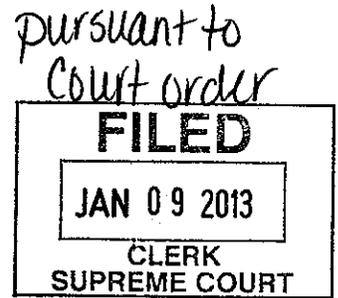


COMMONWEALTH OF KENTUCKY
SUPREME COURT
2011-SC-000159
2012-SC-000187



COMMONWEALTH OF KENTUCKY APPELLANT/CROSS-APPELLEE

v. APPEAL FROM ANDERSON CIRCUIT COURT
 HON. CHARLES R. HICKMAN, JUDGE
 INDICTMENT NO. 2007-CR-00070-001

JIMMIE R. HAWKINS, SR. APPELLEE/CROSS-APPELLANT

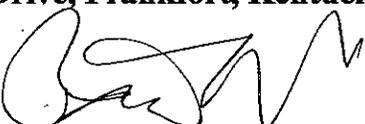
BRIEF FOR APPELLEE/CROSS-APPELLANT, JIMMIE R. HAWKINS, SR.

Submitted by:

BRANDON NEIL JEWELL
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
100 FAIR OAKS LANE, SUITE 302
FRANKFORT, KY. 40601
(502) 564-8006
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief was served upon the following named individuals by mail, first class postage paid on the 21st day of December 2012; Hon. Charles R. Hickman, Judge, Anderson Circuit Court, 15 Courthouse, 501 Main Street, Shelbyville, Kentucky 40065; Hon. Melanie Carroll, Assistant Commonwealth's Attorney, 544 Main Street, Shelbyville, Kentucky 40065; Hon. Josian A. Passalacqua, Bullock & Coffman, LLP, Attorney for Defendant, 101 St. Clair Street, Frankfort, Kentucky 40601; and by state messenger service to Hon. Jack Conway, Attorney General, Criminal Appellate Branch, 1024 Capital Center Drive, Frankfort, Kentucky 40602.



BRANDON NEIL JEWELL

INTRODUCTION

This is a criminal case in which the Appellee/Cross-Appellant (Jimmie Hawkins Sr.) was convicted of one count of complicity to possession of a methamphetamine precursor and one count of possession of drug paraphernalia and sentenced to a total of three (3) years imprisonment. The Court of Appeals reversed his convictions and the Commonwealth thereafter filed a motion for discretionary review in this Court that was granted. Thereafter, Mr. Hawkins Sr. filed a cross motion for discretionary review in this Court which was also granted.

STATEMENT CONCERNING ORAL ARGUMENT

Mr. Hawkins Sr. believes Oral Argument would be helpful to the resolution of the case in large part because this case involves the emergency aid exception to the warrant requirement and there is little Kentucky case law on the subject.

CITATIONS TO THE RECORD

The transcript of record is cited as TR with the page number immediately following. The audiovisual record consists of four (4) CDs and one (1) video tape. It is cited as VR with the date of the proceeding cited and the time cited immediately following. Each CD has the date of the proceeding contained thereon labeled on the front of the CD. The video tapes are not cited to herein.

The Court of Appeals Opinion being reviewed is cited as "COA Opinion" with the page number immediately following and is attached in the appendix. The Attorney General's brief filed in this Court is cited as "AG Brief" with the page number

immediately following. Mr. Hawkins Sr.’s reply brief that was filed in the Court of Appeals is cited as “Hawkins Sr. COA Reply Brief” with the page number immediately following. The Attorney General’s motion for discretionary review is cited as “AG MDR” with the page number immediately following. Mr. Hawkins Sr.’s cross motion for discretionary review is cited as “Hawkins Sr. Cross MDR” with the page number immediately following.

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**APPELLEE'S COUNTER STATEMENT OF THE CASE/
APPELLANT'S STATEMENT OF THE CASE**

Appellee/Cross Appellant, Jimmie Hawkins Sr., and his son, Jimmie Hawkins Jr., were each tried on one count of complicity to manufacturing methamphetamine¹ and one count possession of drug paraphernalia² brought by indictment in Anderson Circuit Court on January 12-14, 2009.³ TR 10-11, 105. On the morning of trial, a hearing was held on Mr. Hawkins Sr.'s motion to suppress evidence obtained as a result of officers entering his barn in violation of the Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution. VR: 1/12/09; 9:26:55-9:56:13.

Trooper Rogers of the Kentucky State Police, the only witness to testify at the hearing, testified that he and Mercer County Deputy Sheriff Rick Moberly were driving along a rural road and observed a vehicle parked partially in the roadway in Anderson County. VR: 1/12/09; 9:29:49-9:30:58.

Trooper Rogers testified that they stopped and approached the vehicle to see if the occupant needed assistance and to ask why he was parked there. Id. The driver, Robert Broce,⁴ told them that he was there to pick up a female, his girlfriend,⁵ who was in a trailer approximately 100 to 150 yards from the road where he was parked. Id. Trooper Rogers testified he told them he was supposed to meet her at a certain time but was not sure exactly when, that he had previously picked her up from the area, but that he did not know who lived there. Id. and Id. at 9:30:36-9:31:32. Broce also told the officers that he had tried to call the female on her cell phone but she had not answered. Id. at 9:38:56.

