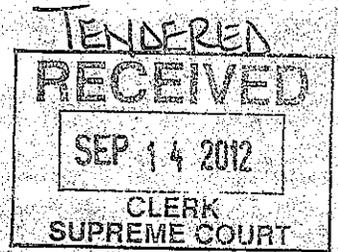


Commonwealth of Kentucky
Kentucky Supreme Court
No. 2011-SC-000159-DG & 2012-SC-000187-DG



COMMONWEALTH OF KENTUCKY

APPELLANT/CROSS-APPELLEE

v.

On Review from the Kentucky Court of Appeals
Case No. 2009-CA-000998-MR
Anderson Circuit Court Indictment No. 2007-CR-00070-001

JIMMIE HAWKINS, SR.

APPELLEE/CROSS-APPELLANT

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that the record on appeal was not checked out and that a copy of the foregoing Brief for the Commonwealth was mailed 1st class U.S. mail, postage pre-paid this 14th day of September, 2012, to: Hon. Charles R. Hickman, Judge, Anderson Circuit Court, 15 Courthouse, 501 Main Street, Shelbyville, Ky. 40065; to: Hon. Brandon Neil Jewell, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601. Sent via electronic mail to: Hon. Laura Donnell, Commonwealth's Attorney, 544 Main St., Shelbyville, Ky. 40065.



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INTRODUCTION

Jimmie Hawkins, Sr., hereinafter “Appellee,” was convicted of possession of a methamphetamine precursor and possession of drug paraphernalia and sentenced to three years in prison following a jury trial in Anderson Circuit Court. He appealed to the Kentucky Court of Appeals, claiming that the trial court erred in denying his motion to suppress evidence discovered during a search of his property, and that certain comments by the Commonwealth during trial improperly shifted the burden to him to prove his innocence. The Court of Appeals reversed the Appellee’s convictions. This Court granted the Commonwealth’s motion for discretionary review, and subsequently granted the Appellee’s cross-motion for discretionary review.

Note Concerning Citations

The record on appeal consists of two volumes of transcript of record and four CD’s. The transcript of record will be cited as “TR” with the page number. The three CD’s of trial will be cited as “VR” with the date and time index.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth will gladly present oral argument to the Court, should the Court deem it helpful.

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STATEMENT OF THE CASE

On October 16, 2007, the Appellee was indicted for complicity to manufacturing methamphetamine, complicity to trafficking in a controlled substance in the first degree - methamphetamine, and complicity to possession of drug paraphernalia. TR 1-3. He was arraigned and pleaded not guilty. TR 19. A trial by jury was held on January 12-14, 2009.¹

Prior to trial the Appellee moved to suppress all evidence found during a search of his property, arguing that officers impermissibly entered and searched his property and barn prior to obtaining a search warrant. TR 57-59. A suppression hearing was held on the morning of the first day of trial. VR 1/12/09, 9:26:50-9:56:12. Kentucky State Trooper Mike Rogers was the only witness at the hearing and testified as follows:

On July 15, 2007, Mercer County Deputy Sheriff Rick Moberly received an anonymous phone call at his residence. VR 1/12/09, 9:28:48. The caller described a trailer on Alford Road in Mercer County and indicated that there was a possible indoor "marijuana grow" or "meth lab" at the location. Id. at 9:29:00, 9:29:24. The next day Trooper Rogers and Deputy Moberly went to attempt to locate the trailer. Id. at 9:29:17. During this attempt they observed a red Toyota pick-up truck parked on the side of

¹ The Appellee's son, Jimmie Hawkins, Jr., was indicted on the same offenses and tried at the same time. TR 1-3; VR 1/12/09, 10:09:00. At trial, the trafficking count was dismissed and Hawkins, Jr. received a directed verdict on the count of possession of drug paraphernalia. VR 1/12/09, 10:24:34; VR 1/13/09, 11:55:55. The jury found Hawkins, Jr. not guilty on the remaining count of manufacturing methamphetamine. TR 86.

Cheese Lick Road in Anderson County.² Id. at 9:29:47. The truck was parked partially in the road. Id. The officers stopped to see if the driver needed assistance and ask why he was parked in the road. Id. at 9:30:06.

