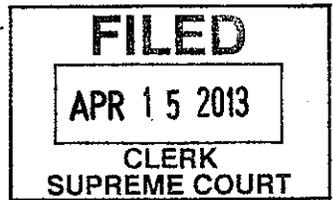


Commonwealth of Kentucky
Supreme Court

Case No. 2012-SC-189-DG
Court of Appeals' Case No. 2010-CA-001617



RANDY BRUMLEY

APPELLANT

v.

Appeal from Clinton Circuit Court
Hon. Eddie C. Lovelace, Judge
Indictment No. 2009-CR-00072

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR COMMONWEALTH

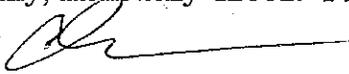
Submitted by:

JACK CONWAY
Attorney General of Kentucky

CHRISTIAN K. R. MILLER
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Dr.
Frankfort, Ky. 40601
(502) 696-5342
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief for the Commonwealth was mailed 1st class U.S. mail, postage prepaid this the 15th day of April, 2013, to: Hon. David Williams, Circuit Court Judge, 112 Courthouse Square, P.O. Box 660, Burkesville, Kentucky 42717; via state-messenger mail to: Hon. Emily Holt Rohrer, Assistant Public Advocate, Department of Public Advocacy, Suite 302, 100 Fair Oaks Lane, Frankfort, Kentucky 40601; and via electronic mail to Hon. Jesse M. Stockton, Jr., Commonwealth's Attorney, P.O. Box 175, Albany, Kentucky 42602. I further certify that the record on appeal was not checked out.


CHRISTIAN K. R. MILLER
Assistant Attorney General

INTRODUCTION

Randy Brumley was convicted of manufacturing methamphetamine and possession of drug paraphernalia, receiving a 10-year imprisonment sentence. After appealing as a matter of right, the Court of Appeals affirmed, and this Court granted discretionary review.

ORAL ARGUMENT STATEMENT

The Commonwealth does not request oral argument. Both parties have thoroughly addressed Brumley's two allegations of error. Each alleged error is based on established law and mostly uncontested facts.

PREFATORY STATEMENT REGARDING CITATIONS

The instant record contains one volume of transcript of record. It is cited herein as: TR PAGE #.

The record also contains nine CDs and one VHS tape. Only three of these are cited herein. The VHS tape, which contains a November 24, 2009 suppression hearing, will be cited herein as: SUPPLEMENTAL VR 11/24/09, TIME. The CD containing the jury trial of July 16, 2010, and the CD containing a March 31, 2010 suppression hearing are cited herein as: VR DATE, TIME.

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COUNTERSTATEMENT OF THE CASE

Randy Brumley ran a meth lab at his residence. One night, officers surrounded Brumley's residence to serve a felony arrest warrant on Brumley. (VR 7/16/10, 10:24:15). After officers knocked on the front door, Brumley voluntarily exited the residence and was taken into custody. (*Id.* at 10:25:15). At least one of the officers had been apprised that Brumley had a long gun and a handgun. (Supplemental VR 11/24/09, 11:51:30). Brumley had no weapons on his person when he stepped outside the residence. He did, however, have aluminum foil and a pipe on his person; the pipe later tested positive for methamphetamine residue. (VR 7/16/10, 10:25:45).

Once Brumley was outside, some of the officers heard a rustling sound coming from inside Brumley's residence. (Supplemental VR 11/24/09, 11:44:00, 11:51:45, 12:14:00).¹ Fearing for their safety – because someone may be inside the residence with the long gun and handgun – officers entered the residence, conducted a brief protective sweep, and found a dog was the source of the noise. (*See id.* at 11:57:15, 11:58:30, 12:14:15). They also discovered, in plain view, items consistent with a meth lab. (*Id.* at 11:44:45).²

¹ Brumley states Trooper David Long thought the sound “was a dog[.]” Aplt's Brf. at 8. Trp. Long only stated that he heard a sound that others eventually figured out was a dog. “I could hear something in there, but I don't know. I think it was a dog or something later on that they figured out what it was.” (Supplemental VR 11/24/09, 12:14:00).

² None of the officers who discovered the meth lab in plain view testified at the suppression hearings or the trial. Sheriff Riddle relayed that he was

See also TR 25-34 (photographs of items found in Brumley's residence). One or two of the officers who had not been in the trailer entered it a few minutes later and made an inventory of the meth lab items, took pictures of the items, and took the non-hazardous items into their possession. (VR 7/16/10, 10:27:15-10:51:30).

Because an officer trained in hazardous material disposal was busy at another location, the residence was left unsecured for many hours. (VR 7/16/10, 11:00:00). When the officer later arrived, he saw a pickup truck driving away from the residence and discovered someone had attempted to destroy parts of the meth lab. (*Id.* at 11:00:45). Though many items were partially burned, the officer was able to identify them as items necessary to manufacture methamphetamine. (*Id.* at 11:01:00-11:04:15, 11:10:45-11:12:00).

At trial, Brumley claimed he did not live at his residence. (VR 7/16/10, 12:31:45). Brumley claimed he only stayed there once every week or so because people had been breaking into the trailer. (*Id.* at 12:32:00). He claimed he had not been manufacturing meth, and he did not know from where many of the meth manufacturing items had come. (*Id.* at 12:33:00).

given this information after the officers exited the residence, and, acting upon that information, Sheriff Riddle went into the residence and took pictures and inventoried the items. (Supplemental VR 11/24/09, 11:45:30).

Following the presentation of evidence, the jury was instructed on one count of manufacturing methamphetamine and the lesser-included offense of possession of a methamphetamine precursor, and one count of possession of drug paraphernalia. (TR 113-120).³ The jury found Brumley guilty of manufacturing methamphetamine and possession of drug paraphernalia. (TR 121-122). They recommended the minimum sentence of 10 years imprisonment for the manufacturing meth count, and the maximum sentence of 12 months jail service and a \$500.00 fine for the possession of a drug paraphernalia count. (TR 123-124).⁴ Brumley later filed a motion for a new trial, which was denied. (TR 143, 138).