¹ KRS 218A.1432.

² KRS 218A.500.

³ A count of complicity to trafficking in a controlled substance (KRS 218A.1412) against each by indictment was dismissed upon motion of the Commonwealth during the proceedings. TR 105.

⁴ Robert Broce was an inmate at the Boyle County Jail at the time but out on work release. Id. at 9:51:28; TR 16.

⁵ She was referred to as April Snape and April Check in the record. Id. at 9:49:14.

Trooper Rogers claimed Broce indicated he was concerned about the female's wellbeing; however, Trooper Rogers could not articulate how Broce indicated such. VR : 1/12/09; 9:30:35, 9:35:11, 9:37:36-9:38:11.

When pressed to explain what Broce told him to indicate that he was concerned for the wellbeing of a female, the trooper simply said, "he indicated that he was concerned for her wellbeing." Id. at 9:37:36-9:38:11. Defense counsel asked "in what way" and the trooper replied, "I would assume physical harm." Id. Counsel asked again, "what did he tell you to indicate danger" and the trooper responded with "it's been quite some time; I can't remember an exact phrase." Id. Later in the hearing, when asked how the individual "indicated that he was concerned for her wellbeing" the trooper said, "I'm not sure of an exact phrase, as I took it as her physical wellbeing, whether she was possibly being held against her will." Id. 9:50:55-9:51:28. Trooper Broce later testified that it was his assumption that she may be in danger. Id. at 9:53:00. Trooper Rogers also testified that it was possible Broce was only concerned about who the female was sleeping with since he was spending his nights in jail. Id. at 9:52:30.

Based on this, the officers went onto Mr. Hawkins Sr.'s property. They knocked on the doors to Mr. Hawkins Sr.'s trailer and there was no response. Id. at 9:31:32-9:31:49. Trooper Rogers testified that they then began to search the property. Id. at 9:31:49-09:32:58. Trooper Rogers walked to a barn by the trailer and went inside. Id. Once inside, he looked to the right and observed a quart sized jar with a lid on it with a clear substance and lithium strips inside and an aluminum kettle next to it with a tube on the top. Id. Thereafter, Trooper Rogers left and obtained a search warrant to search the

trailer for methamphetamine and items related to methamphetamine, as opposed to the female.⁶ Id. at 9:33:41-9:34:31, 14:07:44-14:08:01, 14:24:44-14:33:27.

At the conclusion of the suppression hearing, the trial court found that Broce related concern about the wellbeing of a female to the officers. Id. at 9:55:13-9:56:13. The trial court ruled that the search was therefore proper because the officers searched the property under exigent circumstances and then observed a jar and kettle inside the barn in plain view and then left the property and got a search warrant. Id.

At trial, officers Moberly and Rogers offered substantially similar testimony to that described above. Trooper Rogers testified that after he came back to the property officers searched the trailer home residence, a camper, and the barn.⁷ Id. at 14:35:40-14:40:40. Officers found ice cream salt, liquid fire, and acetone in the camper. Id. In the residence's bedroom, they found a black bag containing carburetor cleaner, rubber gloves, batteries, smaller bags, and two pill bottles with white powder (which subsequently tested positive for pseudoephedrine) along with two glass pipes and scales which were next to the bag. Id. Mr. Hawkins Sr. arrived while the officers were searching. Id. at 14:35:02-14:35:35. Trooper Rogers testified that Mr. Hawkins Sr. informed them that he had no knowledge of anything illegal on his property and invoked his right to remain silent. Id. at 14:35:07, 14:48:41.

⁶ Trooper Rogers testified that the police had received an anonymous tip that marijuana was being grown on somebody's property and that the tipster had included a description of the property. He said he and Officer Rick Moberly were searching for that property when they observed the parked vehicle. VR: 1/12/09; 9:29:28. Rogers also testified that after he and Moberly searched Appellant's property and discovered the evidence that led them to obtain a search warrant, they realized that the description given by the tipster matched Mr. Hawkins Sr.'s property. VR: 1/12/09; 9:44:12-9:44:50. Because the evidence is that officers did not realize the description given by the tipster matched Mr. Hawkins Sr.'s property until after they searched the property and discovered the jug and kettle, that tip is irrelevant for purposes herein. Of course, there was never a female being held against her will on the property.

⁷ However, the camper and trailer were not listed on the warrant as places to be searched. The search warrant only identified the trailer as the place to be searched. TR 38-41.

Mr. Hawkins Sr. testified in his defense. Approximately two weeks prior to the police searching his property he bought a truck from Ron Hartman because he worked on vehicles and bought vehicles for parts. VR: 1/13/09; 13:47:00-13:48:40, 13:49:50-59. Dallas Stratton testified that he had informed Mr. Hawkins Sr. that Hartman had a truck for sale. Id. at 15:32:10-15:32:58. After purchasing the truck, Mr. Hawkins Sr. and his son, Jimmie Hawkins Jr., towed it home. Id. at 13:48:40-13:49:10. Steve Green, a friend of Mr. Hawkins Sr.'s who needed work done on his vehicle, was at Mr. Hawkins Sr.'s residence when he returned with the truck. Id. at 13:50:20-13:50:44, 15:37:55.

