

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
KRISTOPHER STREJCEK,	:	
	:	
Appellee	:	No. 1908 WDA 2011

Appeal from the Order Entered November 10, 2011,  
In the Court of Common Pleas of Washington County,  
Criminal Division, at No. CP-63-CR-0000309-2011.

BEFORE: SHOGAN, OTT and COLVILLE\*, JJ.

MEMORANDUM BY SHOGAN, J.:

Filed: January 11, 2013

The Commonwealth of Pennsylvania ("the Commonwealth") appeals from the order entered on November 10, 2011 that granted the suppression motion filed by Kristopher Strejcek ("Appellee"). We reverse and remand for further proceedings consistent with this memorandum.

The relevant facts and procedural history of this matter were set forth by the suppression court as follows:

On July 23, 2010, Washington County Deputy Sheriffs Paul Rock, Ed Schell, and Anthony Mosco proceeded to 93 Monarch Street in Canton Township. The deputies had an arrest warrant for Brian A. Wagner, and went to Canton Township after receiving a tip that he would be at the 93 Monarch Street residence. Suppression Hearing Transcript, May 27, 2011, pp. 5-6 (hereafter "S.H. 5/27/11"). When they arrived at the residence, which was a mobile home, Shannon Rush opened the door. Ms. Rush was the owner of the mobile home and an informant for the Washington County Sheriff's

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\*Retired Senior Judge assigned to the Superior Court.

office. Suppression Hearing Transcript, June 24, 2011, pp. 8-9 (hereafter "S.H. 6/24/11").

Deputy Rock informed Ms. Rush that they were looking for Mr. Wagner. She told the deputies he wasn't there, but they asked if they could search the residence anyway. Ms. Rush invited the deputies in to search for Mr. Wagner. S.H. 6/24/11 pp. 10-11. At no time did the deputies have or present a search warrant for the residence, but instead they entered the home pursuant to an arrest warrant for Brian Wagner and Ms. Rush's permission to search for Mr. Wagner. *Id.*

Upon entering the home, the deputies immediately saw scales[,] which are commonly used to weigh drugs[,] sitting on the living room table. S.H. 5/27/11 pp. 22-23. The deputies also found a bag of marijuana and a credit card with suspected cocaine residue. They then conducted a body sweep to find anyone else in the mobile home. During that sweep they found [Appellee] in the bathroom, and his girlfriend, Amber Barros, in the living room.<sup>1</sup> Ms. Barros also lived at the 93 Monarch Street residence with Ms. Rush. S.H. 6/24/11 pp. 6-7. [Appellee] had been invited to the apartment the night before as a guest of Ms. Barros, and was still there with Ms. Barros when the deputies arrived.

<sup>1</sup> When deputies first encountered [Appellee], he identified himself as Michael Strejcek.

After identifying all three people, the deputies had each of them sit in the living room while they looked through the mobile home for other individuals, presumably looking for Brian Wagner. At no point did the deputies call for backup from the local police department or secure a search warrant based on the drug paraphernalia found in plain view when they entered the home. Instead, Deputy Rock went back into the small bathroom and observed a small hole in the wall for the hookup of hoses for a washing machine. S.H. 6/24/11 p. 11. It was immediately obvious that a person could not fit into the hole, which led to a cabinet underneath the kitchen sink in an adjoining room. *Id.* Nonetheless, Deputy Rock shined a flashlight into the hole and saw a bag of suspected cocaine. Only then did he go to the kitchen and open the cabinet under the kitchen sink, and retrieve the bag of suspected cocaine.

A lab test revealed that the bag of suspected cocaine contained 20.4 grams of powder cocaine. S.H. 5/27/11 p. 11. The bag of marijuana found in plain view contained 1.4 grams of marijuana. *Id.*

[Appellee] was charged with False Identification to a Law Enforcement Officer, Possession of a Controlled Substance, Possession with Intent to Deliver a Controlled Substance, and Possession of Drug Paraphernalia. On May 26, 2011, [Appellee] filed the instant Omnibus Pretrial Motion. This Court held a hearing on [Appellee's] Motion on May 27, 2011. At the conclusion of the hearing the Commonwealth requested a recess to subpoena Ms. Rush. The hearing was recessed and concluded on June 24, 2011.

Both parties were ordered to file any additional legal memoranda by September 30, 2011. Defendant filed a timely response, and the Commonwealth filed a legal memorandum on October 14, 2011.

