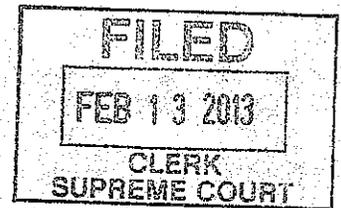


SUPREME COURT OF KENTUCKY
FILE NO. 2012-SC-189-DG
(COURT OF APPEALS CASE NUMBER 2010-CA-001617)



RANDY BRUMLEY

MOVANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HON. EDDIE C. LOVELACE, JUDGE
CIR. NO. 09-CR-00072

COMMONWEALTH OF KENTUCKY

RESPONDENT

BRIEF FOR MOVANT RANDY BRUMLEY

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief for Movant has been mailed, postage prepaid, to: Clinton Circuit Court Judge, 104 Cumberland Street, Albany, Kentucky 42602; Hon. Jesse M. Stockton, Jr., Commonwealth Attorney, P.O. Box 175, Albany, Kentucky 42602; Hon. Charles B. Bates, Assistant Public Advocate, 111 Jamestown Street, Columbia, Kentucky 42728; and by state messenger service to Hon. Jack Conway, Attorney General, Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, on February 13, 2013.

A handwritten signature in cursive script, appearing to read "Emily Holt Rhorer".

Emily Holt Rhorer

INTRODUCTION

This case is on discretionary review to this Court. The Court of Appeals affirmed Randy Allen Brumley's convictions for manufacturing methamphetamine and possession of drug paraphernalia and his sentence of ten years. In so doing, the Court of Appeals found that the exigent circumstances exception allowed a warrantless search of Mr. Brumley's trailer and the chain of custody of the evidence located in the trailer was established. Mr. Brumley disagrees with both of these findings, and urges this Court to reverse the Court of Appeals.

STATEMENT CONCERNING ORAL ARGUMENT

It does not appear that this Court has determined yet whether oral argument should be held in this discretionary review case. Should this Court believe oral argument would be beneficial, Appellant will gladly present his case.

STATEMENT CONCERNING CITATIONS TO THE RECORD

There is one volume of TR, cited to as "TR, ___." The video record originally consisted of seven CDs, which are cited to as "CD: (date); (time)." The record was supplemented in the Court of Appeals, and the supplemental record consists of two CDs, cited as "Supplemental CD: (date); (time)," and one videotape which is cited to as "Supplemental Videotape: 11/24/09; (time)."

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTIONi

STATEMENT CONCERNING ORAL ARGUMENTi

STATEMENT CONCERNING CITATIONS TO THE RECORDi

STATEMENT OF POINTS AND AUTHORITIES..... ii

STATEMENT OF THE CASE1

ARGUMENT5

1. BOTH THE TRIAL COURT AND THE COURT OF APPEALS ERRED IN FINDING THAT EXIGENT CIRCUMSTANCES SUPPORTED ENTRY INTO THE BRUMLEY TRAILER WITHOUT A WARRANT.5