The truck was full of random junk and Mr. Hawkins Sr. and Mr. Green began cleaning it out. Id. at 13:53:33-13:55:50. Mr. Hawkins Sr. found the black bag in the truck and thought the contents inside might be used for illegal purposes. Id. Mr. Hawkins Sr. was afraid to throw it away though because he thought Hartman might want the bag back. Id. Mr. Hawkins Sr. and Mr. Green testified that Mr. Hawkins Sr. gave the bag to his girlfriend, Jackie Miller, to store in the residence. Id. at 13:55:50-13:56:10, 15:37:55-15:39:40. Ms. Miller also testified to the aforementioned facts. Id. at 15:45:13-15:47:04.

A few days later Jeremy Blackwell was at Mr. Hawkins Sr.'s residence helping clear the rest of the junk out of the truck. Id. at 13:58:00-13:58:45. Mr. Blackwell testified that he took much of it to the barn, which was also used for storing items. Id. at 16:04:10-16:06:02. He further testified that among the items he took to the barn were the quart jug and aluminum kettle and that he did not know what the items were used for at that time. Id.

Prior to the case being submitted to the jury, Jimmie Hawkins Jr., who stayed in the camper on the property periodically, received a directed verdict of acquittal on the drug paraphernalia charge and was acquitted on the manufacturing methamphetamine charge. VR: 01/13/09; 16:14:55-16:16:22, TR 76-86.

After deliberating, the jury acquitted Mr. Hawkins Sr. on the manufacturing methamphetamine charge and convicted him on the lesser included offense charge of complicity to possession of a methamphetamine precursor and also convicted him on the possession of drug paraphernalia charge. TR 76-86, 105-106. He was sentenced to three years imprisonment for possession of a methamphetamine precursor to run concurrently with a twelve month sentence on the drug paraphernalia charge and appealed as a matter of right. TR 87-92, 105-106; Ky. Const. §115.

After review, a majority panel of the Court of Appeals found the trial court erred by denying the suppression motion and reversed the conviction and remanded the case. COA Opinion 8, 10. The majority found a search of the trailer would have been justified under the emergency aid exception to the warrant requirement of the Fourth Amendment but that the search of the barn went beyond the permissible scope of that exception because the officers had no objectively reasonable basis to believe the woman was inside the barn. COA Opinion at 5-6. The majority panel also found that it was improper for the prosecution to use Mr. Hawkins Sr.'s invocation of his right to remain silent against him at trial. COA Opinion 9-10.

The Commonwealth thereafter filed a motion for discretionary review in this Court. The Commonwealth asked for review of whether Trooper Rogers' entry of the barn under the emergency aid exception was reasonable. AG MDR pg. 4-6. After this

Court granted review, Mr. Hawkins Sr. filed, and this Court granted, a cross motion for discretionary review.

Due to Trooper Rogers' inability to articulate specific facts to support the conclusion that there was an objective, reasonable belief that a person was in need of immediate aid due to serious physical injury or the threat of such injury, Mr. Hawkins asked for review of whether an emergency aid exception was justified at all in this case. Hawkins Sr. Cross MDR pg. 5-9. Mr. Hawkins Sr. also sought review of whether reversal should have been granted due to the prosecution's improper comments on post arrest silence because the Court of Appeals panel did not specify whether reversal was warranted under that issue. Id. at 9-10.

ARGUMENT

I.

The record in this case does not support a finding that the warrantless search of Mr. Hawkins Sr.'s barn was justified by the emergency aid exception to the warrant requirement.

Preservation:

Review of this issue is preserved by this Court granting Mr. Hawkins Sr.'s cross motion for discretionary review and the Commonwealth's motion for discretionary review. Hawkins Sr. Cross MDR pg. 5-9, AG MDR pg. 4-6. Also, Mr. Hawkins Sr. preserved the issue by filing a suppression motion in the trial court on the grounds that officers illegally entered his barn which was within the curtilage of his residence and in which Mr. Hawkins Sr. had an expectation of privacy. TR 57-59.

In the trial court, the Commonwealth did not argue that the emergency aid exception to the warrant requirement applied and the trial court only found that a non-specified, exigent circumstance existed to save the initial search that gave rise to the warrant. VR: 1/12/09; 09:55:13-09:56:13. Also, the Commonwealth did not dispute that the barn was within the curtilage of Mr. Hawkins' Sr.'s residence before the trial court or the Court of Appeals, nor did the Commonwealth argue that that the barn was not entitled to full Fourth Amendment protection before the trial court or the Court of Appeals. Mr. Hawkins Sr. maintains the Commonwealth waived review of these issues.

General Law:

The Fourth Amendment to the United States Constitution is made applicable to the States by way of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment protects areas in which one has a reasonable expectation of privacy against government intrusion. Oliver v. United States, 466 U.S. 170, 178 (1984). Whenever government agents conduct a warrantless search of an area where a person has a reasonable expectation of privacy, absent the narrowly drawn exceptions to the warrant requirement, such a search is unreasonable. Id., Payton v. New York, 445 U.S. 573, 589-590 (1980). One exception applies 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 (1978).

