

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 00-11,559

VS :

IRVIN COOK :

OPINION AND ORDER

Before the Court is Defendant's Motion to Suppress. Defendant has been charged with possession of marijuana and possession of paraphernalia as a result of an incident that occurred on September 2, 2000. After a review of the testimony from the hearing on the motion, the Court finds the following facts relevant to the Suppression.

Natalie Kerbacher testified that she and the Defendant established a relationship and moved into an apartment together with Kerbacher's three children in the middle of August, 2000. During the last week of August, Kerbacher told the Defendant that the relationship was over. She and her children moved to her mother's home. Kerbacher returned the keys to the residence to the Defendant. Shortly thereafter, the Defendant informed his landlord, Mr. David Kiessling, that Kerbacher and her children had moved out of the residence.<sup>1</sup> He also informed Mr. Kiessling on that date that he had a new roommate.

On September 1, 2000, Kerbacher called the Defendant and asked if she could return to the residence. The Defendant informed Kerbacher that a new roommate had moved into the apartment. Kerbacher contacted the Williamsport Bureau of Police on that date, and requested assistance in retrieving the remainder of her belongings from

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<sup>1</sup> There was a written lease that was never signed by the parties.

the apartment. In the evening hours of September 1, 2000, Kerbacher, accompanied by city police officers, went to the apartment to retrieve her belongings.

On September 2, 2000, Kerbacher went to the Defendant's residence when the Defendant was not at home. She gained entry to the residence by climbing through a window. She was in the residence – watching TV and talking on the phone—for a few hours before the Defendant returned. When the Defendant arrived at the residence, the two had a confrontation with regard to Kerbacher gaining entry into the apartment through the window. Kerbacher demanded that the Defendant vacate the residence so that she could live there with her children. The Defendant agreed to vacate the residence, but not at that time.

Kerbacher then left the residence and called the Williamsport Bureau of Police. She reported that she found narcotics at the Defendant's residence. Officer Eric Houseknecht and Officer Sid Gable were dispatched to the scene. Kerbacher was sitting in front of the residence in her vehicle when the officers arrived. Kerbacher told the officers that the Defendant was in the residence, sitting on the couch with a tray full of drugs. Kerbacher told the Officers that she did not have a key to the front door, and that the Defendant would not let them in. Kerbacher then led the officers to the back entrance of the house where they entered<sup>2</sup>. Houseknecht testified that Kerbacher informed them that she lived in the residence, but that she had just stayed at her mother's residence for a week. Kerbacher informed Houseknecht that many of the items of furniture were hers.

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<sup>2</sup> Officer Houseknecht testified that he believed that Kerbacher had used a key to unlock the door. Kerbacher testified that she had left the back door of the residence unlocked because she no longer had a key.

Once inside the residence, the Defendant was led to the kitchen with Officer Gable while Officer Houseknecht did a brief search of the livingroom. Houseknecht testified that the Defendant was not asked for his consent to search the apartment. The Defendant testified that he was not surprised to see the officers. Defendant believed that the officers were there to gather the remainder of Kerbacher's belongings, as had taken place the night before. The Defendant testified that he repeatedly told Officer Gable that Kerbacher did not live there, and that she had broken into his apartment through a window. Kerbacher told Houseknecht to look for the drugs in the entertainment center. Inside the entertainment center, Houseknecht found a ziplock baggie containing smaller ziplock baggies. No drugs were found.

Houseknecht told Kerbacher that they probably would not arrest unless narcotics were found, and he asked what would happen to her if they left. Houseknecht testified that Kerbacher became upset at that point, and joined in the search. Houseknecht testified that he was ready to discontinue the search, because he was not comfortable doing a more intensive search relying solely on Kerbacher's word. Moments later however, Kerbacher informed Houseknecht that she had found controlled substances under the bathroom sink. Houseknecht recovered a freezer baggie containing marijuana, and a small amount of marijuana measured out. The Defendant was arrested for possession of a controlled substance. The landlord, Mr. Kiessling, testified that on that same date, Kerbacher came to his residence to inform him that she would be occupying the residence, and not the Defendant.

Defendant now argues that the evidence obtained by Officer Houseknecht should be suppressed because the search of his apartment violated his constitutional rights of

privacy. 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 v. Bustamonte](#), 412 U.S. 218, 222, 93 S.Ct. 2041, 2045, 36 L.Ed.2d 854, 858 (1973). One exception is a search that is conducted pursuant to consent. [Id.](#) The Superior Court in [Commonwealth v. Blair](#) 394 Pa.Super. 207, 575 A.2d 593 (1990), set out the categories of consent given by third parties:

Third-party consent cases fall into four broad categories. Previous to this decision, cases in our Commonwealth concerned situations where: (1) the consenting party had "superior authority" to the party objecting to the search, see, [Commonwealth v. Latshaw](#), 481 Pa. 298, 392 A.2d 1301 (1978), cert. denied, 441 U.S. 931, 99 S.Ct. 2050, 60 L.Ed.2d 659 (1979) (barn's owner had not surrendered any indicia of her absolute control over barn where defendant's marijuana was found pursuant to warrantless search with consent of barn's owner); (2) the consenting party had equal or common authority to the party objecting to the search, see, [Commonwealth v. Arnold](#), 331 Pa.Super. 345, 480 A.2d 1066 (1984), [Commonwealth v. Lowery](#), 305 Pa.Super. 66, 451 A.2d 245 (1982), [Commonwealth v. Devlin](#), 302 Pa.Super. 196, 448 A.2d 594 (1982); (3) the consenting party had inferior authority to the party objecting to the search, see, [Commonwealth v. Garcia](#), 478 Pa. 406, 387 A.2d 46 (1978), [Commonwealth v. Netting](#), 315 Pa.Super. 236, 461 A.2d 1259 (1983) (third party who has neither interest nor control in a premises may not give the police valid consent to conduct a warrantless search of the premises); and (4) the last area of third-party consent cases concerns those situations where a police officer is reasonably mistaken as to the actual authority of the party consenting to his entry; stated another way, the police officer reasonably mistakes apparent authority for actual authority to consent to his entry.