A judgment and sentence was imposed on August 16, 2010. (TR 139). Brumley was sentenced to concurrent terms of 10 years imprisonment and 12 months incarceration in the county jail, and no misdemeanor fine. (*Ibid*). Brumley filed a notice of appeal on August 26, 2010. (TR 150).

The certified record was filed with the clerk of the Court of Appeals on December 13, 2010, and checked out by the Department of Public Advocacy on December 15, 2010. Following a motion to supplement the record and

³ Brumley had been indicted on one count of manufacturing methamphetamine and one count of possession of drug paraphernalia. (TR 1-2).

⁴Technically, the jury fixed his sentence for the misdemeanor count “at confinement in the county jail for 1 years [sic] and a fine of \$500.00[.]” (TR 124).

motions for extension of time, Brumley's Brief was filed on June 8, 2011. Following an extension of time, the Commonwealth's brief was filed on September 13, 2011. Brumley timely filed a Reply Brief on September 28, 2011. On November 10, 2011, the Court of Appeals ordered no oral argument.

On February 24, 2012, the Court of Appeals entered an opinion affirming the judgment and sentence. Following that opinion, Brumley timely filed a motion for discretionary review. This Court granted discretionary review on October 17, 2012. Brumley was granted an extension of time to file his brief, and Brumley's brief was timely filed with this Court on February 13, 2013.

Any additional facts will be discussed as necessary below.

ARGUMENT

Brumley presents two allegations of error. They are discussed *in seriatim*.

I. OFFICERS REASONABLY FEARED FOR THEIR SAFETY WHEN THEY ENTERED BRUMLEY'S RESIDENCE.

Brumley first alleges the trial court erred by denying his suppression motion regarding the multiple meth labs found inside and outside his residence.

A. Evidentiary Hearing and Trial Court's Findings and Conclusions.

Prior to trial, Brumley filed a motion to suppress the evidence found inside his trailer. (TR 49-50). A hearing on the motion was held on November 24, 2009. (Supplemental VR 11/24/09). The Commonwealth presented the testimony of Sheriff Ricky Riddle, Trooper Tracy Haynes, Deputy Joshua Asbury, and Trooper David Long – four of the half-dozen or so officers who assisted in serving the felony arrest warrant on Brumley. Brumley presented no evidence. Following the evidence and arguments by both parties, the trial court rendered oral findings of fact and conclusions of law. (Supplemental VR 11/24/09, 12:29:45). Brumley's Brief at 9-10 recites a summary of those findings and conclusions, which the Commonwealth has reviewed and agrees is accurate, save for minor edits:

- (1) On May 29, 2009, Sheriff Riddle accompanied by other officers went to a trailer in Clinton County where they believed Mr. Brumley was located;
- (2) Sheriff Riddle had received a tip Mr. Brumley was at the trailer;
- (3) Sheriff Riddle knocked on the door, and Mr. Brumley came out of the trailer, and at this point he was arrested pursuant to the felony warrant;
- (4) A rustling or shuffling sound was heard inside the trailer;
- (5) There was testimony there might be [a] long gun and a handgun in the trailer;

(6) Based on the rustling or shuffling sound, officers entered the home and, as a result of the entry, ingredients commonly used to manufacture meth, along with meth, was found.

...

(1) A search or seizure on [a] suspect's premises without a warrant is *per se* unreasonable. The unreasonableness is viewed with regard to exigent circumstances. *Payton v. New York*, 445 U.S. 573 (1980), held that a warrantless felony arrest in a home is prohibited absent probable cause and exigent circumstances. *Welsh v. Wisconsin*, 466 U.S. 740 (1984), held that the burden is on the government to demonstrate exigent circumstances.

(2) As to what [constitutes] exigent circumstances, there must be a compelling need for official action and no time to secure a search warrant. *Mason v. Godinez*, 47 F.3d 852, 856 (7th Cir. 1995). . . . *U[nited] S[tates] v. Wihbey*, 75 F.3d 761, 766 (1st Cir. 1996), hold[s] that the Constitution requires that police normally obtain a warrant before entering a home to make arrest. In determining exigency, was there such compelling necessity for immediate action so as to not brook the delay of obtaining a warrant? Exigency determinations are fact-intensive. In *U[nited] S[tates] v. Bartelho*, 71 F.3d 436, 442 (1st Cir. 1995), it was held that in determining if there is sufficient "compelling necessity for immediate action," factors to consider include the gravity of the underlying offense, whether a delay would pose a threat to police or the public safety, and whether there is a great likelihood that evidence will be destroyed if the search is delayed until a warrant can be obtained.

(3) Applying the law to the case at bar, there was a rustling in the mobile home. While it turned out just to be a dog, that sound coupled with the information given to officers that Mr. Brumley had a long gun and handgun created exigent circumstances. The officers could have believed another person was in the trailer, armed with weapons and a danger to them.

There was sufficient reasonable belief and common sense to enter the home without a warrant. Exigent circumstances coupled with sufficient probable cause justified the warrantless entry so the motion to suppress is overruled.

(Aplt's Brf. at 9-10) (alterations added).

B. Standard of Review.

Review of a trial court's denial of a suppression motion on the basis of a warrantless search involves two steps: first, the trial court's findings of fact are conclusive if they are supported by substantial evidence; and second, the trial court's conclusions of law are reviewed *de novo*. See *Commonwealth v. Pride*, 302 S.W.3d 43, 47-48 (Ky. 2010); *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001).

C. Findings of Fact Are Supported By Substantial Evidence.

Brumley only contests one factual finding: whether the officers had information that guns might be in the residence. Aplt's Brf. at 12-13. Other than cross-examining witnesses, Brumley presented no evidence at the suppression hearing to rebut the uncontroverted evidence that some of the officers had knowledge that Brumley possessed a long gun and a handgun.

Nonetheless, Brumley disagrees with the trial court's factual finding by arguing it is not supported by substantial evidence. The test for substantial evidence is "whether, when taken alone or in light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men." *Com., Cabinet for Human Resources v. Bridewell*, 62 S.W.3d

370, 373 (Ky. 2001). Here, the uncontroverted gun testimony was sufficient to induce conviction in the mind of a reasonable judge.