In a suppression hearing, the burden of proof is on the prosecution to show such a search comes within an exception to the warrant requirement. Vale v. Louisiana, 399 U.S. 30, 34 (1970); Gallman v. Commonwealth, 578 S.W.2d 47, 48 (Ky. 1979); United States v. Thompson, 409 F.2d 113 (6th Cir. 1969). Evidence that is recovered, either directly or indirectly, from an unreasonable search or seizure is inadmissible as “fruit of the poisonous tree.” Northrop v. Trippett, 265 F.3d 372, 377-78 (6th Cir.2001); Wong Sun v. United States, 371 U.S. 471 (1963). Section Ten of the Kentucky Constitution⁸ also protects against unreasonable searches and seizures. Commonwealth v. Wood, 14 S.W.3d 557, 558 (Ky. App. 1999).

“In reviewing a trial court’s ruling on a motion to suppress evidence, the reviewing court must first determine whether the trial court’s findings of fact are supported by substantial evidence. If so, those findings are conclusive. The reviewing court then must conduct a de novo review of the trial court’s application of the law to those facts.” Epps v. Commonwealth, 295 S.W.3d 807, 809 (Ky. 2009) (citing Ornelas v. United States, 517 U.S. 690, 697 (1996); United States v. Martin, 289 F.3d 392, 396 (6th Cir. 2002); Adcock v. Commonwealth, 976 S.W.2d 6, 8 (Ky. 1998)); see also RCr 9.78.

Analysis:

A. The record does not support a finding that the emergency aid exception justified a search of any area protected by the Fourth Amendment.⁹

⁸ “The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.” Ky. Const. § 10.

⁹ The Commonwealth did not dispute that the barn was within the curtilage of Mr. Hawkins’ Sr.’s residence before the trial court or the Court of Appeals, nor did the Commonwealth argue that that the barn was not entitled to full Fourth Amendment protection before the trial court or the Court of Appeals. This subject is dealt with more in subsection “C” infra.

To prove that the emergency aid exception justified a warrantless search, the government must prove that an officer in the same situation would objectively and reasonably believe that he or she had to render immediate aid to a person who was seriously injured or threatened with such injury. Michigan v. Fisher, 558 U.S. 45 (2009); Brigham City v. Stuart, 547 U.S. 398, 403-404 (2006); Mincey v. Arizona, 437 U.S. 385, 392 (1978); Mundy v. Commonwealth, 342 S.W.3d 878, 882-883 (Ky. App. 2011). The government bears an exceptionally high burden to prove that a narrowly drawn emergency aid exception to the warrant requirement justified a search. United States v. Najjar, 451 F.3d 710, 717 (10th Cir. 2006) (citing United States v. Anderson, 154 F.3d 1225, 1233 (10th Cir. 1998)); United States v. Wicks, 995 F.2d 964, 970 (10th Cir. 1993); United States v. Anderson, 981 F.2d 1560, 1567 (10th Cir.1992). The officer's belief must be objectively reasonable and the officer's subjective beliefs are irrelevant. Brigham City, 547 at 403, 404-406, Mincy, 437 U.S. at 394. Accordingly, the officer must be able to point to specific and articulable facts. See State v. White, 886 N.E.2d 904, 911 (Ohio App. 2008); People v. Davis, 497 N.W.2d 910, 921 (Mich 1993); c.f. Terry v. Ohio, 392 U.S. 1, 30 (1968).

The cases cited by the Commonwealth regarding an emergency aid exception involve extraordinary factual situations such as a trail of blood leading from a dead body to a home with blood on the front door (Mills v. Commonwealth, 996 S.W.2d 473, 479 (Ky. 1999) (overruled on other grounds by Padgett v. Commonwealth, 312 S.W.3d 336 (Ky. 2010)), a report of a female who had been missing for two days, who had not picked up her child from babysitters, and a dead body that could be smelled from outside her residence (Hughes v. Commonwealth, 87 S.W.3d 850, 851 (Ky. 2002)), police entering

the home of a total invalid when she could not be seen in her bed from a window after a foul odor was smelled coming from inside her room and her sister, who tended to her, had been hospitalized (Todd v. Commonwealth, 716 S.W.2d 242, 243, 248 (Ky. 1986)), and a neighbor with heart problems who lived by himself and who had not been seen for over a day while his vehicle was parked outside his home with the trunk open and with his house lights still on (Gillum v Commonwealth, 925 S.W.2d 189, 190-191 (Ky. App 1995)).

Nothing close to such factual situations existed in the case at bar. Rather, Trooper Rogers purportedly formed the **subjective belief** that there was a **possibility** that a female was being held against her will. The only facts the trooper could articulate were that a random individual (Broce) was parked on a rural road when he happened to drive by and stop to question him, that Broce told him he was supposed to pick up a female at a certain time who was in a trailer, that Broce told him that she had not answered her cell phone, and that Broce somehow indicated concern for her wellbeing—a concern Trooper Rogers merely **assumed** meant she could be in physical harm and took as meaning she was “**possibly**” being held against her will. VR: 1/12/09; 9:29:49-9:31:32, 9:37:36-9:38:11, 9:38:56, 9:53:00. Trooper Rogers actually testified twice that it was only his **assumption** that she may be in danger. Id. at 9:37:36-9:38:11, 9:53:00.

