testified that the door to his individual room had a distinct and private lock on it. (Id., at 4:05:08).

A supplemental hearing was thereafter held on August 15, 2011, at the request of the Appellant. The Appellant called Nicholas Stewart to the stand. Stewart was the president of the Delta Tau Delta fraternity during the time in which the Appellant's arrest occurred. (VR, 8/15/11, 1:39:35). He testified that the bylaws of the fraternity demanded that the doors of the house remain locked and access be granted only to members and their guests. (Id., at 1:40:59 - 1:41:15). The house is owned by the fraternity and the residents have to sign a residential lease agreement. (Id., at 1:41:37). The lease allows residence in a specific room, with reasonable use of the common areas. (Id., at 1:42:59). The lease prohibited the sale of marijuana. (Id., at 1:55:55).

Stewart testified that there were signs in the parking area that denoted that the spaces were for "private parking." (VR, 8/15/11, 1:45:26). The purpose of the signs was to prevent tailgating. (Id., at 2:02:30). The thought that maybe there had been some private property signs, which may have been temporary, but could not recall, nor could he locate such in some pictures of the backdoor area. (Id., at 2:01:39).

Stewart testified that the door that officers entered through was locked and secured with a numeric keypad lock. He explained the reason for the doors being locked. Earlier in the year, the fraternity house had an "open door policy" that allowed anyone to enter, but stopped that after they were implicated in alcohol violations, and "almost got kicked off campus." (Id.,a t 1:52:34).

Stewart conceded that when the other fraternity members led the officers up the stairs to the second floor, he did nothing wrong, and violated no fraternity bylaws. (Id., at 2:16:35).

After this second hearing, the trial court heard argument from the parties. (VR, 8/15/11, 2:24:40 - 2:39:52). In essence, the Appellant argued that the fraternity house was a private residence, and that entry into the breezeway was improper, while the Commonwealth argued that the house was like an apartment or hotel. After lengthy consideration, the trial court made findings of fact and conclusions of law, eventually denying the motion to suppress. (Id., at 2:46:16 - 3:45:00). Those conclusions will be discussed in the argument section of this brief.

Thereafter, at the request of the Appellant, a third suppression hearing was convened on December 21, 2011. The Appellant called Matthew Neagli, who had been identified as the fraternity brother that greeted the police and led them to Appellant's room. His testimony contradicted that of the police officers. He testified that police went beyond the breezeway and entered through the interior doors of the fraternity house when he came out to see them. (VR, 12/21/11, 1:45:23). He claimed that he did not agree to take the police officers to Appellant's room, and they just "followed" him up the stairs. (Id., at 1:48:53). Further, Neagli testified that when they reached the second floor, the officers just pushed past him and started to scream out for Appellant. (Id., at 1:49:52). He testified that there were four (4) to five (5) officers there and none wore uniform.

However, Neagli conceded that he could smell marijuana as they opened the stairwell door on the second floor. (VR, 12/21/11, 1:52:51). Further, Neagli provided a

rather shocking bit of testimony: the keypad lock on the door that officers entered through was *not functional*. (Id., at 1:47:03).

The Appellant also recalled Nick Stewart to the stand. He provided no new substantive information, but his credibility was utterly destroyed when the court called him out for his lack of candor. Stewart conceded that the keypad lock on the backdoor of the fraternity house did not function. (VR, 12/21/11, 1:58:07). The trial court was upset that he had misrepresented during his prior testimony that the door was "always" locked, and Stewart conceded that he failed to tell the court. (Id., at 2:05:42). Stewart conceded that at the time of the Appellant's arrest, *anyone* could just walk into the house through the door. (Id., at 2:07:36). Further, Stewart conceded that he was not even in the fraternity house on the night of Appellant's arrest, and could give no direct testimony about whether the door was ajar or not. (Id., at 2:08:23).

Again, the trial court gave the matter lengthy consideration, and made additional findings of fact and conclusions of law. Those will be discussed in the Argument section of this brief. The trial court once again denied the motion to suppress. (VR, 12/21/11, 2:37:54 - 3:06:18).