Trooper Tracy Haynes testified that she received information that Brumley had a long gun and a handgun. (Supplemental VR 11/24/09, 11:51:30). She received this information either from a Wayne County deputy or from the Lake Cumberland Task Force. (*Id.* at 11:59:15). Her testimony was subject to cross-examination and did not change. (*Id.* at 11:58:30).

Haynes was one of four officers who testified at the suppression hearing. Two of the four officers who testified were not asked about weapons either by the Commonwealth or Brumley. Thus, their testimonies, which neither add to nor subtract from Haynes's uncontroverted testimony, do not weigh either for or against the substantial evidence inquiry.

The fourth officer who testified, Deputy Joshua Asbury, likewise did not contradict Trp. Haynes's testimony. Though Brumley spins Asbury's testimony as "affirmatively stat[ing] that he was not given any information about guns[,]" Aplt's Brf. at 13, Asbury in fact was not asked about guns:

Def. Atty.: You weren't privy to any other information about Mr. Brumley or danger, any danger prior to his being placed under arrest?

Asbury: Being a danger to us?

Def. Atty.: Yes.

Asbury: No, it's just, it's just a, when, officer safety is the main thing when you're going into a situation like that, so, you hear a noise in there you don't know exactly what is going to go on.

(Supplemental VR 11/24/09, 12:09:30-12:10:00). Neither the question nor the answer constitutes an affirmative statement against receiving information about guns.

However, at worst the testimony shows that Asbury -- who during the incident was positioned along the fence line away from the residence -- was not given the information about the guns. Not being given the information that the other officers possessed does not change the fact that other officers -- the ones who made entry into Brumley's residence -- had the information. Brumley's focus on Asbury is a red herring.

The trial court's factual finding is further buttressed by the "collective knowledge" or "fellow officer" doctrine. *United States v. Lyons*, 687 F.3d 754, 766 (6th Cir .2012). When one officer among a multitude of officers is unaware of specific facts, collective knowledge is imputed to the officer or officers without knowledge. Thus, if one officer has knowledge of facts supporting probable cause, that knowledge is imputed to the other officers who act even though they are unaware of those facts. *See United States v. Hensley*, 469 U.S. 221, 230-231 (1985) ("... had the sheriff who issued the radio bulletin possessed probable cause for arrest, then the Laramie police

could have properly arrested the defendant even though they were unaware of the specific facts that established probable cause.”). In other words, even if none of the other officers knew about the guns, Haynes’ knowledge is imputed to the other officers. The simple fact that it was known by some officers -- or even one officer -- that Brumley had guns was a fact properly utilized in the trial court’s suppression analysis.

Haynes, the only officer specifically questioned about guns relayed that she had information that Brumley had a long gun and a handgun at the residence. Two of the other officers who testified were not asked about whether they had information about guns. And what Brumley spins as “affirmatively stat[ing] that he was not given information about guns[,]” is, in actuality, not a direct question about guns. Even if it were construed as information about guns, however, that testimony does not negate Haynes’s testimony that she was given information about Brumley’s gun possession and that that information came from one of the other officers at the scene.

Brumley’s logic is fallacious -- testimony that an officer did not have information about guns does not equate to affirmative testimony that Brumley did not have guns. In fact no officer testified there was any information that Brumley did not possess guns. Haynes’ information is thus imputed to all other officers.

Given the testimony at the suppression hearing, “when taken alone *or* in light of all the evidence[,]” *Bridewell, supra*, there was evidence of

sufficient probative value to convict a reasonable person that the officers believed “there might be [a] long gun and a handgun in the trailer[.]” Aplt’s Brf. at 9 (trial court’s factual finding). Thus, the trial court’s finding is supported by substantial evidence.⁵ The findings of fact are controlling on appellate review.

D. *De Novo* Review of the Conclusions of Law.

Having determined the factual findings are supported by substantial evidence, appellate review next examines the conclusions of law *de novo*.

1. The Officers Conducted a Lawful Protective Sweep.⁶

⁵ Brumley also insinuates the facts are not supported by substantial evidence because one of the Commonwealth’s witnesses, a deputy from Wayne County, did not testify. Aplt’s Brf. at 13. Though subpoenaed by the Commonwealth, the trial court found the witness was not available to testify. (Supplemental VR 11/24/09, 12:46:00). The witness’s availability to testify has no weight on the substantial evidence inquiry.

⁶ Though the trial court found exigent circumstances and probable cause, this Court “may affirm a lower court for any reason supported by the record.” *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 fn. 19 (Ky. 2009). The *Buie* claim was raised in the Court of Appeals but not ruled on, though the Court of Appeals did not address the issue. See Appellee’s Brief (Court of Appeals) at 8-9. The Commonwealth also argued to the trial court the substance of a *Buie* claim – the officers were executing a felony arrest warrant, they had information about weapons on the premises, and they were justified in entering to secure the scene. (Supplemental VR 11/24/09, 12:27:00).

However, this Court did not adopt *Buie* until after the trial court’s order and after parties filed their briefs at the Court of Appeals. See *Guzman v. Commonwealth*, 375 S.W.3d 805, 807 (Ky. 2012) (“Today, for the first time, this Court follows and adopts the holding in *Buie*.”). Thus, because *Buie* is now the law in the Commonwealth, it is proper to address the protective sweep exception. Cf. *McCloud*, 286 S.W.3d at 786 fn. 19 (“The fact that the trial court’s decision to deny the motion to suppress was based upon different

Though the trial court found the search lawful under a higher standard -- probable cause and exigent circumstances -- because the officers were executing a felony arrest warrant, the search was lawful as a protective sweep under the lesser reasonable-articulable-suspicion standard announced in *Maryland v. Buie*, 494 U.S. 325 (1990). See, e.g., *United States v. Lawlor*, 406 F.3d 37, 41 (1st Cir. 2005) (“Because we believe that the search was a lawful protective sweep, we need not and do not consider the applicability of the emergency doctrine.”).

