

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EVERETT COOPER,

Defendant-Appellant.

UNPUBLISHED

May 24, 1996

No. 183025

LC No. 94-000025-FH

Before: Kavanagh, T.G.,* P.J., and R.B. Burns** and G.S. Allen,** JJ.

MEMORANDUM.

Defendant pleaded nolo contendere to manufacturing marihuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c), and was sentenced to two years' probation. He appeals as of right. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E)(1)(b).

Defendant argues that the "knock and talk" procedure used by the police to obtain his wife's consent to search a pole barn located on his property for marihuana is unconstitutional in several respects. He also argues that the police were without authority to implement the procedure. However, defendant's conditional no contest plea did not preserve these issues for appeal. Defendant's plea was entered pursuant to a plea agreement which reserved his right to appeal the trial court's ruling on his motion to suppress. In his motion to suppress, defendant argued that his wife's consent to search the barn was coerced. At the hearing on the motion, defendant argued that his wife did not give her consent to search, or, if she did, the consent was involuntary. Because the trial court did not consider the arguments defendant makes on appeal in connection with the motion to suppress, and because defendant never presented any evidence or argument in support of suppression on these grounds, the

*Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1995-1.

**Former Court of Appeals Judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1995-1.

issues were not preserved for appellate review by his conditional plea. *People v New*, 427 Mich 482, 493; 398 NW2d 358 (1986); *People v Brake*, 208 Mich App 233, 238; 527 NW2d 66 (1994).

Next, deferring to the trial court's assessment of witness credibility, *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983), we conclude that the court did not clearly err in finding that defendant's wife had voluntarily given her consent to search the barn. *People v Chambers*, 195 Mich App 118, 121; 489 NW2d 168 (1992); *People v Shaw*, 188 Mich App 520, 524; 470 NW2d 90 (1991). The police officers could reasonably have believed that the conduct of defendant's wife constituted consent to the search. See *People v Brown*, 127 Mich App 436, 441; 339 NW2d 38 (1983). Therefore, defendant's motion to suppress was properly denied.¹

Affirmed.

/s/ Thomas G. Kavanagh

/s/ Robert B. Burns

/s/ Glenn S. Allen, Jr.

¹ Defendant also contends that the trial court used an incorrect burden of proof in requiring the prosecution to prove there was a voluntary consent to search by a preponderance of the evidence. Citing *People v Kaigler*, 368 Mich 281, 294; 118 NW2d 406 (1962), defendant asserts that consent must be proved by "clear and positive testimony." See *People v Chism*, 390 Mich 104, 123; 211 NW2d 193 (1973) (citing *Kaigler*); *People v Brown*, 127 Mich App 436, 440; 339 NW2d 38 (1983). Consideration of this issue is unnecessary because we believe the prosecution sufficiently proved that defendant's wife voluntarily consented to the search under either standard.