These facts do not objectively and reasonably support a belief that a female was in need of immediate aid due to serious physical injury or to prevent serious physical injury. People do not always answer their cell phones. People do not always arrive at a meeting location on time. Moreover, the time the female was supposed to meet Broce was not even known in this case. Broce had not waived down the officers and asked for help and

there was no testimony that he seemed genuinely panicked or worried. There was no testimony that the female had told Broce she was at a place where it was possible she could be held against her will and subjected to serious physical injury.

Assuming a possibility is not enough to give rise to an exigent circumstance. In King v. Commonwealth, ___ S.W.3d ___ (2012 WL 1450081),¹⁰ this Court found that the Commonwealth failed to meet its burden of proving exigent circumstances justified a warrantless entry into King's apartment based on an officer's belief that there was a possibility that evidence was being destroyed based on the officer having heard "the same kind of movements we've heard inside" when other suspects have destroyed evidence.¹¹ Id. at 4. As with the emergency aid exception, an officer's belief that evidence is being destroyed must be objectively reasonable for the exigency to justify a warrantless entry.¹² Id. at 4.

As in King, the entry in this case relied on a subjective belief in a mere possibility. If Broce actually did indicate anything, Trooper Rogers' claim that Broce indicated concern about a female's wellbeing could have been shrug of the shoulders by

¹⁰ As of the date of the filing of this brief this case is final and ordered to be published but does not yet have a reporter number.

¹¹ In King, officers were pursuing a suspected drug dealer after he sold drugs to a confidential informant. Id. at 1. They knew the suspect had entered an apartment breezeway. Id. As the officers entered the breezeway, they heard a door shut but did not see which door it was. Id. They smelled marijuana coming from a door on the left that led them to believe the door had recently been opened. Id. The officers, announcing their presence, knocked loudly on the door and then heard movements inside that an officer testified sounded like the noises he had heard before when people were destroying evidence. Id. Claiming they believed people inside were destroying evidence, they busted down the door and entered. Id.

At a suppression hearing, a police officer referred to the "possible" destruction of evidence. Id. at 3. He stated that he heard people moving inside the apartment and that this was "the same kind of movements we've heard inside" when other suspects have destroyed evidence. Id. The officer never articulated the specific sounds he heard which led him to believe that evidence was about to be destroyed. Id. This Court found that the police officer's subjective belief that evidence was being destroyed was not supported by the record and could not conclude the belief was objectively reasonable. Id. This Court stated "[e]xigent circumstances do not deal with mere possibilities and the Commonwealth must show something more than a possibility...." Id.

¹² Under the Fourth Amendment to the United States Constitution, in the absence of consent, police may not conduct a warrantless search or seizure within a private residence without both probable cause and exigent circumstances. Id. at 3. In King, it was undisputed that the officers had probable cause. Id. at n. 1.

Broce in response to leading or suggestive questioning. In any event, a conclusory statement that somebody indicated vague concern is not enough to uphold a search based on the emergency aid exception. The objective facts presented (somebody in a car said he was supposed to pick up a female at some time from a trailer and she did not answer her phone) do not support objectively and reasonably support a factual finding or a legal conclusion that a female was seriously injured or threatened with such injury and in need of immediate aid.¹³ Finally, the fact that the officers did not look in the trailer for the girl but became more concerned about getting a warrant to look for drugs belies any claim there were objectively reasonable grounds to believe a female was in need of immediate aid due to serious physical injury or threat of such.

Accordingly, the Court of Appeals erred in finding that the emergency aid exception applied to the barn, the trailer, or any other area protected by the Fourth Amendment and all evidence obtained in this case required suppression on these grounds.

B. Even if the emergency aid exception applied to the residence, it would not have extended to the barn.

“[A] warrantless search must be ‘strictly circumscribed by the exigencies which justify its initiation, ...’” Mincey, 437 U.S. at 393 (quoting Terry v. Ohio, 392 U.S. 1, 25–26 (1968)) (internal citation omitted). Under the facts of this case, even if the emergency aid exception would have justified a search of the trailer, the officers had no objectively reasonable basis to believe that the woman was inside the barn. Thus, they could not extend the emergency aid exception to the barn. Trooper Rogers specifically testified that Broce said the woman was in the trailer, not the barn, and there were no attendant

¹³ The Commonwealth says the parties did not dispute the trial court’s findings of fact before the Court of Appeals. AG Brief pg. 10. However, Mr. Hawkins Sr. did argue that as a matter of fact and law the trial court erred in finding an exigent circumstance before the Court of Appeals. Hawkins Sr. COA Reply Brief pg. 2-4.

facts that would indicate she was inside the barn. Trooper Roger's observation of two dogs exiting the barn simply does not give rise to an objectively reasonable belief that the woman would be located in the barn.

C. Fourth Amendment and Section Ten protection of the barn.

The Commonwealth did not dispute that the barn was within the curtilage of Mr. Hawkins' Sr.'s residence before the trial court or the Court of Appeals, nor did the Commonwealth argue that that the barn was not entitled to full Fourth Amendment protection before the trial court or the Court of Appeals. Moreover, the trial court implicitly found the barn was on the curtilage or entitled to full Fourth Amendment protection by ruling that exigent circumstances justified the initial search of the barn. However, before this Court, the Commonwealth hints that the barn was not entitled to full Fourth Amendment protection. AG Brief pg. 16.¹⁴

Mr. Hawkins Sr. maintains that any issue regarding the barn not being entitled to full Fourth Amendment protection was waived by the Commonwealth. However, because the Commonwealth has implied the barn was not entitled to full Fourth Amendment protection before this Court, Mr. Hawkins Sr. points out the following.