Buie permits two types of warrantless protective sweeps of a residence following an arrest: (1) with no probable cause or reasonable articulable suspicion, officers may search inside closets and “immediately adjoining” areas to the place of arrest “from which an attack could be immediately launched[.]” *Buie*, 494 U.S. at 334; and (2) with reasonable articulable suspicion, areas “beyond” the immediately adjoining area may be searched for the purpose of “protecting the arresting officers[.]” *id.* at 334-335. These two permissible sweeps are discussed below following a factual recitation of *Buie*.

In *Buie*, officers were executing an arrest warrant on Jerome Buie. 494 U.S. at 328. They entered his home looking for Buie but did not find him on the first or second floors. *Ibid.* They noticed a door to the basement and

reasoning . . . does not alter our result . . .”).

shouted down for Buie to surrender himself. *Ibid.* Buie emerged from the basement. *Ibid.* “He was arrested, searched, and handcuffed” by an officer. *Ibid.* Afterward, a detective entered the basement to see if someone else was down there. *Ibid.* While in the basement he discovered incriminating evidence in plain view and seized it. *Ibid.* Buie appealed, claiming the search and seizure violated his Fourth Amendment rights.

The United States Supreme Court rejected Buie’s claim. It found that “unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary’s ‘turf.’” *Id.* at 333. Because this increased risk of “[a]n ambush in a confined setting of unknown configuration[,]” officers who have just executed a felony arrest warrant at a person’s home, may “as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” *Ibid.* This sweep may be performed as a “reasonable step[] to ensure [officer] safety *after*, and while making, the arrest.” *Id.* at 334 (emphasis added).

This protective sweep is “aimed at protecting the arresting officers” and extends to a “cursory inspection of those spaces where a person may be found.” *Id.* at 335. The sweep may last “no longer than is necessary to dispel

the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.” *Id.* at 335-336.

Buie also authorizes a more extended search when “articulable facts” exist that “taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Id.* at 333.

In other words, after placing a person under arrest, officers who “have a reasonable fear, based upon specific and articulable facts, that the area to be swept may harbor an individual or individuals who present a threat to officer safety” may conduct a protective sweep. *United States v. Atchley*, 474 F.3d 840, 849 (6th Cir. 2007) (citing *Maryland v. Buie*, 494 U.S. 325, 334 (1990)). “A *Buie* sweep is unlike warrantless entry into a house based on exigent circumstances[, as the latter] must be supported by *probable cause* to believe that a dangerous person will be found inside.” *People v. Celis*, 33 Cal. 4th 667, 678 (Cal. 2004) (emphasis in original; alteration added). A *Buie* sweep, on the other hand, is either supported by nothing other than the felony arrest, or by a reasonable articulable suspicion, depending on the location of the arrest and search.

a. Location of the arrest.

Under *Buie*, if a defendant is arrested inside his house pursuant to an arrest warrant, officers need no probable cause or reasonable articulable suspicion to search the places “immediately adjoining” the area of arrest. In Brumley’s case, the trial court found that after the officer knocked on the front door, Brumley exited the trailer and was arrested. Thus, his arrest was immediately outside his residence. The question arises, then, of whether *Buie* permits a suspicion-less search of the residence as immediately-adjointing the place of arrest?

Two federal circuit courts have made such findings in cases where the defendant was arrested partially inside a building. In *United States v. Lemus*, 582 F.3d 958, 963-964 (9th Cir. 2009), the living room “immediately adjoined” the place of arrest when the defendant was arrested partially outside the threshold of the apartment’s sliding glass door. In *United States v. Charles*, 469 F.3d 402, 405-406 (5th Cir. 2006), a storage unit “immediately adjoined” the place of arrest when the defendant was arrested outside the storage unit. *See id.* at 404 (“Charles was ordered out of the unit onto the ground, where he was arrested and cuffed without incident.”).

Here, it is uncontested that Brumley was outside his residence when arrested. There is no evidence Brumley was inside the threshold of the door as in *Lemus*, nor is there any evidence that he was inside of a storage unit

complex but standing outside an individual storage unit as in *Charles*. Thus, it is an open question whether his residence is within the area immediately adjacent to the area of arrest in the *Buie* suspicion-less search context.

That open question need not be addressed, though, as Brumley's search falls under the second type of *Buie* search. *Buie*'s reasonable-articulable-suspicion prong applies when a defendant is arrested immediately outside his or her residence. All federal circuit courts to consider the issue have applied *Buie* to arrests made just outside the home. See *United States v. Lawlor*, 406 F.3d 37 (1st Cir. 2005) (arrested two men in the driveway outside their residence); *United States v. Oguns*, 921 F.2d 442 (2d Cir. 1990) (arrested outside apartment); *Sharrar v. Felsing*, 128 F.3d 810, 824 (3d Cir. 1997) (“an arrest taking place just outside a home may pose an equally serious threat to the arresting officers”) (quoting *United States v. Colbert*, 76 F.3d 773, 776 (6th Cir. 1996), abrogated on other grounds by *Curley v. Klem*, 499 F.3d 199 (3d Cir. 2007)); *United States v. Jones*, 667 F.3d 477, 485 fn. 10 (4th Cir. 2012) (arrested outside front door); *United States v. Watson*, 273 F.3d 599 (5th Cir. 2001) (arrested on porch); *United States v. Colbert*, 76 F.3d 773, 776 (6th Cir. 1996) (detained outside apartment); *United States v. Burrows*, 48 F.3d 1011, 1016 (7th Cir. 1995) (“We have also recognized that officers may be at as much risk while in the area immediately outside the arrestee's dwelling as they are within it.”); *United States v. Davis*, 471 F.3d

938 (8th Cir. 2006) (arrested outside); *United States v. Paopao*, 469 F.3d 760, 765-766 (9th Cir. 2006) (“As other circuits have noted, the location of the arrest, inside or outside the premises, should only bear on the question of whether the officers had a justifiable concern for their safety.”); *United States v. Cavely*, 318 F.3d 987, 994-995 (10th Cir. 2003) (arrested between back door and detached garage); *United States v. Burgos*, 720 F.2d 1520 (11th Cir. 1983) (pre-*Buie*); *United States v. Henry*, 48 F.3d 1281 (D.C. Cir. 1995) (arrested in tenement building hallway just outside own apartment).⁷

Likewise, state courts have adopted *Buie*’s reasonable-articulable-suspicion standard in outside-the-home arrests. *See, e.g., People v. Celis*, 93 P.3d 1027, 1035 (Cal. 2004); *State v. Spencer*, 848 A.2d 1183, 1192 (Conn. 2004).