Payton v. New York, 445 U.S. 573 (1980).....9, 12

Welsh v. Wisconsin, 466 U.S. 740 (1984)passim

Mason v. Godinez, 47 F.3d 852 (7th Cir. 1995).....10

U.S. v. Wihbey, 75 F.3d 761 (1st Cir. 1996).....10

U.S. v. Bartelho, 71 F.3d 436 (1st Cir. 1995).....10

RCr 9.78.....11, 13

Adcock v. Commonwealth, 967 S.W.2d 6 (Ky. 1998).....11

Stewart v. Commonwealth, 44 S.W.3d 376 (Ky. App. 2000)11

Commonwealth v. Opell, 3 S.W.3d 747 (Ky. App. 1999)11

Ornelas v. United States, 517 U.S. 690 (1996).....11

U.S. Const. Amend. IV12, 18

Ky. Const. § 1012, 18

Hallum v. Commonwealth, 219 S.W.3d 216 (Ky. App. 2007)12

Commonwealth v. McManus, 107 S.W.3d 175 (Ky. 2003).....12, 15

<u>Kirk v. Louisiana</u> , 536 U.S. 635 (2002)	12
<u>Southers v. Commonwealth</u> , 210 S.W.3d 173 (Ky. App. 2006)	12
<u>Baltimore v. Commonwealth</u> , 119 S.W.3d 532 (Ky. App. 2003)	14
<u>Sampson v. Commonwealth</u> , 609 S.W.2d 355 (Ky. 1980)	15
<u>Clark v. Commonwealth</u> , 868 S.W.2d 101 (Ky. App. 1993)	15
<u>United States v. Radka</u> , 904 F.2d 357 (6 th Cir. 1990).....	16
<u>Styles v. Commonwealth</u> , 507 S.W.2d 487 (Ky. 1973)	16
<u>Taylor v. Commonwealth</u> , 577 S.W.2d 46 (Ky. App. 1979).....	16
<u>State v. Smith</u> , 199 P.3d 386 (Wash. 2009).....	17
<u>Lee v. State</u> , 856 So.2d 1133 (Fla.Dist.Ct.App. 2003).....	17
<u>Mincey v. Arizona</u> , 437 U.S. 385 (1978)	17
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968).....	17
Ky. Const. § 2	18
Ky. Const. § 7	18
U.S. Const. Amend. XIV	18
2. THE COURT OF APPEALS MISCONSTRUED THE ARGUMENT REGARDING CHAIN OF CUSTODY OF THE EVIDENCE SEIZED FROM THE BRUMLEY TRAILER.....	18
KRE 901A	passim
U.S. Const. Amend. IV	19
<u>Thomas v. Commonwealth</u> , 153 S.W.3d 772 (Ky. 2004)	19, 23
<u>Rabovsky v. Commonwealth</u> , 973 S.W.2d 6 (Ky. 1998)	19, 23
<u>Penman v. Commonwealth</u> , 194 S.W.3d 237 (Ky. 2006)	23, 24
U.S. Const. Amend. V	26

U.S. Const. Amend. VI.....	26
U.S. Const. Amend. XIV.....	26
Ky. Const. § 2.....	26
Ky. Const. § 7.....	26
Ky. Const. § 11.....	26
Ky. Const. § 17.....	26
CONCLUSION.....	27

STATEMENT OF THE CASE

In May, 2009, Randy Brumley, the Appellant herein, a forty-five-year old with no prior felony convictions, was in the process of restoring a trailer at 49 Pleasant Ridge Road in Clinton County, Kentucky. Because he was restoring the trailer, it did not have electricity or water service. Supplemental CD: 7/16/10; 12:32:36, 12:33:49. Thus, he was living elsewhere at the time. Id., 12:31:45.

Mr. Brumley had noticed that someone was breaking into the trailer at night. Supplemental CD: 7/16/10; 12:32:05. The windows were broken out and the door would not lock so he was unable to secure it. Id., 12:32:51. On May 29, 2009, Mr. Brumley stayed the night in the trailer to see if he could catch who was breaking in. Id., 12:31:45.

At around midnight, Clinton County Sheriff Rick Riddle, as well as several other officers from many different police agencies, went to Mr. Brumley's trailer to serve an arrest warrant. Riddle had been to the trailer several other times, at all hours of the day, but could never find Mr. Brumley there. Supplemental CD: 7/16/10; 10:24:36, 10:52:00. Riddle knocked on the door, and Mr. Brumley, who had been asleep, answered the door. When informed of the arrest warrant, he came outside and was placed in custody. Mr. Brumley was totally cooperative. Id., 10:25:20. On Mr. Brumley, Riddle found a glass pipe and aluminum foil.¹ Id., 10:25:47.