[Id.](#), 394 Pa. Super at 215.

The Commonwealth first argues that the third party consent to search the Defendant's residence was proper since Kerbacher had common authority over the premises. "Common authority" of a third-party to consent to a search "rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." .

[Commonwealth v. Davis](#), 743 A.2d 946, (Pa. Super. 1999), *citing* [U.S. v. Matlock](#), 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242. Such common authority is not implied by a mere property interest such as that of a landlord. [Id.](#)

Instantly, the Court finds that Kerbacher did not possess the "common authority" over the property that is necessary to consent to the search of the apartment by the police. Kerbacher had left the residence weeks prior to the incident, and moved in with her mother. She had spoken with the Defendant the day before the incident, who had informed her that she was not welcome to return, and that another roommate had moved in. Additionally, the evening prior to the incident, escorted by officers with the Williamsport Bureau of Police, she had retrieved belongings. Under these circumstances, the Court finds that Kerbacher no longer had mutual use or joint access or control of the premises.

The Commonwealth has argued that even if Kerbacher did not have actual authority to search the Defendant's residence, the police reasonably believed that Kerbacher had authority to consent to the search, see [Illinois v. Rodriguez](#),

[497 U.S. 177, 189, 110 S.Ct. 2793, 2801, 111 L.Ed.2d 148, 161-162 \(1990\)](#) A reasonable –although mistaken—belief of authority, may be sufficient to justify a consensual entry into, and search of a premises. [Commonwealth v. Blair](#), 394 Pa.Super. 207, 575 A.2d 593 (1990). The Blair Court noted,

In adopting the majority position, we are not allowing carte blanche consent entries into residences with the police officer being able to ratify his entry at a later date suppression hearing by merely stating that he was mistaken as to the actual authority of the consenting party. We hold that the police officer's reasonable mistake must be judged from an objective standard based on the totality of the circumstances. Although the police officer's state of mind is one factor to be considered in determining the reasonability of the mistake, it is not the only factor. Moreover, the police officer's mistake must be reasonable. In ambiguous situations, those situations which would cause a reasonable person to question the consenting party's actual authority or if the consenting party's assertions of authority appear unreasonable, a police officer should make further inquiries to determine the status of the consenting party. Reliance on a third party's bald assertion in such situations could subject any search to the remedy of the exclusionary rule. [Adams, supra, 439 N.Y.S.2d at 881, 422 N.E.2d at 541.](#)  
Id., at 598

The question before this Court, therefore, is whether the facts available to Officer Houseknecht at the moment of the search would warrant a person of reasonable caution in the belief that Kerbacher had the authority over the premises. See [Commonwealth v. Quiles](#), 422 Pa.Super.153, 619 A.2d 291 (1993). Officer Houseknecht arrived on the scene to find Kerbacher not inside the residence, but sitting outside in her parked vehicle. When Kerbacher got out of her car to meet the officers, she told the officers that she did not have a key to the front door of the residence. Although Officer Houseknecht testified that he could recall Kerbacher telling him that

she resided at the apartment, he admitted that he felt uncomfortable relying on Kerbacher's word, and had doubts about the situation. Officer Houseknecht testified that at some point, the Defendant stated that Kerbacher had broke into the apartment through a window, and that Kerbacher was not supposed to be there. After reviewing the totality of the circumstances in this case, the Court finds that the situation presented would have warranted a reasonable person to question Kerbacher's authority. The Court therefore finds that there was no apparent authority for Kerbacher's consent to search the residence.

The Commonwealth last argues that even if there was no consent obtained for the search of the premises, it is immaterial since it was Kerbacher, and not the officers who found the drugs. The Commonwealth argues that since a private citizen found the drugs, there was no action under color of state law. The Court rejects this argument. To be under color of state law, the actor must have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. In the instant case, Kerbacher entered the premises along with officers to search the Defendant's apartment for evidence of criminal activity. Had she not been joined by the officers, Kerbacher, who was not an occupant and had no authority to be on the premises, would not have been permitted inside the residence. Once inside the residence, the officers condoned and encouraged Kerbacher to aid them in locating the illegal substances. The Court would find under the circumstances in this case that Kerbacher was acting under color of state law.

ORDER

AND NOW, this \_\_\_\_\_day of January 2001, based on the foregoing Opinion, it is ORDERED AND DIRECTED that the Defendant's Motion to Suppress is GRANTED. It is further ORDERED and DIRECTED that the marijuana and paraphernalia found as a result of the illegal search are suppressed.

By The Court,

Nancy L. Butts, Judge

cc: CA  
Kyle Rude, Esquire  
Diane Turner, Esquire  
Honorable Nancy L. Butts  
Judges  
Law Clerk  
Gary Weber, Esquire