On January 6, 2012, the Appellant entered a guilty plea conditioned on the appeal of the denial of his suppression motion. (TR, 81-83). The Appellant was formally sentenced to one (1) year probated for three (3) years by a judgment entered on March 21, 2012. (Id., at 92-95)

The Appellant appealed to the Kentucky Court of Appeals. On August 30, 2013, that court rendered a to-be-published opinion affirming the Appellant's convictions.

(hereafter "Slip Opinion). The Appellant sought discretionary review from this Court, and such was granted. Additional facts will be set forth below as needed.

ARGUMENT

I.

THE TRIAL COURT CORRECTLY DENIED THE MOTION TO SUPPRESS

A. Introduction

On discretionary review, the Appellant raises three (3) issues regarding the entry of police into the Delta Tau Delta fraternity house. Since these issues all concern the same facts as adduced at the suppression hearing, the Appellee has combined its response to all the issues in this one (1) argument with appropriate subdivisions.

B. Findings of Fact and Conclusions of Law made by trial court

The trial court made oral findings of fact and conclusions of law on two occasions in this case following the second and third supplemental suppression hearings.

After hearing evidence on August 12 and August 15. 2011, the trial court found that officers went to the Delta Tau Delta fraternity house on November 30, 2010 to conduct a knock and talk with Appellant based on a tip that he was selling marijuana. (VR, 8/15/11, 2:46:16 - 3:45:00). The officers went to the entrance of the house that was facing Nicholasville Road, which is technically the back door, but commonly used for entrance to the house. The officers knocked on the door and rang the doorbell, but no one answered the door. The door was ajar, and the officers entered into a common breezeway and announced their presence. A man whom they believed was a fraternity brother came

to them and spoke with them, acknowledging that Appellant lived there, and offering to show them to his room. Officers followed the man to the second floor, and smelled burning marijuana. The officers knocked on Appellant's door and he answered, opening the door. Officers could see marijuana on the coffee table and smelled an overwhelming odor of marijuana when the door was opened. (Ibid.). Appellant consented to entry by the officers and a search of his side of his room. He admitted to police that the sold marijuana to thirty (30) people, mostly his fraternity brothers in the house. The Court found that neither officer saw any "member's only" signs on the exterior of the building. (Ibid.).

The trial court then made conclusions of law. The trial court found that nothing prohibited the officers from walking up to the exterior door of the Delta Tau Delta house, relying on Quintana v. Commonwealth, 276 S.W.3d 753 (Ky. 2008). Further, the court concluded that the officers did not violate the privacy rights of the Appellant by entering the fraternity house through the open door and stepping into the breezeway. The court likened the fraternity house to an apartment building or hotel, and rejected the Appellant's arguments that it was a private residence. The trial court distinguished and rejected the authority cited by the Appellant: State v. Miller, 2011 WL 1167181 (Ohio. App. 2011) and Reardon v. Wroan, 811 F.2d 1025 (7th Cir. 1987). The trial court found that there was no privacy interest in common breezeway.

> A fraternity house with a keypad in place, but with the door ajar, is more in line with an apartment building where you have to open up a door to get into a common hallway before leading to the different rooms.

(VR, 8/15/11, 3:37:00). Further, the trial court concluded that officers believed that the

man that greeted them was a fraternity member and had common authority over the premises and further that this man consented to leading the officers to the Appellant's room. Appellant voluntarily opened the door to his room, and in plain view was marijuana as well as the overwhelming odor of marijuana. Appellant consented to a search of the room, and waived his rights before confessing.

Based on the evidence adduced at the third supplemental suppression hearing, the trial court made further findings of fact and conclusions of law. The trial court concluded while there was a keypad lock on the door of the fraternity house, it was not functional on the day in question. (VR, 12/21/11, 2:37:54 - 3:06:18). Further, the Court found that the second set of interior doors that led to the main common areas of the house were also open. Specifically, the court found Neagli's credibility to be lacking, and found that officers never went any further into the house than the initial entry made to the breezeway. (Id., at 2:51:43, 3:03:35). The trial court concluded that whether or not Neagli affirmatively offered to lead officers to Appellant, or if he just led the way as he testified, was not important, since he consented under either theory.

