RENDERED: JUNE 21, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001312-MR

BARNEY BREWER — APPELLANT

v.

APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NOS. 11-CR-00057 AND 11-CR-00057-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, MAZE AND THOMPSON, JUDGES.

MAZE, JUDGE: Appellant, Barney Brewer (hereinafter "Brewer"), appeals following his conditional plea of guilty and sentence on the charges of manufacturing methamphetamine, first offense, possession of a controlled substance in the first degree, and possession of drug paraphernalia. Specifically,

Brewer appeals the ruling of the Wolfe Circuit Court on his Motion to Suppress evidence in his case uncovered as the result of the warrantless entry of his home by police. Finding error by the trial court in its application of current case law to the facts of this case, we reverse the denial of Brewer's Motion to Suppress and remand to the trial court for further proceedings.

Background

On May 4, 2011, following a tip from someone who had been inside a home rented by Brewer earlier in the day, Kentucky State Police became aware that there was on-going methamphetamine production at the residence. The same person informed troopers that there were likely to be firearms inside the home as well. Wolfe County Sheriff Chris Carson later testified that Trooper Bowling informed him of "three or four names" mentioned as being involved in the methamphetamine production.

Acting on an instruction from a superior, Trooper Anthony Bowling decided to initiate a "knock and talk" with Brewer at the residence in question. Out of concern for the possible presence of firearms, Trooper Bowling gathered other units from three surrounding counties to accompany him to Brewer's home. In total, seven or eight officers traveled to Brewer's home to initiate the "knock and talk." About three hours after they received the initial tip, officers took up various positions behind and around the home and Trooper Bowling pulled in vehicle into the home's long driveway. In the process, Trooper Bowling observed a man, later identified as Brewer, spot his vehicle from a second-story window

and, as the Trooper later testified, "looked like he was going to run." Trooper Bowling pulled his vehicle into the house's carport, at which point he observed the same person spotted in the window running from the home across the backyard of the home. Trooper Bowling pursued Brewer on foot and, with the assistance of other officers, apprehended Brewer and another female co-defendant in the backyard.

Trooper Bowling and Sheriff Carson entered the residence through an open door, arresting one other co-defendant. Consistent with the description they had been given by the initial tip, they proceeded to the upstairs of the home where they found several precursors of manufacturing methamphetamine and a room which contained two operable methamphetamine labs. Two other individuals were eventually found to have exited the home "through a hole underneath the kitchen cabinet" into the crawl space beneath the home.

Trooper Bowling exited the home and contacted the "Meth Team" for safe handling and disposal of the lab. He then attempted, unsuccessfully, to contact the Commonwealth's Attorney before traveling the short distance to the Wolfe County Attorney's home to obtain a search warrant. Less than four hours after first contact with Brewer at his home, officers obtained and executed a search warrant for Brewer's home.

Brewer and three others were charged in connection with the methamphetamine manufacturing operation. Brewer filed a Motion to Suppress the fruits of officers' initial, warrantless search, arguing that no valid exception to

the warrant requirement existed and, therefore, evidence seized as a result of that search must be excluded at trial. The trial court heard testimony and arguments on this motion on May 14, 2012. Trooper Bowling testified that after officers entered the backyard to apprehend Brewer and his co-defendant, they could smell "starting fluid or ether which is used in the manufacturing of methamphetamine." Trooper Bowling then reasoned, out of concern for "officer safety," that a "person search of the house" was necessary. Trooper Bowling later testified that this decision was not in response to information that more persons were in the home; rather, "[j]ust to make sure there's nobody else in the residence; for officer safety."

Following this testimony, the Commonwealth argued that exigent circumstances for officers' entry into the home were raised by concerns for officers and other residents, concerns regarding persons who may pose a threat to officers and regarding possible destruction of evidence. On June 6, 2012, the trial court entered its order denying Brewer's motion to suppress, finding that the "hot-pursuit" and "destruction of evidence" exceptions to the warrant requirement applied and rendered the warrantless search constitutional. The same day, the trial court entered an amended order, clarifying its reliance on *Kentucky v. King*, __ U.S. __, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011), and finding that officers were "legitimately on the premises for a knock and talk." The trial court further held that the officers' presence was further justified under "the emergency exigent circumstances doctrine" due to the volatile and "explosive" nature of methamphetamine.