“The resident’s expectation of privacy continues to shield the curtilage where an outsider has no valid reason to go.” Quintana v. Commonwealth, 276 S.W.3d 753, 759 (Ky. 2008). “The fact that the curtilage as well as the home itself is entitled to Fourth Amendment protection and an expectation of privacy is premised on strong concepts of

¹⁴ In a footnote, the Commonwealth cites to two cases in which a reasonable expectation of privacy was found in an outbuilding and a barn. *Id.* The Commonwealth also cites a case in which the court found a reasonable expectation of privacy did not exist in a buried camper located outside curtilage where the structure had a readily visible entrance and no lock or door protecting the entryway. *Id.* citing United States v. Pennington, 287 F.3d 739, 745-746 (8th Cir. 2002). However, in Pennington, this structure was 250 to 300 yards from the residence and the Court still found this determination to be “a very close issue.” *Id.*

intimacy, autonomy, and sanctuary that develop around the home and family life, and the fact that many related activities will occur outside the house.” Quintana, 276 S.W.3d at 757 (citing Dow Chemical Co. v. United States, 476 U.S. 227 (1986)).

United States v. Dunn, 480 U.S. 294 (1987), suggests that a determination regarding whether something is within the curtilage to a home be considered with reference to four factors: “the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put and steps taken by the resident to protect the area from observations by people passing by.” Id. at 295. However, Dunn states that these factors are simply useful analytical tools. Id. In Dunn, the Court found a barn that was located 60 yards away from a house, standing in isolation outside of the area surrounding the house that was enclosed by a fence, 50 yards from the fence, with an extremely strong odor of phenylacetic acid coming from the barn was not in the curtilage of the house. Dunn, 480 U.S. at 302.

In the case at bar however, Commonwealth’s Exhibit 1 shows a picture of the barn and it is very close to the residence. (See Appendix and photographs in record at Supreme Court’s Clerk’s Office). Officer Rogers testified at the suppression hearing that the barn was a very short distance, within a stone’s throw, from the residence, and that the residence was approximately 100-150 yards from the road, satisfying the most important Dunn factor of proximity. VR: 1/12/09; 09:42:29-09:42:58. Moreover, regarding the nature and use of the barn, Mr. Hawkins Sr.’s motorcycle and truck were inside the barn and there was testimony that it was used for storage. (See photographs in record at Supreme Court’s Clerk’s Office); VR: 1/13/09; 16:04:10-16:06:02.

Furthermore, this barn was 100 to 150 yards away from the road in a rural area, indicating one did not want passersby to observe the interior and that one would believe passersby would not observe the interior.

However, even if the barn were outside the curtilage, the inquiry does not end there. An individual may have a protected expectation of privacy in a barn located outside the home's curtilage. People v. Pitman, 813 N.E.2d 93, 104 (Ill. 2004) (citing Dunn, 480 U.S. at 303-304 and Sievert v. Severino, 256 F.3d 648, 654 (7th Cir. 2001) (Dunn found the barn outside the curtilage and that an officer could look inside to see what was in plain view from an open field. "But Dunn did not hold the police could enter the barn itself.") (emphasis in original). For the sake of argument, Dunn actually accepted that the barn was outside of the curtilage but still enjoyed Fourth Amendment protection and could not be entered without a warrant. Dunn, 480 U.S. at 303.

"The fourth amendment protects structures other than dwellings, and those structures need not be within the curtilage of the home." Pitman, 813 N.E.2d at 104 (citing United States v. Santa Marina, 15 F.3d 879, 882-883 (9th Cir. 1994) (collected cases)). In Pitman, the Court stated,

Several factors should be examined to determine whether a defendant possesses a reasonable expectation of privacy: (1) ownership of the property searched; (2) whether the defendant was legitimately present in the area searched; (3) whether defendant has a possessory interest in the area or property seized; (4) prior use of the area searched or property seized; (5) the ability to control or exclude others from the use of the property; and (6) whether the defendant himself had a subjective expectation of privacy in the property.

813 N.E.2d at 105-106 citing People v. Johnson, 499 N.E.2d 1355 (1986). In Pitman, the Court found that a barn 40 to 60 yards away from a residence, while outside the curtilage, was entitled to Fourth Amendment protection. Id. at 106. The court found that although

the defendant did not own the residence or the barn, he had a possessory interest in the farm and the ability to control or exclude others from use of the property. Id. The Court further found that the defendant did not have to take affirmative steps to proclaim his expectation of privacy and the fact that parts of the barn's interior were visible did not mean that the defendant threw open the interior of the barn to general public scrutiny. Id.