These holdings are consistent with the fact that officers executing felony arrest warrants may enter the defendant’s residence “to search anywhere in the house that [the defendant] might have been found[.]” *Buie*, 494 U.S. at 330. *See also Payton v. New York*, 445 U.S. 573, 603 (1980) (“[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.”).

⁷ “Although *Buie* concerned an arrest made in the home, the principles enunciated by the Supreme Court are fully applicable where, as here, the arrest takes place just outside the residence.” *Henry*, 48 F.3d at 1284.

Thus, because the federal and state courts apply *Buie*'s reasonable-articulable-suspicion prong to outside arrests, and the extension is consistent with arrest-warrant jurisprudence, *Buie* applies to the instant case. Brumley was arrested immediately outside his residence, and if the officers had a reasonable articulable suspicion of being shot, they were fully entitled under *Buie* to conduct a protective sweep to search for people who may harm the officers.

b. Officers Had a Reasonable Articulable Suspicion of Danger.

The trial court found the officers had probable cause to enter the premises. If there existed probable cause, then there necessarily existed a reasonable articulable suspicion, as “[t]he reasonable and articulable suspicion standard is a significantly lower standard than the probable-cause standard.” *Boyle v. Commonwealth*, 245 S.W.3d 219, 220 (Ky. App. 2007) (citing *Baker v. Commonwealth*, 5 S.W.3d 142, 146 (Ky. 1999)).

Reviewing de novo, the facts here create reasonable articulable suspicion. Officers were executing a felony arrest warrant at night. They had information that Brumley had a long gun and a handgun. Yet, Brumley exited his residence carrying no gun. As the officers walked Brumley toward the police cruiser, some of the officers heard a rustling noise coming from inside the residence. Fearing that someone inside might be attempting to use the guns to shoot the officers, some of the officers entered the residence and conducted a protective sweep. Given these facts—a felony arrest warrant

executed at night at a person's residence where guns are believed to be kept and there are sounds of movement coming from inside the house after the subject of the warrant has been arrested – reasonable articulable suspicion existed. It is reasonable for an officer in that circumstance to believe his or her life might be in jeopardy – that someone might be inside the residence who would use the guns to shoot the officers.

Brumley argues that the officers should have just turned their backs and left once they arrested Brumley. This argument ignores the very real threat of danger to police officers. “Although . . . the police officers could have left the premises immediately after the arrest, this fact does not make the search of the living room any less necessary – there was no guarantee that a potential attacker would not ambush the officers after they had turned their backs to the door.” *Lemus*, 582 F.3d at 964. “Courts should be cautious ‘in limiting the ability of police officers to protect themselves as they carry out missions which routinely incorporate danger[.]’” *United States v. Hatcher*, 680 F.2d 438, 444 (6th Cir. 1982) (quoting *United States v. Coates*, 495 F.2d 160, 165 (D.C. Cir. 1974).

Brumley's argument also ignores that *Buie* permits a protective sweep *after* the arrest. 494 U.S. at 334. Permitting post-arrest sweeps, the *Buie* Court was acknowledging that the danger comes from people other than the arrestee. In the instant case, officers heard noise coming from inside the trailer where they knew guns were kept. Under the totality of the

circumstances, a reasonable articulable suspicion existed that someone might be in the residence who would use the weapons against the officers. The officers lawfully conducted a protective sweep and viewed a meth lab in plain view. The latter evidence was admissible at trial. *Buie, supra*. Thus, the trial court thus properly denied the motion to suppress.

2. Exigent Circumstances and Probable Cause Existed.

Alternatively, Brumley's conviction should be affirmed because the trial court correctly found exigent circumstances and probable cause. This inquiry is separate and distinct from the *Buie* reasonable-articulable-suspicion inquiry. "Exigent circumstances and protective sweeps constitute separate and distinct exceptions to the general rule [against warrantless searches and seizures.]" *Commonwealth v. Robertson*, 659 S.E.2d 321, 324 (Va. 2008).

"It is well established that 'exigent circumstances,' . . . permit police officers to conduct an otherwise permissible search without first obtaining a warrant." *Kentucky v. King*, 131 S.Ct. 1849 (2011). Exigent circumstances permit "a warrantless intrusion [into a person's home if there is a] . . . risk of danger to the police or to other persons inside or outside the dwelling." *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (quoting *State v. Olson*, 436 N.W.2d 92, 97 (Minn. 1989) as "the proper legal standard."). Additionally, "there must be at least probable cause to believe that [the risk of danger to

the police] was present[.]” *Ibid.* “[I]n assessing the risk of danger, the gravity of the crime and likelihood that the suspect is armed should be considered.” *Ibid.* See also *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002); *Payton v. New York*, 445 U.S. 573 (1980).

The probable cause and exigent circumstances inquiries are not wholly separate and distinct, however, considering the inquiries examine the totality of the circumstances. “[F]acts known to officers are not to be parsed into either a category of ‘probable cause’ or ‘exigent circumstances’; ‘a reviewing court analyze[s] each piece of the evidence as part of the totality of information, as it relates to both the probable cause and the exigent circumstances determinations.” *Burton v. State*, 339 S.W.3d 349, 357 (Tex. App. 2011) (quoting *Parker v. State*, 206 S.W.3d 593, 597 (Tex. Crim. App. 2006)). In other words, the facts and inferences used to establish probable cause can be the same facts and inferences used to establish exigent circumstances.

Under these standards, the Commonwealth addresses Brumley’s arguments.

a. Probable Cause of Officer Danger.