Following the trial court's orders denying his Motion to Suppress, Brewer entered into a conditional plea agreement with the Commonwealth in which he pleaded guilty to Manufacturing Methamphetamine, Possession of a Controlled Substance, First-Degree, and Possession of Drug Paraphernalia, for which he received a total of twelve years' imprisonment. Brewer's plea was specifically conditioned on his right to appeal the trial court's decision regarding suppression, and that direct appeal now follows.

Standard of Review

Appellate review of a trial court's rulings on a motion to suppress is two-fold. *Anderson v. Commonwealth*, 352 S.W.3d 577, 583 (Ky. 2011) (citing *Commonwealth v. Whitmore*, 92 S.W.3d 76 (Ky. 2002), and Kentucky Rules of Criminal Procedure ("RCr") 9.78)). First, the factual findings of the trial court are conclusive if supported by substantial evidence. *Id*. Second, if the findings are supported by substantial evidence, the appellate court conducts a *de novo* review to determine whether the trial court's ruling is correct as a matter of law. *Id*. (citing *Whitmore*, 92 S.W.3d at 79). Under this standard, we review the facts surrounding the search of Brewer's residence, and, if necessary, the legal basis for the trial court's decision to uphold the validity of that search.

Analysis

On appeal, Brewer argues that the trial court was incorrect as a matter of law in upholding the search of the home. Brewer argues that officers exceeded the scope of their intended "knock and talk" when they surrounded the home,

failed to approach the home's main entrance only, and entered the backyard to apprehend Brewer and one of his co-defendants. Brewer further argues that the Commonwealth failed to meet its burden of proving that exigent circumstances existed or that any other exception to the warrant requirement was met. Therefore, Brewer contends, the officers' search of the home was both "presumptively unreasonable" and constitutionally invalid.

"It is a 'basic principle of Fourth Amendment Law' that searches and seizures inside a home without a warrant are presumptively unreliable." *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980). Likewise, the Kentucky Constitution also protects citizens from unreasonable searches and seizures without a warrant. *See Hallum v. Commonwealth*, 219 S.W.3d 216 (Ky. App. 2007). Generally speaking, "[a]ll searches without a valid search warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. The burden is on the prosecution to show the search comes within an exception." *Gallman v. Commonwealth*, 578 S.W.2d 47, 48 (Ky. 1979).

Among these recognized exceptions is when "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 394, 98 S.Ct. 2408, 2414, 57 L.Ed.2d 290 (1978). Such exigent circumstances include when officers are in hot pursuit of a suspect. See *Kentucky v. King*, __ U.S. __, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011) (citing

United States v. Santana, 427 U.S. 38, 42-43, 96 S.Ct 2406, 2409-2910, 49 L.Ed.2d 300 (1976)). "[E]xigent circumstances justifying a warrantless entry are [also] those which require 'swift action to prevent imminent danger to life or serious damage to property[] . . . and action to prevent the imminent destruction of evidence. *Bishop v. Commonwealth*, 237 S.W.3d 567, 569 (Ky. App. 2007) (citing *Cormney v. Commonwealth*, 943 S.W.2d 629, 633 (Ky. App. 1996)) (internal citations omitted).

Two other exigencies recognized by the courts of this Commonwealth are "a 'plain smell' analogue to the 'plain view' doctrine," *Bishop*, 237 S.W.3d at 569 (quoting *Cooper v. Commonwealth*, 577 S.W.2d 34, 36 (Ky. App. 1979) (*overruled on other grounds*)), and a risk of danger to officers or others. *Id*. (citing *United States v. Atchley*, 474 F.3d 840 (6th Cir. 2007); *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 23 L.Ed.2d 419 (1970)). We discuss both in greater detail later in this opinion.