In the case at bar, as the resident of the property,¹⁵ Mr. Hawkins Sr. had a possessory interest in and a legitimate presence on the property, and thus could control or exclude others from using it. He used the property as his home and the barn as one could expect a barn to be used—and, because he kept valuable items such as his vehicles in the barn, had a subjective expectation of privacy in the barn. Even if a barn is not within the curtilage to one's residence, in rural areas especially, people should still have a reasonable expectation of privacy in such structures. After all, if a car with the doors unlocked and the windows rolled down is parked on a public street outside of a house's curtilage and is entitled to Fourth Amendment protection, a barn on private property with vehicles inside, even if outside the curtilage, should be as well. See Mundy, 342 S.W.3d at 883 (emergency aid exception applies to automobiles) (citing collected cases).

Finally, the open fields doctrine would not apply to this case. This doctrine permits officers to go onto "open fields" that are accessible to the public that one would expect the public to access and, from the open field, look into open structures or windows of structures that are outside the curtilage of a home. Dunn, 480 U.S. at 304; Oliver, 466 U.S. at 179. As the Court of Appeals noted, even if one were to assume the barn was outside the curtilage, Trooper Rogers did not stop and observe the interior of the barn from the vantage point of an open field or merely peer into the barn and observe evidence

¹⁵ VR: 1/12/09; 14:34:50; TR 15.

of a crime as in Dunn. COA Opinion pg. 7. Rather Trooper Rogers specifically testified that he did not see evidence of the methamphetamine related items at issue until after he entered the barn and looked to the right.

Conclusion:

For the reasons articulated herein, the trial court's order denying the suppression motion must remain reversed and this case must be remanded to the Anderson Circuit Court with an order that the convictions be vacated and all evidence obtained in this case be suppressed under the Fourth and Fourteenth Amendments to the United States Constitution, Section Ten of the Kentucky Constitution, and the abovementioned case law.

ARGUMENT

II.

Through testimony, questioning, and remarks, the Commonwealth improperly informed the jury that Mr. Hawkins Sr. invoked his right to remain silent to the police and improperly argued that Mr. Hawkins Sr. should have proved his innocence prior to trial.

Preservation:

This issue was unpreserved in the trial court. Mr. Hawkins Sr. asked the Court of Appeals to review this issue under RCr 10.26 and KRE 103(e) which allows reversal in the event that manifest injustice results from an unpreserved error. A manifest injustice occurs when there is a substantial possibility that the alleged error affected the overall fairness of the proceedings or a defendant's substantial rights and that the result at trial would have been different. Brewer v. Commonwealth, 206 S.W.3d 343, 351 (Ky. 2006).

The Court of Appeals' panel found that it was improper for the prosecution to used Mr. Hawkins Sr.' invocation of his right to remain silent against him at trial. COA Opinion 9-10. In the event that this Court does not find that suppression of all evidence was warranted for the reasons articulated in Argument Section I, Mr. Hawkins Sr. preserved review of whether a reversal is warranted on this issue in his cross motion for discretionary review. Hawkins Sr. MDR pg. 9-10.

Law:

Under the Fifth and Fourteenth Amendments to the United States Constitution and Section Eleven of the Kentucky Constitution¹⁶, individuals have the right to remain silent when questioned by the police. "The Commonwealth is prohibited from introducing evidence or commenting in any manner on a defendant's silence once that defendant has been informed of his rights and taken into custody." Hunt v. Commonwealth, 304 S.W.3d 15, 35 (Ky. 2009) (citing Doyle v. Ohio, 426 U.S. 610 (1976) and Romans v. Commonwealth, 547 S.W.2d 128, 130 (Ky.1977)).¹⁷

Also, under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Kentucky case and statutory law, in order to attain a criminal conviction the Commonwealth is required to prove every element of a criminal offense beyond a reasonable doubt and that burden of proof cannot be shifted to an accused nor can an accused be required to prove his innocence. Patterson v. New York, 432 U.S. 197 (1977); In re Winship, 397 U.S. 558 (1970); Kirk v. Commonwealth, 6 S.W.3d 823 (Ky.

¹⁶ "In all criminal prosecutions the accused ... cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land..." Ky. Const. § 11.

¹⁷ In Green v. Commonwealth, 815 S.W.2d 398, 400 (Ky. 1991), this Court also concluded that it does not matter if the right is invoked before or after the giving of Miranda warnings. "The giving of a Miranda warning does not suddenly endow a defendant with a new constitutional right. The right to remain silent exists whether or not the warning has been or is ever given." Id.

1999); Coomer v. Commonwealth, 694 S.W.2d 471, 472 (Ky. App. 1985); KRE 500.070; RCr 9.42(c). “As the presumption of innocence mandates that the burden of proof and production fall on the Commonwealth, any burden shifting to a defendant in a criminal trial would be unjust.” Butcher v. Commonwealth, 96 S.W.3d 3, 10 (Ky. 2002).

Analysis:

During the Commonwealth’s case-in-chief, Trooper Rogers testified that Mr. Hawkins Sr. invoked his right to remain silent when he arrived at his property while it was being searched. VR: 1/12/09; 14:35:07-14:35:23, 14:48:40-14:48:55. Later, Mr. Hawkins Sr. explained that he was not involved in manufacturing methamphetamine and that the evidence found on his property had come out of a truck he had bought from another individual. During cross-examination, the prosecutor commented on Mr. Hawkins Sr. invoking his right to remain silent and made reference to or asked him why he did not attempt to prove his innocence during the 18 months prior to trial:

Prosecutor: So, I think my question was and you answered, you did know they were there to do a search warrant concerning a meth lab.

