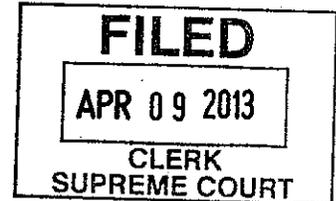


COMMONWEALTH OF KENTUCKY
SUPREME COURT
2011-SC-000159
2012-SC-000187



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

REPLY BRIEF FOR JIMMIE R. HAWKINS

Submitted by:

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this reply brief was served upon the following named individuals by mail, first class postage paid on the 9th day of April 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

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PURPOSE

The purpose of this Reply Brief is to respond to argumentation and analysis contained in the Commonwealth's brief. If Mr. Hawkins chooses not to respond to a particular point or argument, this means that he reasserts the arguments made in his Opening Brief.

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.

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

As this Court has stated, “[e]xigent circumstances do not deal with mere possibilities and the Commonwealth must show something more than a possibility....” King v. Commonwealth, 386 S.W.3d 119, 123 (Ky. 2012). 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).

In this case, Trooper Rogers happened to drive by a random person stopped on the side of the road and stopped and asked him why he was there. VR: 1/12/09; 9:29:49-9:30:58. The driver, Robert Broce, told him that he was there to pick up a female, his girlfriend, 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 officers that he had tried to call the female on her cell phone but she had not answered. Id. at 9:38:56. 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.

From this phantom indication of concern, Trooper Rogers merely **assumed** she could be in physical harm and that 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. Again, assumptions and possibilities are not enough to justify an officer invoking the emergency aid exception to the warrant requirement. The Commonwealth simply did not 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.

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

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. The Commonwealth did not argue that the barn was not entitled to full Fourth Amendment protection before the trial court or the Court of Appeals. Mr. Hawkins maintains this issue has been waived by the Commonwealth. In Jackson v. Commonwealth, 187 S.W.3d 300 (Ky. 2004), an appellant argued on appeal that the trial court erred in denying a motion to suppress his statements because they were obtained in violation of his Fifth Amendment rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). This Court noted that a threshold issue in such cases was whether such statements were made during a custodial interrogation. Jackson, 187 S.W.3d

at 305. Because that threshold issue was not challenged by the Commonwealth, it was not reviewable on appeal. Id. While maintaining this position, Mr. Hawkins will now address the Commonwealth's substantive argument.

The Commonwealth seems to concede that the proximity of the barn to the residence supports the finding that the barn was in the curtilage of the residence. Commonwealth's reply brief pg. 11. However, the Commonwealth argues that because the barn may have been used for business purposes, this possibility should weigh against a finding that the barn was within the curtilage of the residence. Id. This contention is without merit. The Commonwealth points to no authority to support this claim. This is because the United States Supreme Court has "... long recognized that the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes." Williams v. Commonwealth, 213 S.W.3d 671, 675 (Ky. 2006) quoting New York v. Burger, 482 U.S. 691, 699 (1987). Even if Mr. Hawkins used his barn for business purposes at times, it was still entitled to Fourth Amendment protection.

The Commonwealth also argues that Mr. Hawkins having cameras posted on his residence but not on the barn should weigh against a finding that the barn was in the curtilage. Commonwealth's reply brief pg. 12-13. However, it is possible the cameras posted on the residence captured the barn in their viewing area and thus there was no reason to post cameras on the barn. Even if such were not the case though, it would make sense to only take the time, effort, and money to install security cameras on the residence—one's personal safety inside the residence is more important than any object of material value one could have in a barn. In any event, such hypotheticals should be irrelevant because the residence and barn were 100 to 150

yards away from the road in a rural area, indicating one did not want, or expect, passersby to observe the interior and that one would believe passersby would not observe the interior.

Moreover, a person entering Mr. Hawkins' barn without his permission is a trespass onto and into one of Mr. Hawkins' effects.¹ In United States v. Jones, 132 S.Ct. 945, 950 (2012), the United States Supreme Court reaffirmed that property rights play a part in deciding what is protected from warrantless searches, which originally "was tied to common-law trespass." Id. at 949. The Court emphasized: "for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." Id. at 950.

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.

The Commonwealth first introduced evidence of Mr. Hawkins invoking his right to remain silent during its case in chief. VR: 1/12/09; 14:35:07-14:35:23, 14:48:40-14:48:55. The Commonwealth now argues that this evidence was proper as impeachment evidence regarding Mr. Hawkins. Commonwealth reply brief pg. 14. However, Mr. Hawkins had not yet testified at that point. Thus, when the Commonwealth began introducing this, there was nothing yet to impeach and this evidence was improper as evidence of Mr. Hawkins invoking his right to silence and it was irrelevant and unduly prejudicial under KRE 401, 402, and 403. Ordway v.

¹ See KRS 511.070: "A person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a building..."

Commonwealth, ___ S.W.3d ___ (Ky. 2013) (2010-SC-000783-MR slip opinion pg. 7-8)²; see also Green v. Commonwealth, 815 S.W.2d 398, 400 (Ky. 1991).³

The Commonwealth continued to introduce evidence of Mr. Hawkins invoking his right to remain silent during his testimony, during Jackie Green's testimony, and strongly emphasized it during its closing argument. VR: 1/13/09; 14:43:22-14:44:52, 15:56:15-15:56:40, VR: 1/14/09; 11:51:50-11:58:00, 12:19:35. The Commonwealth acknowledges that the United States Supreme Court has held that, even when introduced as impeachment evidence, such is "fundamentally unfair" and held that the prosecution's "use for impeachment purposes of [a defendant's] silence at the time of arrest and after receiving Miranda warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." Doyle v. Ohio, 426 U.S. 610, 618-619 (1976), Commonwealth reply brief pg. 18.

The Commonwealth's continued introduction of evidence of Mr. Hawkins invoking his right to remain silent was evidence that he invoked the right from his initial encounter with police through the time of trial. That is, the Commonwealth introduced evidence that Mr. Hawkins invoked his right to remain silent from the time he encountered police, **before and after he was arrested**, prior to being given Miranda warnings, **after being given Miranda warnings**, and up until the time of trial. Such is improper under any circumstances.

These errors warrant reversal as argued in the Opening Brief. Also, as this Court has stated, "the admission of such evidence would clearly result in the danger of undue prejudice, confusion of the issues, or the misleading of the jury..." Ordway, supra.

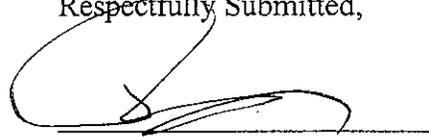
² As of the date of this filing, this case is final but does not yet have a reporter number. It can be found on Westlaw at 2013 WL 646175.

³ "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. The warning is required not to activate the right secured, but to enable citizens to knowingly exercise or waive it. Recognizing that the right to remain silent does not truly exist if one may be penalized for its exercise, the Supreme Court of the United States has held, "The prosecution may not therefore use at trial the fact that [the accused] stood mute or claimed his privilege in the face of an accusation." Miranda, 86 S.Ct. at 1624 n. 37 (1966). Kentucky authority is fully in accord."

CONCLUSION

For the reasons stated herein, and in Mr. Hawkins' Opening Brief, the Court of Appeals' Opinion must be affirmed and the Anderson Circuit Court must be ordered to suppress all evidence obtained in this case.

Respectfully Submitted,



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