There was a rustling noise in the trailer, and officers—without a search warrant—entered it. A dog was found inside the trailer. Supplemental CD: 7/16/10; 10:25:30. An unknown officer said he saw “stuff” in an open stove. Riddle subsequently went inside

¹ Mr. Brumley testified at trial that while he was a methamphetamine user, he was not a manufacturer. Supplemental CD: 7/16/10; 12:35:40. He said a buddy, whose name he declined to disclose, gave him the meth that he had smoked out of the pipe found on him. Id., 12:34:30.

the trailer, and observed what appeared to be evidence of the manufacture of methamphetamine. Id., 10:27:30. The warrantless entrance into the trailer under the guise of “exigent circumstances,” and the chain of custody of the evidence found in the trailer are the focus of the two issues in this appeal.

The evidence supporting the manufacture of methamphetamine was as follows. Liquid fire was discovered in a kitchen cabinet of the trailer. Supplemental CD: 7/16/10; 10:29:16. In another kitchen cabinet were coffee filters and what officers initially suspected were pseudoephedrine tablets.² Id., 10:32:53. In the kitchen trash were paper towels and aluminum foil. Id., 10:34:06. In the aforementioned open stove in the living room were HCl generators. Id., 10:30:30. By the bed in the living room, on the floor, was plastic tubing and a bottle cap with a hole in it. Id., 10:31:20. By this was a duffel bag which had the Pulaski County Sheriff’s Department logo on it, and contained coffee filters and aluminum foil. Id., 10:33:23. Between the bed and the wall was a box of table salt. Id., 10:32:00. Under the mattress was a loaded shotgun. Id., 10:35:40. There was a police scanner on the couch in the living room, with the Clinton County Sheriff’s department frequency on it. Id., 10:34:32. Also on the couch was a taped up bag of ammonium nitrate.³ Id., 10:35:00. A notebook in the living room contained a notation of “Coleman Fuel, batteries, hoses” on a page. Id., 10:38:40-10:40:00.

Two lids with holes in the middle of them were found outside the trailer, by the steps. Supplemental CD: 7/16/10; 10:41:00-10:42:00.

² This was incorrect. The tablets turned out to be phenylephrine-based, and they cannot be used to manufacture meth. Supplemental CD: 7/16/10; 11:28:00.

³ Mr. Brumley testified at trial that some items in the trailer belonged to him. For example, he had the liquid fire to unstop the trailer pipes. The tablets found in a kitchen cabinet were for his allergies. Supplemental CD: 7/16/10; 12:33:15. The police scanner was his. Id., 12:35:15. On the other hand, the Pulaski County Sheriff’s Department duffel bag was not his, and he did not know where it came from. Id., 12:33:15. The HCl generators were not his, and he had no idea what they were used for. Id., 12:36:30. The trailer was not being used by him as a residence, and it was very cluttered. Id., 12:31:51.

Sheriff Riddle contacted KSP Detective Eddie Paul Murphy, a drug force officer who specializes in methamphetamine labs, to have him collect the hazardous materials. However, he was tied up with another meth lab and was not able to come to the trailer until the morning. Supplemental CD: 7/16/10; 10:50:00. Sheriff Riddle and his team, who had arrived at around midnight, were out of the trailer and off the property within an hour. Id., 10:54:50.

Det. Murphy arrived in Clinton County to work on the Brumley trailer several hours after Sheriff Riddle had called him. Supplemental CD: 7/16/10; 11:00:10. He was on the phone with Sheriff Riddle as he drove up to the trailer because he was not sure he was at the right location. A brown pick-up truck was coming from the trailer as he approached, and he gave Riddle a description of the vehicle. Riddle did not know "for sure who it was." Id., 11:00:36, 11:14:06.

When he pulled in the driveway of the trailer, he saw that there was a smoking burn pile. Detective Murphy was still on the phone with the sheriff, and he said it was not there the night before. Supplemental CD: 7/16/10; 11:01:00, 11:07:30. In the burn pile were melted 20-oz. Mountain Dew bottles. Inside the trailer, in the heat stove, were two HCl generators, one of which was in the process of melting down. The stove had been set on fire since photographs of it were taken by Riddle the night before. Id., 11:03:00. Outside under the trailer, Murphy found a couple more 20-oz. bottles containing a white milky substance but there was no cap on them. Id., 11:01:18. Also under the trailer, he located a small bag of ammonium nitrate. Id., 11:01:40.