The trial court found that officers did not invade the privacy rights of the Appellant since they did not enter the area of the house beyond the breezeway. (VR, 12/21/11, 3:03:41). The officers were no different from a pizza delivery man that could have opened that door and yelled, as the officers did, to summon someone. (Id., at 3:05:00).

> The consent given by Mr. Neagli under the totality of the circumstances was certainly, either by spoken words if you accept the officer's [testimony], or certainly implied if you

> believe that he just went up the steps and the officers followed without protest.

(Id., at 3:05:48). The trial court again denied the Appellant's motion to suppress.

C. Standard of Review

The standard of review after a denial of a suppression motion is that determinations of law should be reviewed *de novo* on appeal. However, the appellate court reviews findings of facts for clear error and gives due weight to inferences drawn from those facts by resident judges and local enforcement officers. Ornelas v. United States, 517 U.S. 690 (1996). This legal standard takes into account the unique position that the trial court occupies in that it can best judge the credibility of witnesses. Thus, the United States Supreme Court is correct to conclude:

> [A]s 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, *supra.* at 699.

A trial court's factual rulings are conclusive and not clearly erroneous if they are supported by substantial evidence. RCr 9.78; Simpson v. Commonwealth, 834 S.W.2d 686 (Ky. App. 1992); Taylor v. Commonwealth, 987 S.W.2d 302 (Ky. 1999). "Substantial evidence" has been defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." Owens-Corning Fiberglass Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998).

D. Entry into Fraternity House Breezeway through and open an unlocked door was proper since the fraternity house was like a duplex or apartment complex for Fourth Amendment purposes

For his first two (2) questions of law on discretionary review, the Appellant alleges that the entry of the police officers into to the Delta Tau Delta fraternity house and into the breezeway violated the Appellant's privacy rights. However, the Appellant is mistaken. The fraternity house was more akin to an apartment complex than a private residence (first question of law) and the officers did not exceed the scope of a knock-and-talk (second question of law).

The operative facts underpinning this issue were found by the trial to the trial court to be thus:

- Officers went to conduct a knock and talk with the Appellant at the Delta Tau Delta fraternity house,
- Officers knocked on the door and rang the doorbell for several minutes, but received no response,
- The door was ajar, and in any event, the keypad lock was non-functional,
- Officers entered through the door into a breezeway and yelled until Neagli came in from the common area and greeted them.
- Officers never went beyond the breezeway

Those facts are supported by substantial evidence, being the testimony of the police officers as well as the testimony of Appellant's witnesses Stewart and Neagli. Thus, the findings are not clearly erroneous, and *conclusive* on appeal as noted above[3].

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[3] The Court of Appeals concluded that the trial court made an adequate and thoughtful synthesis of the evidence" and that the trial court was best

The heart of this case is whether aspirations of privacy equate to expectations of privacy. Without actions to protect the privacy interests, the Delta Tau Delta fraternity members may have aspired to have a private "residence" but through the set-up of the facility and the actions (or inactions) of the members, they created a situation akin to an apartment, duplex, or hotel dwelling. Under our law, common areas in those habitations may be accessed by the public, including police officers.

First, it cannot be challenged that if the officers were in locations where the public could go, then a valid knock and talk situation is permissible without violation of any of Appellant's rights. *see* United States v. Thomas, 430 F.3d 274, 277 (6th Cir. 2005) (knock and talk approved). Under Quintana v. Commonwealth, 276 S.W.3d 753 (Ky. 2008), an expectation of privacy must be *reasonable*. The access to the entrance to a residence, unless it is physically barred, is deemed to be publically accessible.

> Thus, certain areas such as driveways, walkways, or the front door and windows of a home frequently do not carry a reasonable expectation of privacy because they are open to plain view and are properly approachable by any member of the public, unless obvious steps are taken to bar the public from the door.