First, Brumely’s probable cause analysis is faulty because his focus is wrong. Brumley questions whether the officers had probable cause to believe “contraband or evidence of a crime” would be found in Brumley’s residence. Aplt’s Brf. at 14. But in the context of the officer-and/or-others danger exigent

circumstance, the danger to the officer's life is the "contraband or evidence of a crime" to be found in Brumley's residence. *Cf. Olson, supra*. This is because it is illegal – a crime – to shoot or harm an officer or another person without provocation. The exigency and the suspected crime are wrapped up together.

Here, probable cause existed to believe that the officers would be shot by someone inside the residence. "Probable cause is a standard with which prosecutors, defense counsel and judges in the Commonwealth are very familiar although it often eludes definition." *Rodgers v. Commonwealth*, 285 S.W.3d 740, 754 (Ky. 2009). This Court has adopted the United States Supreme Court's definition, to wit: "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Rodgers*, 285 S.W.3d at 754 (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)) (alteration in original). Probable cause looks at "whether there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Moore v. Commonwealth*, 159 S.W.3d 325, 329 (Ky. 2005).

However, probable cause "does not require certainty that a crime has been committed or that evidence will be present in the place to be searched." *Ibid.* "[I]nnocent behavior frequently will provide the basis for a showing of probable cause" *Illinois v. Gates*, 462 U.S. 213, 245 (1983).

Applying the above standards to the instant cause, officers had probable cause to believe a risk of danger to themselves was present. Officers were serving a felony warrant on Brumley. While officers did not have information or a reason to believe anything illegal was occurring in the house when they knocked on the door, (Supplemental VR 11/24/09, 11:48:45), they did have information that Brumley was armed with multiple guns.

When Brumley came outside his residence no guns were found on his person, thus the danger of being shot by the guns still existed because they had not yet been accounted for. Had Brumley walked out with his long gun and handgun when he surrendered to the police, the inquiry would be different. But Brumley left the guns -- and their potentially lethal danger -- inside the residence.

After getting Brumley out of the residence, officers then heard rustling coming from inside the residence. Fearing for their safety -- because someone else might be in the house with the guns and use them against the officers -- as argued above, officers conducted a protective sweep of the residence. See *Maryland v. Buie*, 494 U.S. 325 (1990) (permitting officers serving a felony arrest warrant to conduct a protective sweep of the arrestee's immediate vicinity), adopted by *Guzman v. Commonwealth*, 375 S.W.3d 805 (Ky. 2012). Above and beyond the protective sweep, though, the noise coming from inside the residence combined with the knowledge that guns may be inside the

residence created “probable cause to believe” the officers were in danger. *See Olson*, 495 U.S. at 100.

“Probable cause does not require certainty that a crime has been committed or that evidence will be present in the place to be searched.” *Moore v. Commonwealth*, 159 S.W.3d 325, 329 (Ky. 2005). If it did require certainty, the danger-to-police-or-others exigent circumstances exception would only apply when a person begins firing at police officers or other people. Adopting Brumley’s narrow reading of probable cause in this exigent circumstance not only contravenes the prevailing state and federal law, it subsumes the entire exigent circumstance. It requires police officers or ordinary citizens to become actual – not probable – human targets before probable cause is found.

Here, the evidence was sufficient to prove probable cause. Officers believed guns were in the residence and heard rustling noises coming from inside the trailer after Brumley exited. Fearing for their safety the officers entered and conducted a brief protective sweep. This action was both reasonable and supported by probable cause. The trial court properly found probable cause.

b. Exigent Circumstances Existed.

Having found probable cause, the inquiry now turns to whether the circumstances constituted an exigency that fits into an exception to the warrant requirement.⁸

i. Danger to Officer's Lives is an Exigent Circumstance.

The exigency here – danger to the officers' lives – fits within one of the exceptions to the warrant requirement. *Cf. Olson, supra*. Brumley claims this exception should apply only “when police officers face circumstances requiring them to act not only for their own protection, but also for the protection of the lives and property of others.” Aplt's Brf. at 16.

This statement is incredulous and debasing. Are officer's lives worth nothing? Even the cases cited by Brumley do not support his proposition.

In fact, Brumley's cited case of *Taylor v. Commonwealth*, 577 S.W.2d 46 (Ky. App. 1979) wholly rebuts this assumption, finding exigent circumstances may exist where only the officer is endangered: “[A] warrantless search is permissible where it is necessary to prevent harm to arresting officers, where there is the possibility that suspects will escape, or where evidence may be destroyed.” *Id.* at 48. *See also Bishop v.*

⁸ Probable cause can exist without an exigent circumstance, and vice versa. For example, in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), officers had probable cause to conduct a warrantless search of Coolidge's automobile, but no exigent circumstances existed warranting the search. *Id.* at 464 (“Here there was probable cause, but no exigent circumstances justified the police in proceeding without a warrant.”).

Commonwealth, 237 S.W.3d 567, 569 (Ky. App. 2007) (“Another exception to the warrant requirement ‘arises when, considering the totality of the circumstances, an officer reasonably finds that sufficient exigent circumstances exist, such as a risk of danger to police or others’”) (emphasis added) (quoting *United States v. Atchley*, 474 F.3d 840, 850 (6th Cir. 2007)); *Pate v. Commonwealth*, 243 S.W.3d 327, 331 (Ky. 2007) (same); *United States v. Adams*, 583 F.3d 457, 466 (6th Cir. 2009) (noting “risk of danger to the police or others” is an exigent circumstance).

Thus, danger to the life of an officer constitutes an exigent circumstance.

ii. The Totality of the Facts Demonstrate the Officer Safety Exigency Existed in Brumley’s Case.

Having determined officer safety is an exigent circumstance, the final inquiry is whether that exigency existed in the instant case.

Brumley argues the officer-and/or-others safety exception is “so broad.” Aplt’s Brf. at 16. His argument is partially meritorious. The safety exception is meant to be broad in application as it provides for, “‘The need to protect or preserve life or avoid serious injury [which] is justification for what would be otherwise illegal absent an exigency or emergency.’” *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) (quoting *Wayne v. United States*, 115 U.S. App. D.C. 234, 241, 318 F.2d 205, 212 (U.S.D.C. 1963) (alteration added)).