Mr. Hawkins Sr.: Yeah, he informed me that before I left.

Prosecutor: Okay, you knew that, and at that point you didn’t say “hey I picked up this stuff from a dude, a scary dude from Cornishville, and you might want to go look at that or you might want to go look for this you didn’t inform them then did you?”

Mr. Hawkins Sr.: No. I wasn’t asked about that, I was asked about propane tanks.

Prosecutor: Okay, and even though they were concerned, they were asking you this for officer safety it sounds like. You didn’t give them any other information regarding where this stuff had come from?

Mr. Hawkins Sr.: I wasn’t that, I was not asked.

Prosecutor: Now, this was back in July 16th of 2007, so we're what 16, 18 months later. And this is really the first time we've heard this story, isn't it?

Mr. Hawkins Sr.: Uh, yes, this may be your first time, I'm not sure of that.

Prosecutor: And during that time, Ms. Miller your girlfriend, she didn't tell police about the scary dude from Cornishville?

Mr. Hawkins Sr.: Well, I can't speak for her, I can speak for me and say I was not asked anything on that matter.

VR: 1/13/09; 14:43:22-14:44:52. The prosecutor also referenced the same in her cross-examination of Jackie Miller. Id. at 15:56:15-15:56:40.

The prosecutor emphasized that Mr. Hawkins Sr. never attempted to prove his innocence prior to trial at the very start of her closing argument:

I want you to think about eighteen months. Eighteen months, the defendant's had time to let someone in law enforcement know 'hey, this wasn't our stuff.' Eighteen months. Until Monday we didn't hear that. Eighteen months, they had time to think about the evidence against them and come up with a very well-rehearsed explanation.

VR: 1/14/09; 11:51:50-11:58:00. The prosecutor also emphasized the same at the end of her closing argument. Id. at 12:19:35.

By asking these questions and making these remarks repeatedly, the prosecutor was commenting on Mr. Hawkins Sr. invoking his right to remain silent. Because the prosecutor was asking why Mr. Hawkins Sr. never, until the day of trial, told his story, she was necessarily referencing his post-arrest silence and conveying that Mr. Hawkins Sr. should have attempted to prove his innocence prior to trial. However, Mr. Hawkins Sr. had no obligation to speak to the police nor did he have any obligation to prove his innocence prior to trial or even at trial. The burden of proof is entirely on the Commonwealth to prove an accused guilty beyond all reasonable doubt. The

prosecutor's repeated questions and comments constituted improper comments on Mr. Hawkins Sr. refusing to speak to police and improper burden shifting in violation of the Fifth and Fourteenth Amendment to the United States Constitution, Section Seven and Eleven of the Kentucky Constitution, and the aforementioned case law.

This case is similar to Doyle, supra. In Doyle, the defendants proclaimed their innocence, testifying that what looked like a drug transaction was actually a disgruntled dealer's attempt to frame them. 426 U.S. at 613. The prosecution attempted to undercut this explanation by asking the defendants why they had not told detectives the frame up story at the time of their arrest. Id at 616. The prosecutor in Doyle argued that it could question defendants about the apparent discrepancy between silence at the time of arrest and an exculpatory story at trial under the guise of impeachment:

It does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.

Id. (citing United States v. Hale, 422 U.S. 171, 177(1975)).

In the case at bar, the improper comments and questions affected Mr. Hawkins Sr.'s substantial, constitutional rights. Mr. Hawkins Sr. explained to the jury how the items ended up on his property and they obviously believed his explanation to a great extent as they did not find him guilty of manufacturing methamphetamine but only of the Class D lesser-included offense of complicity to possession of a methamphetamine precursor. The prosecutor's comments and questions as to why Mr. Hawkins Sr. remained silent and did not prove his innocence to the police prior to trial could have

easily caused the jury to question some of Mr. Hawkins Sr.'s explanation of what happened and pushed them into finding the conviction they found.

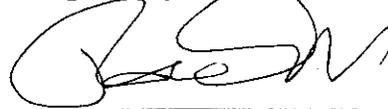
Conclusion:

In the event that this Court does not find that suppression of all evidence was warranted for the reasons articulated in Argument Section I, Mr. Hawkins Sr. asks this Court to reverse for a new trial due to the improper comments on Mr. Hawkins Sr. refusing to speak to police and improper burden shifting in violation of the Fifth and Fourteenth Amendment to the United States Constitution, Section Eleven of the Kentucky Constitution, and the aforementioned case and statutory law.

CONCLUSION

For the reasons stated herein, Mr. Hawkins Sr.'s convictions must be vacated and the case remanded to the Anderson Circuit Court with an order to suppress all evidence obtained or, alternatively, with an order that upon retrial the prosecution is precluded from eliciting testimony or commenting on Mr. Hawkins Sr. invoking his right to remain silent.

Respectfully submitted,



Brandon Neil Jewell
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
(502) 564-8006

APPENDIX

<u>Tab Number</u>	<u>Item Description</u>	<u>Record Location</u>
1	COA Opinion Reversing & Remanding	N/A
2	Trial, Verdict, & Judgment	TR 105-106
3	Commonwealth's Exhibit #1	Exhibit Envelope (SCt. Office)