Quintana, 275 S.W.3d at 758. In this case, there was no obvious steps taken to bar the public from the door. There was no gate or fence. The private parking signs in the parking lot served as no impediment to officers walking up to the door of the fraternity house. The fraternity brothers' consent for the public to approach is assumed.

> situated to judge credibility. (Slip Opinion, 12). The Court of Appeals found that the findings of fact were supported by substantial evidence. (Ibid.).

If the police are in a location where the public could also be, then there is no constitutional implication in knocking on a door and attempting to talk to an occupant. "The answer in basic knock and talk cases then is clear: the officer who approaches the main entrance of a house has a right to be there, just as any member of the public might have." Quintana, 275 S.W.3d at 758. What the police cannot do, is use underhanded means to gain entry into the residence once the door is answered. A back or side door is considered to be publically accessible if used as a primary access. Here, the trial court concluded that the backdoor was routinely used for entry into the fraternity house. The Court of Appeals agreed with the trial court. "[I]t was permissible for the police officers to approach these double doors and ring the bell in order to speak with Milam." (Slip Opinion, 15).

Thus, it is clear that the police had the right to approach the door of the fraternity house. Next, it is also clear that they had a right to open the exterior door and step into the breezeway and yell for someone. The fraternity house, *under the facts of this case*, is no different than an apartment building or duplex. In the trial court, the Commonwealth cited United States v. Dillard, 438 F.3d 675 (6th Cir. 2006). Dillard lived on a the second floor of a duplex. Police wanted to speak with him, and they arrived to find the door to the duplex building unlocked, and ajar. They entered into the building and then went up a flight of stairs to Dillard's residence. Dillard argued that the police had no right to enter the duplex building and climb the stairs to his residence. The Sixth Circuit rejected that claim soundly:

> There is no question that Dillard, as a tenant, had a possessory interest in the common hallway and stairway of his duplex and the right generally to exclude anyone who was not a tenant. But because Dillard made no effort to maintain his privacy in the common hallway and stairway, he did not have an objectively reasonable expectation of privacy in those areas. Both doors on the first floor were not only unlocked but also ajar. By not locking the duplex's doors, Dillard did nothing to indicate to the officers that they were not welcome in the common areas.

Dillard, 438 F.3d at 682. Further, the federal appeals court noted that there was no way to summon Dillard from outside the building. "Nothing in these circumstances indicates that Dillard had a reasonable expectation of privacy in the hallway and stairway." Id., at 683. The Sixth Circuit collected a number of cases that indicate that the First, Second, Third, Seventh, Eighth, and Eleventh Circuits follow that rule.

Thus, in this case, the Delta Tau Delta fraternity house was, for all intents and purposes, an apartment house. As further evidence of this status, consider that the uncontroverted proof in this case is that Appellant had to sign a residential lease that gave him use of his room and the reasonable use of the common areas. Further, the lease had "rules" such as that which prohibited the selling of marijuana. The fraternity owned the fraternity house and acted as landlord, imposing rules regarding cleanliness of areas such as the "nice room." as well as limiting visitors, etc. The fraternity members were mere tenants of the chapter house, not roommates as Appellant argues. Consider that each room had its own lock and was *numbered*. It is illogical to think that if all the members were just roommates, they would have numbered their rooms, and signed detailed leases

with themselves. No, they are tenants that contract with the fraternity for housing, and agree to follow the rules.

Furthermore, what steps did Appellant take to secure the common areas of the house, namely the breezeway? None. For what Appellant claims is a organization that "prides itself on selectivity and exclusiveness" *no steps* were in place on the evening in question to in anyway bar the public from the breezeway. The door was ajar. The keypad lock was for show, and did not even work![4] *Anyone* could have walked right in, went up the steps, and for that matter entered the main common area on the ground floor, the "nice room." Nothing whatsoever stood in their way.

This is no different that the situation in Dillard. Since Appellant "made no effort to maintain his privacy in the common hallway and stairway" he had no privacy right to be violated by the police when they stepped into the breezeway. Dillard, 438 F.3d at 682. Therefore, the act of stepping inside the breezeway and yelling for someone did not violate the privacy interests of the Appellant. As the trial court stated, a pizza delivery man could have done the exact same thing. Here, the officers did not venture into the main part of the house. They waited until Neagli came to them in the breezeway. Only then did they follow him up the stairs after he agreed to show them Appellant's room.