The exception is narrow, however, in the scope of the search. “[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)). In the instant case, the officers acted reasonably and narrowly construed their search.

Here, the officers acted reasonably to “protect or preserve life or avoid serious injury[.]” *Mincey, supra*. The scope of their search was also narrow. Some, not all, of the officers briefly conducted a protective sweep of the apartment looking in common areas for the source of the noise. They found a dog and items consistent with a meth lab in plain view. There is no evidence the officers searched in drawers or other small spaces where a person is not likely to be found. There is no evidence officers rummaged through Brumley’s personal effects. Had Brumley hidden the meth lab items, officers would not have found them. They would have conducted the brief sweep, found the dog, and exited the residence. Thus, the officers properly narrowed the scope of the search. Because the scope of their search was narrowly conscripted to the probable cause and exigent circumstances the officers faced, the search was proper.

In the Eighth Circuit exigent circumstances exist when there is a “legitimate concern for the safety’ of law enforcement officers” or “a reasonable fear of harm[.]” *United States v. Hill*, 430 F.3d 939, 941 (8th Cir. 2005) (quoting *United States v. Vance*, 53 F.3d 220, 222 (8th Cir. 1995),

United States v. Williams, 633 F.2d 742, 744 (8th Cir. 1980)). The Tenth Circuit examines whether the officers had a “reasonable belief” that there was an “immediate need ‘guided by the realities of the situation presented by the record’ from the viewpoint of ‘prudent, cautious, and trained officers.’”

United States v. Najar, 451 F.3d 710, 718-719 (10th Cir. 2006) (quoting *United States v. Anderson*, 154 F.3d 1225, 1233 (10th Cir. 1998)). Their ultimate test is two-fold: “whether (1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable[.]” *United States v. Najar*, 451 F.3d 710, 718 (10th Cir. 2006).

Under both of these tests, the officers here were responding to an exigent circumstance. They were acting under a reasonable fear of harm, as they were aware guns were on the property and they heard noise coming from the inside of the trailer. Their belief was objectively reasonable – they were executing a felony arrest warrant at night at a trailer where they had information that two guns were likely kept. After removing the only person they knew was in the residence, they heard noises coming from inside the trailer. Any objectively reasonable person would believe at this point he or she may be in danger from whoever remained in the house where the guns were located.

Furthermore, the manner and scope of the search was reasonable. Officers entered and conducted a brief protective sweep, searching only for

people. They discovered a dog and, in plain view, items consistent with a meth lab.

The officers here acted reasonably and in conformity with the exigent circumstances exception. When facing a reasonably-inferred, immediate threat to their lives, police officers need not adopt a wait-and-see approach to being shot.

Under the exigent circumstances exception to a warrant, the officers were justified in searching the residence. The trial court properly denied the motion to suppress.

E. Removal of Dog Extinguished the Exigency?

Brumley also summarily argues the exigency was extinguished when the dog was removed and “[a]ny warrantless entry into the home after that point was unreasonable and could not fall under the exigent circumstance exception to the warrant requirement.” Aplt’s Brf. at 17-18. This argument fails because it was not presented below and because the officer saw the meth lab in plain view while lawfully conducting the protective sweep. *See, e.g., Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006).

F. Dismissal Is Not Proper.

Finally, if the Court finds error, Brumley’s request for reversal “with instructions to the trial court to dismiss the case” must be denied for two reasons. Aplt’s Brf. at 18. See also Aplt’s Brf. at 26. First, Brumley is essentially requesting this court direct a verdict of acquittal, which is not

permitted at this stage. *Commonwealth v. McManus*, 107 S.W.3d 175, 178 (Ky. 2003). “[I]t is not within the Court of Appeals’ authority to essentially direct a verdict in favor of the appellee[]. The Commonwealth is free to continue its prosecution of the appellee[]. However, any such prosecution will be without the benefit of evidence gathered as a result of the unlawful warrantless entry.” *Ibid.*

Second, in addition to manufacturing meth, Brumley was also found guilty of possession of drug paraphernalia due to the aluminum foil and meth pipe that were found on his person in a search incident to his arrest. This arrest was pursuant to a valid felony arrest warrant, and no suppression motion could be sustained regarding this evidence. Thus, that conviction cannot be reversed.

II. A PROPER CHAIN OF CUSTODY WAS LAID.

Finally, Brumley argues the Court of Appeals misconstrued his chain of custody issue. He claims he “is not alleging that a ten-minute gap of time is the reason that the chain of custody has not been established.” Aplt’s Brf. at 19. This argument belies Brumley’s assertions at the Court of Appeals, the trial court, and in his brief to this Court.⁹

⁹ Brumley’s Court of Appeals argument is best shown by the last four sentences of his Reply Brief:

There may not be a gap between the time it was placed into the evidence locker and trial but *there certainly is a gap between the time that Mr. Brumley exited the trailer and it was collected.*

Nonetheless, Brumley asserts to this Court his real “problem is that it is unknown who found the items and when the items were located by whoever found them.” Aplt’s Brf. at 20. But not knowing what went on during the 10-minute gap means Brumley’s real problem is with the 10-minute gap. That is the substance of a chain-of-custody-gap issue -- it is unknown what happened during that time period. In this case, the 10-minute gap was sufficiently accounted for by the officers’ testimonies and did not create any inference that the meth lab had been materially altered during the 10-minute gap. Brumley concedes the only people at the scene were himself, the officers, and the dog. It is rational to believe that none of those people (or the canine) altered the evidence -- which consisted of readily identifiable HCl generators and meth lab -- in any material respect.

In addition to the fact that Brumley’s claim lacks merit, Brumley’s trial counsel waived the issue. The Commonwealth addresses these responses in reverse order.

Riddle said the officers were in the trailer 10-15 minutes before he went in to collect the evidence. What happened during that time? Who was in the trailer? We do not know.

Aplt’s Reply Brf. (Court of Appeals) at 5 (emphasis added). This argument is copied almost verbatim in Brumley’s brief to this Court. Aplt’s Brf. at 25.

Brumley absolutely argued to the Court of Appeals that the ten-to-fifteen-minute gap in the chain of custody created reversible error. He presents that claim again to this Court. To claim the Court of Appeals misconstrued his argument is incredulous.