In all, Detective Murphy cleaned up five HCl generators. It only takes one generator to make a batch of meth. Supplemental CD: 7/16/10; 11:02:10. Two

generators were in the stove in the trailer, one was in the burn pile, and one to two were under the trailer. Id., 11:04:00.

Detective Murphy testified that based on his training and experience all the equipment necessary to manufacture meth was at the trailer. He said as far as chemicals go, the only items missing were lithium batteries and pseudoephedrine. Supplemental CD: 7/16/10; 11:11:30. However a little later he testified that he did find five lithium battery casings in the burn pile. Id., 11:16:30. When asked about whether there was lye at the residence, Murphy said his notes indicate there was an empty can of lye there. Id., 11:12:20. He found an empty container of Coleman fuel by the corner of the trailer. Id., 11:17:23. Thus, all that was missing was pseudoephedrine, and it is used by the cooking process. Id., 11:17:42.

KSP lab analyst Jamie Hibbert tested two tubes he received from Sheriff Riddle. Supplemental CD: 7/16/10; 11:19:43. They contained meth. He also received aluminum foil but he did not test that since he found meth in the tubes. Id., 11:21:00.

In a bizarre twist, the Brumley trailer was subsequently set on fire and burned down. Mr. Brumley was in custody when this happened. Supplemental CD: 7/16/10; 12:30:30.

In June, 2009, Mr. Brumley was indicted by a Clinton County Grand Jury on charges of manufacturing methamphetamine and possession of drug paraphernalia. TR, 1-2. A one-day trial occurred on July 16, 2010, and a Clinton County jury convicted Mr. Brumley of both charges. TR, 113-122. The jury recommended a sentence of 10 years for the manufacturing conviction and “one year” and a \$500 fine for the misdemeanor drug paraphernalia conviction. TR, 123-124. At final sentencing, the trial court noted

that the 12 month sentence would run concurrently with the 10 years for manufacturing. It abrogated the \$500 fine since Mr. Brumley was indigent. CD: 8/16/10; 9:35:00. Final judgment was entered on August 16, 2010. TR, 139-142; Appendix Tab 1. A timely notice of appeal was filed on August 26, 2010. TR, 150.

Mr. Brumley raised the two issues noted above—warrantless search of trailer and chain of custody of evidence in the trailer—on direct appeal to the Court of Appeals. The Court of Appeals affirmed Mr. Brumley’s convictions and sentence in an unpublished Opinion rendered on February 24, 2012. See Slip Op. 10-CA-1617-MR in Appendix Tab 2. This Court accepted discretionary review on both issues.

Other facts will be developed as necessary in the Argument.

ARGUMENT

1. BOTH THE TRIAL COURT AND THE COURT OF APPEALS ERRED IN FINDING THAT EXIGENT CIRCUMSTANCES SUPPORTED ENTRY INTO THE BRUMLEY TRAILER WITHOUT A WARRANT.

Preservation. This issue is preserved by Mr. Brumley’s motion to suppress the evidence seized from his home. TR, 49-50. A hearing was held on the motion, and the trial court made oral findings of fact and conclusions of law, overruling Mr. Brumley’s suppression motion. Supplemental Videotape: 11/24/09; 12:29:42-12:36:00.

Relevant Facts. On November 24, 2009, a hearing was held on the defense motion to suppress the evidence seized from the trailer, the basis of the motion being that the officers entered and searched the trailer without a search warrant. TR, 49-50. At the suppression hearing, the Commonwealth called five witnesses but one of those witnesses, Jerry Coffey from the Wayne County Sheriff’s office, did not testify. He was a no show

at the hearing despite the fact that he had been subpoenaed. Supplemental Videotape: 11/24/09; 12:19:14.

Clinton County Sheriff Rick Riddle testified that on May 29, 2009, he had a felony arrest warrant for Mr. Brumley. He had gone to Mr. Brumley's trailer several times, but he was never home. On the evening in question, however, Sheriff Riddle had received a call that Mr. Brumley was there so he and several officers went to serve the arrest warrant. Supplemental Videotape: 11/24/09; 11:43:00.

