

COMMONWEALTH OF PENNSYLVANIA v.
DARRYL EUGENE MITCHELL, Defendant,
C.P. Fulton County Branch, Criminal Action No. 190 of 2000

Motion to Suppress — Search — Consent — Common Authority

1. Consent to search may be given by one with common authority over the premises or effects to be inspected.
2. Common authority is not evidenced by a property interest alone or access, but by mutual use.
3. An estranged wife may give consent to search the marital home where her husband remains when she occasionally stays at the residence and uses the residence in her duties as co-parent of their children.

Appearances:

Dwight C. Harvey, District Attorney

Travis L. Kendall, Esq., Counsel for Defendant

OPINION

Walker, P.J., March 19, 2001

Standard of Review

Pursuant to Rule 323(h) of the Pennsylvania Rules of Criminal Procedure, the Commonwealth must prove by a preponderance of the evidence that the challenged evidence is admissible. Pa.R.Crim.P. 323(h).

Findings of Fact

Defendant Darryl Eugene Mitchell and Justina Mitchell were at one time a married couple residing at 855 Tannery Road in Wells Tannery, Pennsylvania. During their sometimes tumultuous marriage, the Mitchells often argued about defendant's personal use of marijuana in the house, because Mrs. Mitchell did not want her three children exposed to illegal drugs. Sometimes, their arguments turned to physical confrontation and violence, and troopers from the Pennsylvania State Police had been called to the house on occasion to intervene. Indeed, on one such occasion, the police confiscated her keys to the residence. Now separated but not divorced from defendant, Mrs. Mitchell also has a residence in Hustontown, Pennsylvania, while defendant continues to reside at the marital home in Wells Tannery.

On May 28, 2000, Mrs. Mitchell arrived at the Wells Tannery residence at approximately 3:00 P.M. in order to drop off her children, as it had been pre-arranged that defendant would keep the children that evening while Mrs. Mitchell was at work. However, defendant was not to be found at the Wells Tannery residence, therefore Mrs. Mitchell entered the house and placed a phone call to her father. She arranged for her father to watch over the children at the Wells Tannery residence until defendant's return, and then left for work. She periodically had phone conversations with her parents throughout the evening, and during one such conversation, her mother informed her that defendant had returned to the Wells Tannery residence intoxicated. As she determined that defendant was in no condition to care for the children, Mrs. Mitchell traveled to the Wells Tannery residence after work to retrieve the children and "pick a fight" with defendant.

When Mrs. Mitchell arrived at the house, she smelled marijuana, and after a cursory search of the premises she discovered marijuana plants in the basement. The children were in the house at the time, all of them asleep. Mrs. Mitchell woke defendant and told him to dispose of the plants, lest she notify the police, but defendant simply laughed and resumed his sleep. True to her word, Mrs. Mitchell notified the Pennsylvania State Police, and at approximately 3:45 A.M., Trooper Robert Reed responded with another trooper in tow. Upon the troopers' arrival, Mrs. Mitchell went outside the residence and met them in the driveway. She told the troopers that she found marijuana plants on the property, and pointed to an area behind a shed nearly one hundred (100) yards east of the residence.

The troopers moved to the area surrounding the shed, discovered the marijuana plant in a pot and were then told by Mrs. Mitchell that there were more plants inside. Before moving inside, the troopers were assured by Mrs. Mitchell that she sometimes stayed at the residence though her name was not on the deed, that her children were inside sleeping and that she wanted the troopers to remove the plants posthaste. Satisfied that Mrs. Mitchell had authority to consent to a search, the troopers entered the residence without a warrant and likewise without a signed consent form. All of the plants were subsequently seized and taken away by the troopers, but neither spoke to defendant at all that morning. Indeed, they did not speak to him about the plants until approximately one month later.

Discussion

Instantly, defendant maintains that the troopers conducted an illegal search of his residence on the evening in question because Mrs. Mitchell had no common authority to consent to a search. The Commonwealth

asserts, however, that Mrs. Mitchell had authority to consent to the search because of her common usage of the residence. Alternatively, the Commonwealth proposes that if Mrs. Mitchell did not have the requisite authority to consent, the troopers' reasonable mistake may nonetheless be excused given the totality of the circumstances.

Consent to search may be given by one "who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *U.S. v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). Common authority is not "to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property...but rests rather on mutual use of the property by persons generally having a joint access or control for most purposes..." *Id.* at 171 n. 7, 94 S.Ct. 988. For example, a contractor may not consent to the search of the building or home simply because he has permission to be in the home for limited purposes. See *Commonwealth v. Gutierrez*, 750 A.2d 906 (Pa.Super. 2000). Likewise, a nurse may not consent to the search of a patient's clothing to which she has access and a landlord may not consent to the search of a tenant's apartment. See *Commonwealth v. Silo*, 480 Pa. 15, 389 A.2d 62 (1978); *Commonwealth v. Davis*, 743 A.2d 946 (Pa.Super. 1999). Though the contractor, nurse and landlord above all had **access** to the premises or objects searched, none had **mutual use**.

Upon review of the facts, we find that Mrs. Mitchell had such a mutual use of the property in Wells Tannery. First, the residence was the marital home of the Mitchells. At the time immediately preceding their schism, there is no doubt that she had mutual use of the property since she continuously dwelt there. The separation, however, did not sever her use. The couple was not divorced, so their marriage was technically intact. The evidence indicates that Mrs. Mitchell stayed there on occasion, so perchance there was hope for reconciliation between the two. Their children sometimes stayed at the Wells Tannery residence as well. Clearly, Mrs. Mitchell's connection to the residence was more than a contractor, nurse or landlord. She was the wife of defendant and mother of his children who necessarily had mutual use of the Wells Tannery residence in order to facilitate the rearing of their children.

During the day before the search was conducted, Mrs. Mitchell freely entered the house to drop the children off. She then waited within the house for a period of time. Her father then, on Mrs. Mitchell's prerogative, remained at the Wells Tannery residence until defendant returned. Finally, when Mrs. Mitchell arrived later that evening, she let herself inside and

made her presence known to defendant. If she had no common authority over the residence, defendant presumably would have asked her to leave. He did not do so because she had a right to be there. Defendant did not find it unusual that Mrs. Mitchell was present because such was customary in the history of their relationship. Whatever personal differences the couple had, it appears they were able to work together to a considerable degree as parents. Indeed, Mrs. Mitchell testified that she believed defendant was a very good father aside from his marijuana use. It is in this capacity as co-parent that Mrs. Mitchell retained her mutual use of the residence, without objection by defendant until now.

ORDER OF COURT

March 19, 2001, the court having considered the evidence presented at the omnibus hearing, the subsequent briefs submitted by the parties and applicable legal standards, it is hereby ordered that the instant motion to suppress is denied, as Mrs. Mitchell had common authority to consent to the search of the premises.