The driver, Robert Broce, stated that he was waiting on his girlfriend, April Snape.³ VR 1/12/09, 9:30:15. He indicated that she was in a trailer which was visible from where the truck was parked and was approximately 100-150 yards away. Id. at 9:30:18. Mr. Broce stated that he was supposed to meet Ms. Snape and she had not shown up. Id. 9:30:30-9:30:50. He had been unable to contact her on her cell phone. Id. at 9:38:55. Mr. Broce had met her there on prior occasions and was concerned for her well-being. Id. at 9:30:30-9:30:50. He did not know who lived in the trailer or anything about it. Id. at 9:31:04.

Based on this information the officers went to the trailer in an attempt to locate Ms. Snape and check on her well-being. VR 1/12/09, 9:30:50; 9:35:10. The property was an open lot without any fences. Id. at 9:40:50. Trooper Rogers went to the front door of the trailer. Id. at 9:31:13. He knocked on the door and there was no response. Id. at 9:31:20. While he was at the trailer two large, white dogs came out of a nearby barn. Id. at 9:31:48. The barn was in close proximity to the trailer, approximately 20-30 yards or 50-60 feet away. Id. at 9:42:38. Trooper Rogers walked over to the barn since there was no response at the trailer. Id. at 9:31:58. The barn was open and no one

² Alford Road runs from Mercer County into Anderson County and becomes Cheese Lick Road in Anderson County. VR 1/12/09, 9:29:05.

³ April Snape is also referred to as April Cheek in the record.

responded from inside. Id. at 9:32:02. There were no doors on the barn. Id. at 9:54:55.

Trooper Rogers stepped inside to see if anyone was in the barn to check on Ms. Snape. Id. at 9:32:12; 9:55:00.

Once inside he saw a mason jar sitting on a table. VR 1/12/09, 9:32:15. The jar contained lithium strips and a clear substance. Id. at 9:32:23. He saw a large aluminum kettle beside the jar. Id. at 9:32:38. The kettle had been modified and had a tube running from one side of the top to the other. Id. at 9:32:47. Trooper Rogers recognized these items as indicative of methamphetamine production. Id. at 9:33:00.

Trooper Rogers then went to a camper located behind the trailer. VR 1/12/09, 9:33:08. Deputy Moberly had been at the camper and said that he had heard voices inside and had knocked on the door but received no response. Id. Trooper Rogers did not hear voices. Id. at 9:33:25. At that point Trooper Rogers called for additional assistance. Id. at 9:33:45. He left the property and obtained a search warrant after other officers arrived. Id. at 9:34:05. He later realized that the trailer and the property matched the description of the property described by the anonymous caller. Id. at 9:44:00.

At the conclusion of the hearing the trial court set forth its ruling on the record. The court found that the officers were on their way to conduct an independent investigation to corroborate the information obtained through the anonymous tip when they encountered Mr. Broce. VR 1/12/09, 9:55:10-9:55:30. Mr. Broce relayed to the officers that he was concerned about the well-being of his girlfriend. Id. at 9:55:32. The court found that this placed the officers on the property under an exigent circumstance, as there was concern for whether Ms. Snape may have suffered some physical harm or was

being held against her will. Id. at 9:55:38. The court further found that upon noticing the items in plain view the officers left and obtained a search warrant for the property. Id. at 9:55:57. The trial court denied the motion to suppress based on these findings. Id. at 9:56:05.

Following the hearing, the matter proceeded to trial at which Trooper Rogers and Deputy Moberly testified consistently with the events described above. Trooper Rogers also testified that upon returning to the property after obtaining the search warrant the Appellee had arrived and was talking to officers who had remained at the scene. Id. at 14:33:50. The Appellee indicated that he had no knowledge of anything on his property. Id. at 14:35:28.

Upon executing the warrant, officers found two glass pipes, a blue bank-style bag, and a black garbage bag in the Appellee's bedroom in the trailer. VR 1/12/09, 14:39:25-14:40:40. The blue bag contained digital scales and multiple plastic baggies. Id. at 15:32:00. The garbage bag contained items consistent with the manufacture of methamphetamine including: a clear gallon jug, black rubber gloves, an aerosol can of carburetor cleaner, lithium batteries, and two pill bottles half-full of a white powder which was later determined to contain pseudoephedrine. Id. at 15:37:25; VR 1/13/09, 10:13:00, 11:43:35. A box containing hypodermic needles was also discovered in the trailer. VR 1/12/09, 14:47:45. In the camper officers found additional items which can be used in the manufacture of methamphetamine including liquid fire, acetone, and ice cream salt located together in a cardboard box. Id. at 14:36:00; VR 1/13/09, 10:20:40.