Sheriff Riddle could not recall all the officers who accompanied him to the trailer to serve the arrest warrant, but the group included his deputy Josh Asberry, two state troopers, and an officer or two from the Wayne County Sheriff's office. Id., 11:43:24. He thought there were four officers in total with him. Id., 11:46:20. Officers surrounded the trailer, and Sheriff Riddle knocked on the door. Mr. Brumley answered the door, was informed of the arrest warrant, and stepped outside where he was placed under arrest. A trooper heard something inside, and officers entered to "clear" the trailer. It was a dog. Id., 11:44:09. Sheriff Riddle said while in the trailer, "they" noticed remnants of what appeared to be a meth lab. Id., 11:44:46.

After officers cleared the house, evidence of the alleged meth lab was collected, and as a result Mr. Brumley was charged with manufacturing methamphetamine. In addition, a pipe was found on Mr. Brumley's person. This was discovered by Riddle as the other officers "cleared" the house. Id., 11:45:30-11:46:00. Mr. Brumley was totally cooperative. Id., 11:47:30.

Sheriff Riddle testified that he had no reason to believe anything illegal was in the house. He did not ask Mr. Brumley if anyone was in the house. He was searching Mr.

Brumley when movement in the house was heard by other officers. Mr. Brumley was outside and not causing any problems, nor was there an indication he would cause problems. Id., 11:48:38.

KSP Trooper Tracy Haines was the second witness to testify at the suppression hearing. She believed there were eight officers present at the Brumley trailer to execute this arrest warrant. Id., 11:51:10. A little later, she said she thought it was her and five other officers, including a person from the drug task force. Id., 11:53:33.

She was stationed on the perimeter of the trailer. She was at one end of the trailer, looking to see if people exited from anywhere other than the front door. There were three to four officers at the front door, so her focus was not on the front door. She observed nothing illegal from the trailer from direction she was looking. Id., 11:54:20.

Trooper Haines stated they went into the trailer because they heard movement. She believed either Wayne County deputies or the drug task force person told her they had information that Mr. Brumley had two guns in his possession. Id., 11:59:12.

Officers went into the trailer to “clear it” after hearing movement. Id., 11:51:10. The shuffling noise they heard, however, ended up just being a dog. Id., 11:52:00. Trooper Haines testified all she did was clear the trailer; she did not participate in the search of the trailer. Id., 11:52:31. She was not the first person in the trailer, nor was she the person who collected the dog, nor did she know where the dog was found. She did not see anything illegal in the trailer—all she did was look for persons in the trailer and exit it. There was no one in the trailer. Id., 11:59:40-12:00:10.

Clinton County Sheriff’s Deputy Josh Asberry was the third witness at the suppression hearing. He was stationed outside the trailer when the warrant was served.

He believed Sheriff Riddle and another officer went into the trailer. Once Mr. Brumley was in custody, officers entered the trailer because of concerns someone else might be in the trailer. Id., 12:03:22. Asberry did not hear any noise or movement from the trailer before the officers entered it. Id., 12:04:45. He was some distance away from the trailer on one side of a fence. Trooper Long was on the other side of the fence. Id., 12:07:00.

When Mr. Brumley came outside, no officers had entered the trailer yet. Id., 12:09:00. Deputy Asberry had not been told anything about guns prior to the serving of the warrant. Id., 12:09:30. Deputy Asberry did not locate the dog. He could not recall if he found any of the evidence in the trailer. Id., 12:11:00. However, he was the one who took the written inventory of items found in the trailer. Id., 12:04:22. Officers would point out evidence, and he logged it in. Id., 12:11:00. He could not recall in what rooms the evidence was found. Id., 12:12:00.