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[4] Especially suspect here is how the fraternity president showed a lack of candor regarding the functionality of the lock, and had to be called out in open court by the trial court judge. (VR, 12/21/11, 12:05:42). It is useful to recall that the direct evidence was that it was not privacy that motivated the installation of the lock in the first place, but rather the fact that the police had learned that illegal drinking was occurring the fraternity house and they "almost got kicked off campus." (VR, 8/15/11, 1:52:34). The Court of Appeals found the testimony "at the very least, disingenuous." (Slip Opinion, 17).

The trial court distinguished the two (2) main cases cited by Appellant. In State v. Miller, 2011 WL 1167181 (Ohio. App. 2011), a campus security officer observed two (2) men smoking on a balcony of the Delta Tau Delta house at Bowling Green State University. He decided to investigate, so he went to the door of the fraternity house and opened the locked door using a keypad combination. He went to the second floor and gained entry to the balcony by going through a computer lab, where he found people smoking marijuana. That entry was adjudged illegal. It is obvious that Miller is completely different than the case at hand. Here, the officers entered via an unlocked and ajar door. In fact, the keypad lock was not even functional. Further, the officers here did not march into Appellant's room and bust up his drug den. Rather, they knocked at the door, and he consented to the police entry.

Appellant also relies on Reardon v. Wroan, 811 F.2d 1025 (7th Cir. 1987). Reardon was a civil rights case where a fraternity member sued police for improper intrusion. This is a civil case, and it was the standard for summary judgment that was applied to the facts, not the exclusionary rule. The holding relied on by the Appellant appears to be at best *dicta* as it is contained in a footnote. Reardon, 811 F.2d at 1028, n. 2. The Dillard case, from this Circuit, is a much better guide on this issue of first impression in Kentucky.

The Appellant, and his brothers at Delta Tau Delta, may have had high aspirations of privacy in their fraternity house. But they failed to take action to turn those aspirations into expectations of privacy. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," Katz v. United

States, 389 U.S. 347, 351 (1967). They left the door to the fraternity house ajar. They took no steps to ensure it was locked, by having a non-functioning lock, which they *knew* was not working. *Anyone* could have walked into the house...period. They did not install any physical impediment to *anyone* walking up to the door. The police in this case were in a position where *anyone* from the public, including the pizza delivery man, could have been. They did not violate the sanctity of a home. They stood in a common breezeway, and traveled on stairs attached to that breezeway. They did not storm through the house looking for Appellant. If the Appellant did not want the public in the breezeway, he had to take steps to prevent such....and he took none. The ensuing knock and talk was valid since officers simply knocked on his door and he opened it, spilling forth the odor of marijuana and having a jar of marijuana in plain view from the door. Appellant consented to police entry and admitted to trafficking in marijuana. The trial court's findings of fact are conclusive, and further the Court of Appeals did not err on this issue.

E. Officers' proceeding up the stairs and through a common hallway to the Appellant's numbered room during a knock and talk was not a violation of privacy; otherwise consent was given

For his second assignment of error on appeal, the Appellant alleges that the travel of the police officers with Neagli up the stairs in the breezeway, through a set of unlocked fire doors, and down the hall to Appellant's closed door was a violation of his privacy interest as he alleges Neagli did not explicitly consent. He is mistaken.

After the second suppression hearing on August 15, 2011, the trial court made factual findings on this issue. The trial court concluded that Neagli came to the officers as they were standing in th breezeway, stated that Appellant lived there, and consented to

show them to his room. (VR 8/15/2001, 2:46:16 - 3:45:00). Neagli led the way up the stairs, into the second floor hallway, and pointed out the Appellant's room. (Ibid.). After the third suppression hearing on December 21, 2011, the trial court considered the contrary testimony of Neagli that he did not give consent to the officers to follow him, but rather just led the way up the stairs. The trial court refused to make further findings of fact as to what happened, since in the trial court's mind, it was irrelevant since Neagli did in fact lead officers up the stairs to the Appellant's door. (VR, 12/21/11, 2:37:54 - 3:06:18). The factual findings by the trial court are supported by the evidence in this case and are conclusive.