A specialized team was called to handle the hazardous items in the barn. VR 1/12/09, 14:49:18. The items were packed and taken from the property to be destroyed. Id. at 9:35:20. Detective Jasper White, a methamphetamine expert with the Kentucky State Police, testified that he believed that the barn contained an active meth lab and that the items found on the property were to be used to manufacture methamphetamine. Id. at 10:39:38.

In his defense, the Appellee denied knowing how to manufacture methamphetamine and denied any involvement with it. VR 1/13/09, 14:18:45, 14:23:55. He stated that the items found in his bedroom were not his.

The Appellee explained that he had purchased a pick-up truck from Ron Hartman in Cornishville, Kentucky, a few weeks before the incident. VR 1/13/09, 13:46:50, 14:26:55. The truck was a "junker" which the Appellee had purchased for parts. Id. at 13:47:08, 13:48:40. According to the Appellee, the truck was full of junk and he found the black garbage bag behind the passenger seat while going through it. Id. at 13:49:15, 13:54:15. He opened the garbage bag and saw a pitcher, starter fluid, gloves, two pill bottles, batteries, and the bank bag. Id. at 13:54:34, 14:31:35. He believed the items were illegal but was afraid of what Mr. Hartman would do if he got rid of them. Id. at 13:55:05. He had his former girlfriend, Jackie Miller, take the bag inside the trailer. Id. at 13:51:20. He planned to return the bag to Mr. Hartman, but was unable to contact him. Id. at 14:18:08.

The Appellee further claimed that he had never seen the items found in the barn. VR 1/13/09, 13:49:02, 13:53:35. He testified that the items found in the camper

were used for legitimate purposes, and stated that the syringes located in the trailer were used on chickens which he had previously raised and fought. Id. at 14:00:00-14:02:00, 14:10:50.

Jackie Miller similarly testified that the Appellee found the garbage bag in the truck and gave it to her to put inside the trailer. VR 1/13/09, 15:38:40-15:39:40, 15:45:40-15:46:05. She took the bag and went through it. Id. at 15:46:10. Afterwards she set it behind some speakers in the Appellee's bedroom and set the blue bag beside it. Id. at 15:47:00. She also placed the two glass pipes from the garbage bag in a drawer in his bedroom. Id. at 15:47:08.

At the conclusion of the evidence the trial court instructed the jury on manufacturing methamphetamine, the lesser offense of possession of a methamphetamine precursor, and possession of drug paraphernalia.⁴ TR 79-80, 82. The jury found the Appellee guilty of possession of a methamphetamine precursor and fixed a three year sentence. TR 84, 91. The jury also found the Appellee guilty of possession of drug paraphernalia and fixed a twelve month sentence. TR 85, 92. On February 17, 2009, the trial court sentenced the Appellee accordingly to a total sentence of three years in prison. TR 105-106 (Appendix A1-A2).

The Appellee appealed his convictions to the Kentucky Court of Appeals, raising two claims of error. He first argued that the trial court erred in denying his motion to suppress, claiming that the barn was entitled to Fourth Amendment protection and that

⁴ The count of trafficking in a controlled substance was dismissed at the beginning of trial. VR 1/12/09, 10:24:34.

exigent circumstance exception did not apply since the officers lacked both probable cause and exigent circumstances. In addition, the Appellee raised an unpreserved argument that the Commonwealth improperly shifted the burden to him to prove his innocence through its comments and questions during trial concerning why he had not informed authorities before trial that he had inadvertently obtained the contraband.

On February 18, 2011, the Court of Appeals rendered a not-to-be-published opinion reversing and remanding the Appellee's convictions, Jimmie Hawkins, Sr. v. Commonwealth, 2009-CA-000998-MR.⁵ (Appendix A3-A14). In the opinion the Court of Appeals found that the trial court erred in denying the motion to suppress and remanded for a new trial. Slip Opinion pg. 1, 5, 7-8. Specifically, the court found that the emergency exigent or emergency aid exception to the warrant requirement would have permitted Trooper Rogers to perform a warrantless search of the Appellee's trailer, but that it did not extend to allow his warrantless entry into the barn. Id. at 6-7. The court also addressed the Appellee's burden-shifting argument in order to provide guidance on potential retrial. The court found that questions or comments concerning why the Appellee waited until trial to come forward with his explanation constituted an impermissible comment on his post-arrest silence. Id. at 10. However, the court noted that the Commonwealth could ask other defense witnesses why they had not come forward with the explanation sooner. Id. Judge Keller dissented and filed a separate opinion. Id. at 11-12.