KSP Trooper David Long was the fourth witness for the Commonwealth. He went to the Brumley trailer to assist in the serving of the arrest warrant. He was stationed by a fence, approximately 40-50 feet from the trailer. Id., 12:14:44. He saw Mr. Brumley emerge from the trailer and be placed under arrest. Trooper Long never entered the trailer. Id., 12:13:20. He could hear a sound, which he thought was a dog, when he was by the fence. Id., 12:14:00. He recalled seeing an officer bring a dog outside. Id., 12:16:09.

Trooper Long thought some fish and wildfire officers, as well as “Deputy Jim Guffey,” participated in the arrest and search. Id., 12:16:34. He did not know who entered the trailer. He did not know what was found in the trailer. He never heard

anything suspicious prior to the officers entering the trailer nor did he observe anything suspicious from the outside. Id., 12:17:30.

The defense presented no witnesses at the suppression hearing, but argued that a felony warrant only gives police the right to arrest the person who is the subject of the warrant. Here, police were using the arrest warrant as a ruse to search Mr. Brumley's trailer. Once Mr. Brumley was outside and placed under arrest, there was no reason to enter the trailer without a search warrant. The sound of a dog did not give rise to an exigent circumstance to enter the trailer. In addition, only Trooper Haines testified about having information about Mr. Brumley possessing guns. No testimony was elicited to where the dog was located, or at what point the dog was located vis-à-vis the discovery of the allegedly contraband items. This was an illegal search. Id., 12:27:35.

The trial court made the following oral findings of fact:

- (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 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. Id., 12:30:00-12:31:30.

The court then made the following oral conclusions of law:

- (1) A search or seizure on 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 is 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). The court also cited to U.S. v. Wihbey, 75 F.3d 761, 766 (1st Cir. 1996), holding 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.S. 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. Id., 12:31:36-12:36:30.

On direct appeal, the Court of Appeals also held that the exigent circumstances exception to the warrant requirement applied:

In this case, the trial court found that the facts provided police officers with reason to believe that they were at risk of being in danger. The officers had received information that guns were in the residence. It was not unreasonable for them to suspect another person might be armed inside the trailer when they heard the movement. They had surrounded the trailer anticipating the possibility that another person might exit. Brumley argues that it was obvious that no one else was inside the trailer because only he answered the door when the police knocked. We do not agree. Many people do not answer knocks at the door. Additionally, the arrest took place late at night; other occupants could have been sleeping. Although the rustling sound was caused by a dog, guns were indeed discovered. It was not unreasonable for police to enter the trailer in order to insure their safety. The trial court did not err in its findings of fact and conclusions of law on this point.

Slip Opinion, 4. See Appendix Tab 2.

Standard of Review. The appellate standard of review of a trial court's decision on a suppression motion following a hearing is twofold. First, the factual findings of the court are conclusive if they are supported by substantial evidence. RCr 9.78; Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998); Stewart v. Commonwealth, 44 S.W.3d 376 (Ky. App. 2000). Second, there is a de novo review to determine whether the court's decision is correct as a matter of law. Commonwealth v. Opell, 3 S.W.3d 747, 751 (Ky. App. 1999). See Ornelas v. United States, 517 U.S. 690, 698–700 (1996).

Argument. Mr. Brumley did what he was supposed to do when a large number of officers from different police agencies showed up with an arrest warrant at his trailer at around midnight on May 29, 2009. He answered the door when the police knocked, and he voluntarily stepped outside. He was placed under arrest, and he cooperated as Sheriff Riddle searched him and secured him.

At the moment Mr. Brumley stepped outside and acquiesced to the arrest, police business at 49 Pleasant Ridge Road should have ceased with the exception of transporting Mr. Brumley to jail. Yet it did not. *Some* officers heard a rustle and entered the trailer *after* Mr. Brumley had been arrested peacefully. *One* officer said “they” had heard from the mysterious Wayne County contingent that Mr. Brumley *might* have a couple of guns. Despite the fact that the officers should have gotten into their cruisers and driven off having completed the task at hand—serving an arrest warrant on Mr. Brumley—the officers did not do that. They entered the trailer, removed the dog that caused the “rustling,” and started searching the place.