Suppression Court Opinion, 11/10/11, at 1-3 (footnotes 2-5 omitted). The suppression court concluded that the deputies exceeded the scope of their permission to search for Brian Wagner, and because the cocaine was not in plain view, the deputies' action of looking into a hole in a wall and then searching the cabinet to which the hole led, rendered the search improper. *Id.* at 6. The suppression court entered an order on November 10, 2011, that granted Appellee's suppression motion with respect to the cocaine and dismissed the charges of possession of a controlled substance and possession with intent to deliver a controlled substance relative to the cocaine. The Commonwealth timely appealed.

On appeal, the Commonwealth raises one issue:

1. Did the Suppression Court err in finding that the sheriff's deputies illegally searched the trailer belonging to Shannon Rush and unlawfully seized the cocaine found in a six-foot long kitchen cabinet by exceeding the scope of consent to search that was given to them by Ms. Rush?

Commonwealth's Brief at 5.

The standard of review this Court applies when faced with a Commonwealth appeal from an order granting suppression is well settled:

We must first determine whether the factual findings are supported by the record, and then determine whether the inferences and legal conclusions drawn from those findings are reasonable. We may consider only the evidence from the defendant's witnesses together with the evidence of the prosecution that, when read in the context of the entire record, remains uncontradicted. When the evidence supports the suppression court's findings of fact ..., this Court may reverse only when the legal conclusions drawn from those facts are erroneous.

***Commonwealth v. Lyles***, 54 A.3d 76, 79 (Pa. Super. 2012). We further point out:

The Fourth Amendment of the Constitution of the United States embodies the concern of our society for the right of each individual to be let alone. ***Schneckloth v. Bustamonte***, 412 U.S. 218, 236, 93 S.Ct. 2041, 2052, 36 L.Ed.2d 854, 872 (1973). The Fourth Amendment ensures that certain areas, particularly a home, are not subject to invasion at the caprice of investigating agencies. A citizen must be secure in knowing that his property and possessions are safe from search and seizure except in those situations where police have sufficient knowledge, probable cause, to believe that acts or things prohibited by our laws have or are occurring or where evidence of acts or things prohibited by our laws are located.

A search conducted without a warrant issued upon probable cause is *per se* unreasonable under the Fourth and Fourteenth Amendments, subject only to a few specifically established and well-delineated exceptions. [***Schneckloth***] at 222, 93 S.Ct. at 2045, 36 L.Ed.2d at 858. One exception is a search that is conducted pursuant to consent. ***Id.***

***Commonwealth v. Blair***, 575 A.2d 593, 595-596 (Pa. Super. 1990).

Additionally, the “plain view doctrine” permits a warrantless seizure of an item where: “(1) the police have not violated the Fourth Amendment in arriving at the location from which the item could be viewed; (2) the item is in plain view; (3) the incriminating character of the item is immediately apparent; and (4) the police have a lawful right of access to the item itself.”

***Commonwealth v. Jones***, 605 Pa. 188, 200-201, 988 A.2d 649, 656 (2010) (citations omitted).

Here, there is no dispute that Ms. Rush, the owner of the home, granted the deputies permission to search the residence for Brian Wagner. Rather, the dispute is whether the deputies lawfully viewed the cocaine during their search.

The trial court concluded:

[T]he consent to search her home was only given with respect to executing the arrest warrant for Brian Wagner. Ms. Rush did not give consent to do an investigatory search of her home for contraband. Thus the Commonwealth’s argument that the cocaine was found as the result of a consensual search is without merit. It is clear from the record that Deputy Rock knew a person could not fit into the hole in the wall in which the cocaine was found. Deputy Rock clearly exceeded Ms. Rush’s consent when he shined his flashlight into the hole and searched inside the bathroom wall.

Having determined that Deputy Rock was conducting a warrantless, non-consensual search when he used his flashlight and searched inside the bathroom wall, this Court must determine if the evidence was in plain view, and therefore not ripe for suppression. ... In [*Commonwealth v.*] *Graham*, [554 Pa. 472, 721 A.2d 1075 (1998)], an officer conducted a valid *Terry* [<sup>1</sup>] frisk which did not reveal any weapons or contraband. However, the officer felt a small roll in the defendant's back pocket. He used his flashlight to search the defendant's back pocket, which revealed cocaine. The instant case is strikingly similar to *Graham*. There, the validity of the search ended after the *Terry* frisk revealed no contraband. Here, the search of the bathroom was complete when it was clear nobody was secreted within the room.

Like the officer in *Graham*, Deputy Rock then went beyond his authority. In both cases, the officers used flashlights to look into an area for contraband. Neither officer had independent justification to extend the search, and therefore neither was in a lawful vantage point.