Finally, regarding the establishment of exigent circumstance, the burden rests with the Commonwealth. "Exigent circumstances do not deal with mere possibilities, and the Commonwealth must show something more than a possibility that evidence is being destroyed to defeat the presumption of an unreasonable search and seizure. *King v. Commonwealth*, 386 S.W.3d 119, 123 (Ky. 2012) *cert. denied*, 12-140, 2013 WL 1704747 (U.S. Apr. 26, 2012). With

this litany of law in mind, we turn our attention to the present case and address each of Brewer's arguments in turn.

I. Reasonableness of the "Knock and Talk"

Brewer first argues that the officers' conduct in entering the backyard to apprehend him, from which point they then entered the home, exceeded the permissible legal scope of a "knock and talk" and that the trial court erred in finding to the contrary. We ultimately disagree.

As the trial court pointed out, this Court previously found that a "knock and talk" could continue until officers successfully made contact with the occupants of a home. *Cloar v. Commonwealth*, 679 S.W. 2d 827 (Ky. App. 1984) (*abrogated by Quintana v. Commonwealth*, 276 S.W.3d 753 (Ky. 2008)). We supported this finding by establishing

> that a police officer in the furtherance of a legitimate criminal investigation has a legal right to enter those parts of a private residential property which are impliedly open to public use. We limit the permissible scope of this right, however, to driveways, access roads, and as much of the property's sidewalks, pathways, and other areas as are necessary to enable the officer to find and talk to the occupants of the residence.

Id. at 831.

However, the Kentucky Supreme Court recently replaced our framework from the *Cloar* rule which, under certain circumstances, extended the typical protection reserved only for a home's curtilage to other areas. The Court held,

> [w]hile there is a right of access for a legitimate purpose when the way is not barred, or when no reasonable person would believe that he or she could not enter, this right of access is limited. The resident's expectation of privacy continues to shield the curtilage where an outsider has no valid reason to go. Thus any part of the curtilage may be protected, including driveways, depending on the circumstances of each case.

Quintana, 276 S.W.3d at 759. The Court qualified this rule with at least two exceptions. "Unless an officer has probable cause to obtain a warrant or *exigent circumstances arise*, the intrusion can go no further than the approach to the obvious public entrance of the house. *Id*. (Emphasis added).

The Commonwealth essentially argues that, though Trooper Bowling sought to initiate a consensual "knock and talk," Brewer's conduct in fleeing prevented that "knock and talk" from occurring and further gave rise to exigent circumstances entitling the police to detain Brewer. The Commonwealth contends that, while Trooper Bowling was in a publicly accessible area of the curtilage – the driveway – his observation of Brewer, as well as Brewer's decision to flee, then gave officers a "reasonable and articulable suspicion that a crime [was] occurring," justifying Brewer's temporary and investigative detention. *Hampton v. Commonwealth*, 231 S.W.3d 740, 744 (Ky. 2007) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

Though we have some reservation about the trial court's reasoning, we find that it was correct in its conclusion regarding officers' right to be on the

premises. In its orders, the trial court twice quoted the abrogated standard in *Cloar* in support of its ruling. However, the rule in *Quintana* controls the issue at hand. Nevertheless, upon viewing the facts and the record in this case through the lens of *Quintana*, we come to the same conclusion as the trial court. *Quintana* requires us to look to the circumstances surrounding the officers' presence on the curtilage of the residence, and so we shall. Trooper Bowling testified that police approached the home with the intent of conducting a consensual "knock and talk" with the occupants of the home. In doing so, Trooper Bowling drove into the driveway of the home. We find that, based on the information they had received earlier in the day, the circumstances permitted Trooper Bowling to be in the driveway in hopes of conducting the "knock and talk." Trooper Bowling then pulled into the carport of the home after seeing Brewer disappear from an upstairs window and then flee out of the back of the home. On this more pivotal point, we agree with the Commonwealth that, once Brewer was seen fleeing through the backyard, exigent circumstances arose, as officers had a "reasonable and articulable suspicion that a crime was occurring." It was not unreasonable for officers to believe that Brewer, a person fleeing from a home in which they suspected criminal activity was occurring, might be a participant in that activity. Therefore, whereas the backyard of the home would typically be protected curtilage not open to public access, Brewer's decision to flee and officers' reasonable suspicion as to his motive for doing so gave rise to circumstances which, under *Quintana*, justified officers' entry into the backyard to detain Brewer.