“[T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. ... It is not surprising, therefore, that the Court has recognized, as a basic principle of Fourth Amendment law, that searches and seizures inside a home without a warrant are *presumptively unreasonable*.” Welsh v. Wisconsin, 466 U.S. 740, 748-749 (1984) (internal citations omitted; emphasis added).

Both “the Fourth Amendment of the United States Constitution and Section Ten of the Kentucky Constitution protect citizens from unreasonable searches and seizures without a warrant.” Hallum v. Commonwealth, 219 S.W.3d 216, 221 (Ky. App. 2007). “It is a ‘basic principle of Fourth Amendment Law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.” Payton v. New York, 445 U.S. 573, 586 (1980). Therefore, “[b]efore agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.” Welsh, 466 U.S. at 750. See also Commonwealth v. McManus, 107 S.W.3d 175, 177 (Ky. 2003).

It is well established that police may not conduct a warrantless search or seizure within a private residence unless there exists both (1) probable cause and (2) exigent circumstances. Kirk v. Louisiana, 536 U.S. 635, 638 (2002). See also Southers v. Commonwealth, 210 S.W.3d 173, 176 (Ky. App. 2006).

1. No substantial evidence to support the finding that the officers had information that there were guns in the trailer.

As to the information about guns in the trailer, only one of the four officers who testified at the suppression hearing testified to this. Interestingly, Trooper Haines stated

that she believed it was either the Wayne County deputies or the drug task force person who told her this. Supplemental Videotape: 11/24/09; 11:59:12. Of course, the Wayne County deputy who was subpoenaed *by the Commonwealth* to appear at the suppression hearing never showed up to testify. And no one could ever recollect the names of the other Wayne County deputy or “drug task force person.”

Even more troubling is the fact that Clinton County deputy Josh Asberry affirmatively stated that he was not given any information about guns. Supplemental Videotape; 11/24/09; 12:09:30. Trooper Long did not testify that anyone told him about Mr. Brumley having guns. *Id.*, 12:13:20-12:17:30.

The testimony adduced at the suppression hearing did not support the finding that the officers had information that there were guns in the residence. In addition, the Court of Appeals’ finding that warrantless entry into the trailer was appropriate because “[m]any people do not answer knocks at the door,” Slip Op. 4, makes little sense as Mr. Brumley did answer the knock at his door. Further the Court of Appeals stated, “[a]dditionally, the arrest took place late at night; other occupants could have been sleeping.” If the “other occupants” were sleeping, surely they could not cause a rustling sound?

Both the trial court and the Court of Appeals were incorrect in their finding of fact that there were exigent circumstances due to information about guns. Here there was no “substantial evidence” to support the court’s finding that the officers had information about Mr. Brumley possibly having guns where only one witness out of four testified to this. RCr 9.78.

2. The trial court, in its analysis, failed to consider the requirement of probable

cause, and there was no such showing made by the Commonwealth. While paying lip service to the probable cause requirement, the Court of Appeals failed to analyze the absence of it in this case.

The Court of Appeals agreed with Mr. Brumley that probable cause was a requirement when the exigent circumstances exception to the warrant requirement is applied, Slip Op. at 3-4, but failed to identify the probable cause showing in this case. Perhaps that is because there was no such showing below. The trial court, when it announced its conclusions of law, focused exclusively on the “exigent circumstances” prong of the required analysis. The court found that the sound of rustling along with the “information” that Mr. Brumley might have two guns created exigent circumstances. While the court paid lip service to the “probable cause” requirement in its final sentence overruling the motion to suppress, the court never identified what the sufficient probable cause was to justify a warrantless search of the trailer. Supplemental Videotape: 11/24/09; 12:35:00.