⁵ The Court of Appeals's opinion was written by Judge Thompson. Senior Judge Shake concurred in the opinion.

On March 14, 2012, this Court granted the Commonwealth's motion for discretionary review to consider whether the Court of Appeals majority erred in finding that the emergency aid exception did not apply to Trooper Rogers's entry into the barn. This Court subsequently granted the Appellee's cross-motion for discretionary review to consider whether the Court of Appeals erred in finding that the emergency aid exception applied at all in this case, and to consider whether the post-arrest silence and burden-shifting issue would also warrant reversal of the Appellee's convictions.

ARGUMENT

**THE COURT OF APPEALS'S OPINION MUST BE
VACATED AS TROOPER ROGERS'S ENTRY INTO
THE APPELLEE'S BARN WAS LAWFUL AND
REASONABLE UNDER THE EMERGENCY AID
EXCEPTION.**

In this matter the Court of Appeals found that Trooper Rogers's warrantless entry into the barn went beyond the permissible scope of the emergency aid exception to the warrant requirement. In so holding, the court erroneously found reasonable and prudent conduct by the officer to be unlawful. The Court of Appeals's opinion must be vacated.

A. Preservation

This matter is preserved for appellate review. As noted, the Appellee filed a motion to suppress in the trial court on the grounds that officers performed an unlawful warrantless search of his property, including his barn. TR 57-59. The trial court denied the motion following a hearing, finding that officers acted lawfully since they were on the Appellee's property under an exigent circumstance based on concern for Ms. Snape. VR 1/12/09, 9:55:38. The Court of Appeals reversed the trial court's suppression ruling on the grounds that Trooper Rogers's entry into the barn went beyond the permissible scope of the emergency exigent or emergency aid exception. Slip Opinion pgs. 6-7. This Court granted discretionary review to consider the matter.

B. Standard of Review

Appellate review of a trial court's ruling on a motion to suppress involves a two-step analysis. Anderson v. Commonwealth, 352 S.W.3d 577, 583 (Ky. 2011) (citing Commonwealth v. Whitmore, 92 S.W.3d 76 (Ky. 2002)). First, an appellate court must determine whether the trial court's findings of fact are supported by substantial evidence. Id. (Citing RCr 9.78). If the facts are supported by substantial evidence they are conclusive. Id. In reviewing the facts, an appellate court should review only for clear error and "give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." Whitmore, supra, 92 S.W.3d at 79 (quoting Ornelas v. United States, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996)).

If the findings of fact are supported by substantial evidence, the appellate court must then conduct a de novo review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law. Anderson, supra, 352 S.W.3d at 583.

C. The Trial Court's Findings of Fact are Conclusive.

The parties did not dispute the trial court's findings of fact before the Court of Appeals. The trial court's findings are supported by substantial evidence through the testimony of Trooper Rogers and are conclusive.

D. No Unreasonable Search Took Place.

The Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution prohibit unreasonable searches and seizures. As a general rule all warrantless searches are unreasonable unless they fall under an exception to the

warrant requirement. Commonwealth v. McManus, 107 S.W.3d 175, 177 (Ky.2003). The burden of proof is on the Commonwealth to prove that a warrantless search falls within one of the exceptions to the general rule. Id.

One such exception is the emergency aid exception. This exception was recognized by the United States Supreme Court in Mincey v. Arizona, 437 U.S. 385, 392, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290 (1978), as follows:

We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.

Id.

Under this exception, officers must have an objectively reasonable basis for believing that a person is in need of immediate aid. Michigan v. Fisher, 558 U.S. 45, 130 S.Ct. 546, 548, 175 L.Ed.2d 410 (2009) (citing Brigham City v. Stuart, 547 U.S. 398, 406, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006), and Mincey, *supra*, 437 U.S. at 392).

The emergency aid exception has been recognized and applied in several Kentucky cases. In Hughes v. Commonwealth, 87 S.W.3d 850 (Ky. 2002), an officer entered an apartment to look for a missing woman. The woman had been missing for two days and had failed to pick up her children, and the officer entered after he received no response at the door and noticed an unusual odor emanating from inside. Id. at 852. The warrantless entry led to the discovery of her decomposing body. Id. This Court upheld

the entry and search on the basis that the officer had a reasonable belief that the woman might be inside and be in need of emergency assistance. Id.