A. Brumley's Argument and Waiver of the Issue at the Trial Court Level.

Brumley's first appointed attorney, the Hon. Shanda L. West-Stiles, filed a motion to suppress the meth lab evidence for lack of a proper chain of custody. (TR 71-72). In the three-paragraph motion, Ms. West-Stiles conceded the chain-of-custody had been sufficiently established: "[a]t a previous hearing in the above styled case items were found, where and by whom the items were found and the procedures by which they were collected, preserved and tested." (TR 71). Her newest objection to the chain of custody was, "It is unclear what procedures were followed when the items were received, what safeguards were in place between the receipt and handling of the items."

Ibid.

A hearing was held. (VR 3/31/10, 7:08:30). At that hearing, the Commonwealth presented testimony from Trooper Hines, Sheriff Riddle, and Detective Eddie Paul Murphy of the Kentucky State Police special drug investigations unit. Trooper Hines testified that she was part of the team that first entered the residence to secure the officers' safety after hearing a noise. (*Id.* at 7:10:30). She did not take anything into evidence. (*Id.* at 7:10:45).

Sheriff Riddle testified that he remained outside with Brumley while officers went inside the residence. (*Id.* at 7:14:00). After officers came out of the residence and informed Sheriff Riddle that they discovered an operational

meth lab, Sheriff Riddle went inside the residence, took an inventory, and took into evidence certain items. (*Id.* at 7:14:15). Sheriff Riddle placed the items in a secure lockup to which only he had access. (*Id.* at 7:22:30). They remained there on the day of the hearing. Finally, Det. Murphy testified that he came to the residence many hours later, he saw a brown pickup truck driving away from the residence, he discovered portions of the meth lab had been burned, and he disposed of the hazardous materials. (*Id.* at 7:27:15). Brumley presented no evidence.

Brumley was represented at this hearing by newly-appointed counsel who argued the chain of custody was not proven because a 10-minute gap existed between when the officers first entered the residence and when Sheriff Riddle took the inventory. (*Id.* at 7:32:00). The Commonwealth responded that Brumley's previous attorney's problem with the chain of custody was not the 10-minute gap, but instead was the lack of inventory. (*Id.* at 7:33:00). Compare with TR 71 (motion to suppress). The trial court agreed and believed the testimony at the previous suppression hearing was sufficient to establish the chain of custody for Brumley's 10-minute gap. (*Id.* at 7:33:30).

Brumley's trial counsel explained that he had not viewed the previous suppression hearing, and he conceded that this latest hearing addressed Brumley's concerns about the chain of custody. (*Id.* at 7:34:30). Brumley's

trial counsel informed the trial court that he would review the previous hearing and if there were any concerns about the chain of custody, he would make the court aware of it by formal written motion. (*Id.* at 7:35:15).

Though given nearly four months between the hearing and the trial to review the previous suppression hearing, Brumley did not file another suppression motion. Brumley, thus, waived this issue.

Brumley claims that due to the change of attorneys his attorney at the second suppression hearing was at a “disadvantage” and “had the wool pulled over his eyes[.]” *Aplt’s Brf.* at 25. However, this same attorney represented Brumley at trial where only Sheriff Riddle, Det. Murphy, and a handful of laboratory technicians testified to the chain of custody – yet at trial he made no objection to the introduction of evidence for failing to prove a proper chain. There was no “wool” pulled over his eyes. He chose not to object, and he chose not to bring this issue to the trial court’s attention. His choices constitute a waiver of this issue.

B. The Evidence Was Properly Admitted.

Finally, even if Brumley had not waived the claim, the alleged error is without merit. An “unbroken chain of custody is generally unnecessary” because the chain of custody is “a term of art describing a means of proving an object’s authenticity.” *Thomas v. Commonwealth*, 153 S.W.3d 772, 781 (Ky. 2004) (citing *McCormick on Evidence* § 212, at 9 (John W. Strong ed., 5th Ed. 1999)). “Any gaps go to the weight, rather than the admissibility of

the evidence, and the proponent need only demonstrate a reasonable probability that it has not been altered in any material respect.” *Thomas*, 153 S.W.3d at 781 (citing *McKinney v. Commonwealth*, 60 S.W.3d 499, 511 (Ky. 2001)).

Here, during Brumley’s complained-of 10-minute gap,¹⁰ evidence demonstrated a reasonable probability that the meth lab had not been altered in any material respect. After Brumley exited the residence, only a dog and a few officers were inside the residence. Once the officers found the dog, they exited and informed Sheriff Riddle about the meth lab. Sheriff Riddle then entered and either by himself or with assistance took an inventory. It is reasonable to believe that the meth lab was not altered by any person during the 10-minute gap. Brumley could have attacked this gap as to the weight of the evidence, but he chose not to do so.¹¹

¹⁰ Brumley also makes a loose argument that the chain of custody was not proven because of the alleged tampering with the meth lab by the driver of the brown pickup truck. Aplt’s Brf. at 26. This argument highlights that the gaps in the chain go to the evidence’s weight, as Brumley’s trial counsel sought to create reasonable doubt at trial by reiterating that Brumley was in custody when the driver of the brown truck was at the residence destroying evidence. (VR 7/16/11, 11:14:15). Brumley’s use of this brown truck evidence further shows he chose to waive any objection.

¹¹ An attack of this sort would have worked against Brumley. He would have had to argue the officers planted and/or cooked the meth during the 10-minute gap, or the dog planted and/or cooked the meth. Either choice would have been poor trial strategy.

The judgment and sentence should be affirmed.¹²

CONCLUSION

The trial court did not abuse its discretion by admitting the meth lab evidence.

WHEREFORE, the Commonwealth respectfully requests the Court AFFIRM the judgment and sentence entered against Brumley.

Respectfully submitted,

JACK CONWAY
Attorney General of Kentucky



CHRISTIAN K. R. MILLER
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Ky. 40601
(502) 696-5342
Counsel for Appellee

¹² Brumley again asks that the case be dismissed. The Commonwealth reincorporates Argument I.F.