Initially, the Commonwealth argues that irrespective of Negali's consent, or even presence, the police had the right to ascend the stairway that was in the common breezeway, enter through the unlocked fire door, and walk down the common hallway to the Appellant's numbered room under Dillard, *supra*. Recall that in Dillard, the police were allowed to enter the duplex common area through an unlocked and ajar door, travel up a stairwell, and then into a common hallway, all the way to the Dillard's door. That is the case here. The breezeway, accessed through a unlocked and ajar entry door, the stairs in the breezeway, and the hallway on the second floor were all common areas of the fraternity house that Appellant failed to take steps to ensure where within his private domain. Since Appellant "made no effort to maintain his privacy in the common hallway and stairway" he had no privacy right to be violated by the police when they went up the stairs off the common breezeway, and into the common second floor hallway. Dillard, 438 F.3d at 682. Thus, as to the actual issue here, the Appellant's privacy interest, the

police had every right to go to his room, just as any person of the public, aye even the pizza delivery man, could have done on that night. There was no locked door on the ground floor. The stairwell was located in the common breezeway. The fire door to the second floor was not locked or secured in any way[5]. The officers went through the common hallway to the Appellant's closed and numbered room, where they knocked on the door. Under Dillard there is no error in the denial of the motion to suppress, and no reason to reverse.

Further, the trial court made the finding that Neagli, whose name was unknown at the time, engaged the officers in conversation and offered to lead them to Appellant's room. *If*, for argument's sake, the stairwell and common second floor hallway were private areas, then "[i]t is well settled that valid consent may be given by a third party with common authority over the premises. United States v. Hinojosa, 606 F.3d 875, 881 (6th Cir. 2010), *see also* United States v. Matlock, 415 U.S. 164 (1974); United States v. McCauley, 548 F.3d 440, 446 (6th Cir.2008).[6] Neagli came to the officers from the interior of the building. It was reasonable under the circumstances for the officers to perceive that he had apparent common authority over the premises. "Consent, implied or not, was provided by him." (Slip Opinion, 24).

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[5] Though not necessary for this analysis, the Commonwealth would note that officers and Neagli all testified that they could smell burning marijuana when they reached the second floor door.

[6] Appellant's reliance on U.S. v. Little, 431 Fed. Appx 417 (6th Cir. 2011), is misplaced. That case is unpublished.

Finally, the trial court considered that it made no difference if Neagli agreed to lead the officers, or as he testified at the third suppression hearing, he just went up the steps and they followed.

> The consent given by Mr. Neagli under the totality of the circumstances was certainly, either by spoken words if you accept the officer's [testimony], or certainly implied if you believe that he just went up the steps and the officers followed without protest.

(VR, 12/21/12, 3:05:48). Here, the police were properly standing in the common breezeway, as established herein. According to Detective Beetz, Neagli "said we could come in", and then "I know where he is" before he led them to the Appellant's room. (VR, 8/12/11, 3:01:14, 3:37:06, 3:50:00 - 3:50:45). At play in this issue of implied consent for the officers to follow Neagli up the stairs and to Appellant's door is an element of *common sense*. To accept what the Appellant argues requires us to believe that after the police asked about Appellant, Neagli just turned and went up the stairs to the Appellant's door without any regard that the police were following him. That makes no logical sense under these facts. If Neagli was not leading the police to Appellant's room voluntarily, what was he doing? Did he just happen to be on a ramble when he went by the police in the breezeway, and then happened to meander upstairs to the Appellant's door with the police in some oblivious following march like lemmings? Of course that is not the case. Neagli agreed to take them to Appellant, and even if not by those exact words, his direct actions reflected an implied consent for the officers to follow him to Appellant's room. Reversal is not required.

CONCLUSION

For all the foregoing reasons the judgment of the Fayette Circuit Court should be affirmed.

Respectfully Submitted

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