In Gillum v. Commonwealth, 925 S.W.2d 189 (Ky. App. 1995), the Kentucky State Police received a call from a neighbor who was concerned for the appellant's well-being. Id. at 189-190. When officers arrived at the scene the neighbor expressed concern that the appellant might be in need of help based on his history of heart problems, and unusual circumstances such as the appellant's truck door staying open for several hours the previous night, lights remaining on in the residence, and the neighbor's inability to contact him. Id. at 190. A warrantless entry by officers led to the discovery of a large number of marijuana plants. Id. The Court of Appeals upheld the entry under the exigency or emergency exception, on the basis that it was reasonable for the officers to believe the appellant was in need of immediate aid under the circumstances. Id. at 190-191. See also Todd v. Commonwealth, 716 S.W.2d 242, 247-248 (Ky. 1986) (upholding warrantless entry into residence on the basis of emergency exigent circumstances where officers obtained no response at the home of victim who was virtually a total invalid, and did not see victim in bed when they looked through windows while attempting to check on her well-being); Mills v. Commonwealth, 996 S.W.2d 473, 480 (Ky. 1999), overruled on other grounds by Padgett v. Commonwealth, 312 S.W.3d 336 (Ky. 2010) (recognizing that blood trail leading to appellant's residence justified a warrantless entry in order to render immediate aid and assistance).

Similarly here, the officers entered the Appellee's property under the reasonable belief that Ms. Snape may be in need of immediate aid. When Trooper Rogers

encountered Mr. Broce he expressed concern for Ms. Snape's well-being and Trooper Rogers understood this concern to be that she may have suffered physical harm or may be being held against her will. VR 1/12/09, 9:51:00. Nothing in the record indicates that Mr. Broce's concern was not genuine, or that Trooper Rogers entered the property for any purpose other than to check on Ms. Snape's well-being. Trooper Rogers testified that it was not until after the Appellee's property was searched that the officers realized that it matched the description given by the anonymous caller. Id. at 9:44:20. Thus, Trooper Rogers reasonably responded to the emergency circumstance based on a citizen's report as did the officers in Hughes and Gillum.

As noted, the Court of Appeals found that the emergency aid exception applied in this case and would have permitted a search of the Appellee's trailer. Slip Opinion pg. 6. However, the court found that the search of the barn "went beyond the permissible scope of the emergency exigent exception" since Trooper Rogers had no objectively reasonable basis to believe that the woman would be located there. Id. Such a conclusion is erroneous and unreasonable under the circumstances.

In Mincey, the Supreme Court held that "a warrantless search must be strictly circumscribed by the exigencies which justify its initiation." 437 U.S. at 393, 98 S.Ct. at 2413. By way of background, the search in Mincey was an extensive four-day warrantless search of the petitioner's apartment following the shooting death of a police officer in the apartment. 437 U.S. at 387-389, 98 S.Ct. at 2411. The warrantless search was upheld on appeal in Arizona state court under the purported "murder scene exception" to the warrant requirement, but the Supreme Court rejected such an exception.

437 U.S. at 388, 395, 98 S.Ct. at 2412, 2415. In its opinion the Court rejected the state's argument that a possible homicide presented an emergency situation which demanded immediate action, holding as follows:

But a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation," Terry v. Ohio, 392 U.S., at 25-26, 98 S.Ct., at 1182, and it simply cannot be contended that this search was justified by any emergency threatening life or limb. All the persons in Mincey's apartment had been located before the investigating homicide officers arrived there and began their search. And a four-day search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency search.

437 U.S. at 393, 98 S.Ct. at 2413-2414.

By comparison, Trooper Rogers's entry into the Appellee's barn here was properly limited to what was necessary to address the emergency situation. Unlike in Mincey, the exigency in this case had not been resolved but was still ongoing, and the record indicates that Trooper Rogers entered the barn in a continued attempt to locate Ms. Snape. VR 1/12/09, 9:55:00. As Judge Keller recognized in dissent, "When no one responded to knocks on the front and back doors of the trailer, it was not unreasonable for Trooper Rogers to look further for the woman." Slip Opinion pg. 11.

Furthermore, it was objectively reasonable for Trooper Rogers to believe that Ms. Snape or someone who may know her whereabouts could be found in the barn. While Mr. Broce indicated that Ms. Snape was in the trailer (VR 1/12/09, 9:30:15), he never stated that he saw her enter the trailer. The barn was also in close proximity to the trailer (Id. at 9:42:38), it was open (Id. at 9:32:00), and Trooper Rogers observed two

large dogs walk out after he received no response at the trailer door (Id. at 9:31:48).