Ultimately, we agree with the Commonwealth that it was Brewer's decision to flee, and not the officers' failure to follow acceptable "knock and talk" procedure, which precipitated and justified officers' entry upon otherwise protected curtilage. Again, we note the trial court's failure to conclude this based on current law and our wish that it had followed the more recent and clear standard which we now apply. However, if this could be perceived as error – and we do not believe it was – it was harmless, as the same conclusion is reached in applying current law to the testimony and facts established in the record. Hence, though for different reasons, we affirm the trial court's ruling regarding officers' attempt to initiate a "knock and talk."

II. Reasonableness of the Warrantless Search

Brewer next argues that the entry of Trooper Bowling and the sheriff into the residence did not meet any recognized exception to the warrant requirement, and was therefore constitutionally invalid. On this matter, we agree with Brewer that the trial court erred as a matter of law.

As the law we cite above establishes, the Commonwealth had the burden of establishing that the circumstances surrounding the search of the residence were such that an exception to the warrant requirement was sufficiently met. The trial court found that three such exceptions applied here: 1) risk of danger to police and other possible occupants of the home; 2) officer's "hot pursuit" of a fleeing Brewer; and 3) potential destruction of evidence. In its amended order of June 6, 2012, the trial court relied exclusively on its reasoning

that "officers were justified in entering the home pursuant to the emergency exigent circumstances doctrine. The safety of the alleged occupants and/or the officers was in question because of the noxious fumes and/or explosive nature of methamphetamine." The trial court's ruling regarding the application of all three exceptions was unsupported by the facts on the record and was therefore in error.

Indeed, as we stated earlier in this opinion, Kentucky recognizes exigent circumstances arising from what an officer smells and from an officer's reasonable belief that there is "a risk of danger to police or others." *United States v. Atchley*, 474 F.3d 840 (6th Cir. 2007) (citing *United States v. Plavcak*, 411 F.3d 655 (6th Cir. 2005)). However, neither is the reason Trooper Bowling testified he and Sheriff Carson searched the home. Trooper Bowling stated, "For officers safety, we did a person search of the house." Trooper Bowling repeatedly calls the initial warrantless search he and Sheriff Carson conducted a "person search" and even adds that "we wasn't [*sic*] going through any drawers or anything like that." Such testimony indicates that Trooper Bowling and Sheriff Carson conducted a search akin to a "protective sweep" incident to an arrest. *See Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). Nowhere in the record does Trooper Bowling or Sheriff Carson invoke the exigent circumstance spoken of in *Bishop* and *Atchley*, yet both the original and amended orders of the trial court rely on the existence of this exigency.

Similarly, there was no testimony at the suppression hearing, nor was there any other indication in the record, that police suspected that evidence was

being destroyed or would be destroyed if they paused to obtain a search warrant. Neither Trooper Bowling, nor Sheriff Carson testify to their being concerned regarding the preservation of evidence. Yet, again, the trial court states in its original order "[T]hough the officers did not hear any noise of evidence being destroyed . . . the officers had to consider . . . that if [they] left the scene at that point to secure a search warrant . . . evidence may have been destroyed during that time period in seeking the warrant." The trial court imputes evidentiary support to this exigency which simply does not exist in the record.

While other exigencies may have existed to justify the officers' entry into the home, those which the Commonwealth argue existed, and which the trial court applied, in this case in denying Brewer's motion to suppress, were unsupported by substantial evidence in the record. As a result, we must reverse the trial court's denial of the motion to suppress.

Conclusion

We find that, while officers were legally and legitimately on the curtilage of the home when they detained Brewer, substantial evidence did not support the trial court's finding that fear of destruction of evidence or personal safety justified officers' entry into the home. The Commonwealth failed to overcome the presumptive unreliability of the warrantless search following Brewer's arrest. Therefore, we affirm in part and reverse in part, and we remand this issue of suppression to the trial court for further proceedings to determine whether other exigent circumstances were present to justify the officers' entry.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Molly Mattingly
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

J. Hays Lawson
Assistant Attorney General
Frankfort, Kentucky