Suppression Court Opinion, 11/10/11, at 4-5 (footnote added). The suppression court then found that the deputies did not have a lawful vantage point from which to view the cocaine. *Id.* at 5. We disagree, and pursuant to the aforementioned standard of review, we conclude that the inferences and legal conclusions drawn from the suppression court's findings are erroneous. *Lyles*, 54 A.3d at 79.

The testimony reveals that Deputy Paul Rock stated that he shined his flashlight into a hole through a wall while doing a "body sweep" to see who

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<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that law enforcement officers may briefly detain a person and frisk him for weapons when there is reasonable suspicion that criminal activity is afoot).

was in the house and if a person could be on the other side of the wall. The testimony is as follows:

[Assistant District Attorney Carroll] Q. When you did the body sweep, was that just to make sure that nobody was around?

[Deputy Paul Rock] A. Yeah. We basically checked all the rooms where bodies can be found.

Q. What did you personally observe?

A. Well, there was a hole in the bathroom where I looked and it opened up and we were checking for bodies, and I seen two plastic bags containing a white powder. I then went around the bathroom around to the kitchen. There was a big cabinet there. I opened the cabinet door and there it was. It was observed through the hole, but we were checking for bodies the whole time.

Q. When you were in the bathroom, you said there was a hole in the wall?

A. There was a hole behind, like, above there was an indentation where the toilet was and there was a hole in the wall.

Q. You looked in there to see if anybody, was in there?

A. Yes.

Q. Was it big enough for somebody to get into?

A. It was actually a cabinet where you can put pots and pans. It was all open. It was probably a six foot long cabinet where you can put pots and pans. It was basically -- there wasn't hardly anything in there. **Somebody could have been laying in there hiding. That's why we checked.**

Q. You saw those items in plain view when you opened that?

A. Yes.

N.T., 5/27/11, at 9-10 (emphasis added).

The fact that a person could not fit through the hole does not mean that a person could not be on the other side of the wall and that he could not be seen through the hole in the wall. The suppression court states that the deputies looked inside the wall. Suppression Court Opinion, 11/10/11, at 4. However, we point out that shining a flashlight **through** an obvious hole in a wall is not the same as shining a light inside a cavity within a wall. Additionally, the testimony unequivocally establishes that the hole, regardless of whether a person could fit through it, led to a cabinet on the other side of the wall that was six feet long. The conclusion that a person could not be hidden inside a six-foot-long cabinet is not reasonable, and the suppression court's conclusion that a person could not be inside this space is not supported by the record. Additionally, the conclusion that the search was over when the bathroom was cleared of Ms. Barros and Appellee ignores the reality that the deputy saw a large hole that led to an open space. It is reasonable to conclude, as testified to by Deputy Rock, that he looked through this hole to see if there was a person hidden on the other side. On the other side was a cabinet, and this cabinet, which could be accessed from another room, was large enough to conceal a person. This fact is not contradicted by any defense evidence.<sup>2</sup> *See Lyles*, 54 A.3d at 79 (stating

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<sup>2</sup> There was a dispute as to whether a person could climb through the hole; however, there was no dispute as to whether a person could hide inside the



the standard of review). Moreover, we cannot conclude that the deputy overstepped any boundary by shining a light through the hole into the cabinet, and the suppression court's reliance on *Graham* is misplaced. In *Graham*, the officer, while conducting a *Terry* stop and frisk, felt a bulge in the defendant's pocket that he **did not suspect was a weapon**, and he then shined a flashlight inside the pocket discovering a candy package that was later determined to be crack cocaine. *Graham*, 554 Pa. at 475, 721 A.2d at 1077 (emphasis added).

Here, however, the deputies were sweeping the house for a person, and the deputy looked through a hole in a wall to determine if there was a person hiding on the other side, which we conclude is an entirely reasonable decision under the facts and circumstances presented here. Seeing such a large cavity, which could have hidden a person (N.T., 5/27/11, at 10), the deputy then went to another room on the opposite side of the wall to view the inside of the six-foot-long cabinet to which the hole led. Again, this is reasonable in that the deputy was looking for a person and had the homeowner's consent, thus he was at a legal vantage point pursuant to the plain view doctrine. *Jones*, 605 Pa. at 200-201, 988 A.2d at 656. It was at this point during the lawful search that he lawfully recovered the cocaine.

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cabinet on the far side of the wall. N.T., 5/27/11, at 9-10; N.T., 6/24/11, at 12; 34-35.

After review, we conclude that the suppression court's findings and conclusions are not supported by the facts of record. Accordingly, we reverse the suppression court's order and remand this matter for further proceedings.

Order reversed. Case remanded. Jurisdiction relinquished.