These considerations provided Trooper Rogers with a reasonable basis to associate the exigency with the barn. See People v. Mitchell, 347 N.E.2d 607, 609 (N.Y. 1976), abrogated on other grounds by Brigham City, *supra*, 547 U.S. 398 (recognizing that under the emergency exception to the warrant requirement “[t]here must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched”).

Moreover, it must also be emphasized that “the ultimate touchstone” of the Fourth Amendment is *reasonableness*. Brigham City, *supra*, 547 U.S. at 403, 126 S.Ct. at 1947; See also, Commonwealth v. Brown, 250 S.W.3d 631, 635-636 (Ky. 2008).

Trooper Rogers’s actions in this case were most certainly reasonable. In considering his actions, it should be recognized that “[l]ocal police have multiple responsibilities, only one of which is the enforcement of criminal law” Williams v. State, 962 A.2d 210, 216 (Del Supr. 2008) (quoting State v. Acrey, 64 P.3d 594, 599 (Wash. 2003)).

The modern police officer is a “jack-of-all-emergencies,” with “complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses’; by default or design he is also expected ‘to aid individuals who are in danger of physical harm,’ ‘assist those who cannot care for themselves,’ and ‘provide other services on an emergency basis.’”

Id. at 216-217 (quoting 3 Wayne R. LaFave, *Search and Seizure*, § 5.4(c) (4th ed. 2004)).

Here, as discussed, Trooper Rogers received information from a concerned citizen after having stopped to check on a vehicle which was parked halfway in the road. In response to Mr. Broce’s concern Trooper Rogers attempted to verify Ms. Snape’s

In response to Mr. Broce's concern Trooper Rogers attempted to verify Ms. Snape's well-being. He lawfully entered onto the Appellee's property and lawfully knocked on the door of her suspected location. Quintana v. Commonwealth, 276 S.W.3d 753, 758 (Ky. 2008) (recognizing that "certain areas such as driveways, walkways, or the front door and windows of a home frequently do not carry a reasonable expectation of privacy because they are open to plain view and are properly approachable by any member of the public. . . .").

Upon receiving no response at the door and seeing signs of life emerge from the nearby open barn he walked to the barn and simply stepped inside in a continued attempt to locate Ms. Snape. Given these circumstances, "it was not only reasonable, but prudent law enforcement investigation to look for the missing woman in the open barn." Slip Opinion pg. 11 (Keller, J., dissenting). This is especially the case considering the nature of the barn itself. As has been discussed, the barn was open and had no doors and appears to be located at the end of the Appellee's driveway. TR 38, 41. There was no indication that the Appellee had taken any steps to secure its privacy. Thus, any expectation of privacy the Appellee may have had in the barn was certainly diminished, which further supports the reasonableness of Trooper Rogers's decision to check it.⁶

⁶ See United States v. Trickey, 711 F.2d 56, 58-59 (6th Cir. 1983) (finding that defendant had reasonable expectation of privacy in outbuilding because he took steps to protect his privacy by boarding up windows); State v. Showalter, 427 N.W.2d 166, 170 (Iowa 1988) (finding that defendant had reasonable expectation of privacy in barn that was locked and nailed shut); United States v. Pennington, 287 F.3d 739, 745-746 (8th Cir. 2002) (finding that defendant had no reasonable expectation of privacy in underground bunker located outside curtilage where structure had readily visible entranceway and no lock or door impeding access).

Therefore, based on this discussion, Trooper Rogers's entry into the open barn was reasonable under the circumstances, and was properly limited to address the emergency situation. Rather than entering and searching the Appellee's residence, Trooper Rogers chose a far less-intrusive course of action. There was no unlawful search. The Court of Appeals erred in holding to the contrary.

CONCLUSION

For all of the foregoing reasons, this Court should vacate the opinion of the Court of Appeals and affirm the final judgment of the Anderson Circuit Court.

Respectfully Submitted

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APPENDIX

Jimmie Hawkins

- 1) Trial, Verdict and Judgment, Anderson Circuit Court, Case No. 2007-CR-00070-001
Entered February 29, 2009 A1-A2

- 2) Opinion Reversing and Remanding, Court of Appeals, Case No. 2009-CA-000998-MR
Rendered February 18, 2011 A3-A14