As this Court observed in Southers, the exigent circumstance must be supported by a finding of probable cause. Id., 176. “Probable cause for a search exists when the facts are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.” Baltimore v. Commonwealth, 119 S.W.3d 532, 538 (Ky. App. 2003). What was the contraband or evidence of a crime to be found in the case at bar? Mr. Brumley was not a convicted felon so it could not have been the mere fact that he *might* have in his possession a couple of guns. He had already surrendered to the police peacefully, and he had been secured. In addition, this was not a known “drug” house. The trailer he was in was *not* the place where the incident charged in the felony

warrant occurred. Supplemental Videotape: 11/24/09; 11:46:47. There was no real suggestion that anyone other than Mr. Brumley was there. The police had surrounded the trailer, all 14 x 70 feet of it, prior to the knock at the door, and not one officer observed anyone attempting to flee from the trailer, much less act in a menacing way.

Probable cause must exist and be known to the officer at the time he begins the search. Sampson v. Commonwealth, 609 S.W.2d 355, 358 (Ky. 1980). "It is insufficient to look at the evidence in retrospect and find probable cause. Probable cause exists when the totality of the circumstances then known to the investigating officer creates a fair probability that contraband or evidence of crime is contained [therein]." Clark v. Commonwealth, 868 S.W.2d 101 (Ky. App. 1993). Here there was no attempt made by the Commonwealth to establish probable cause that contraband or evidence of a crime was contained in the trailer.

3. The finding of an exigent circumstance of officer safety was unreasonable in light of the size of the trailer, sequence of events, and the fact that all that was heard was "rustling." This Court should consider a more bright-line approach to the exception.

As to the existence of an exigent circumstance, the Commonwealth ultimately bears the burden of demonstrating exigent circumstances so as to justify a warrantless entry. McManus, 107 S.W.3d at 177. Here the trial court found that the rustling sound along with the information about Mr. Brumley possibly owning two guns created an exigency. The Court of Appeals agreed with the trial court in its Opinion. Slip Op. 4. These circumstances did not rise to the level of exigent circumstances.

A high standard exists to establish exigent circumstances. The situation must be one of urgency or necessity: “[t]he exigent circumstances exception relies on the premise that the existence of an emergency situation, demanding urgent police action, may excuse the failure to procure a search warrant.” United States v. Radka, 904 F.2d 357, 361 (6th Cir. 1990), citing Welsh, 466 U.S. at 750. As a general rule, exigent circumstances are said to exist 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. Styles v. Commonwealth, 507 S.W.2d 487 (Ky. 1973); Taylor v. Commonwealth, 577 S.W.2d 46 (Ky. App. 1979).

The situation as it existed on May 29, 2009, at 49 Pleasant Ridge Road did not rise to the level of exigent circumstances. The facts did not necessitate immediate police action. Mr. Brumley exited his trailer and submitted to the police. There were no weapons on him. He was under arrest so even if there was information from “officers” that he had two guns it was moot at that point. There were no threats or escape attempts. It was clear there was no one else at the trailer as officers had surrounded the perimeter of it prior to the knocking at the door. The only exigency relied upon by the officers was danger to themselves.

The problem with the exigent circumstances-officer safety exception to the warrant requirement is that it is so broad. For example, in the case at bar, “rustling” in a trailer was found to be sufficient for a pack of officers to search Mr. Brumley’s trailer after he was under arrest. Other jurisdictions, perhaps realizing this, have endorsed specific factors to be examined in a totality of the circumstances analysis. For example,

Washington State has six factors that are to be considered by a court confronting exigent circumstances due to officer safety:

- (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry [can be] made peaceably.

State v. Smith, 199 P.3d 386, 389 (Wash. 2009). So, for example, in the case at bar, it would be notable that Mr. Brumley was not being sought pursuant to an arrest warrant for a violent offense but for another drug case, and that he was already under arrest, having surrendered peacefully. See also Lee v. State, 856 So.2d 1133, 1137 (Fla. Dist. Ct. App. 2003), “[f]actors indicating exigent circumstances include (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) a reasonable belief that the suspect is armed; (3) probable cause to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; and (5) a likelihood that delay could cause the escape of the suspect or the destruction of essential evidence, or jeopardize the safety of officers or the public.”

The authority provided by exigent circumstances is limited to whatever action is required to eliminate the exigency. “[A] warrantless search must be ‘strictly circumscribed by the exigencies which justify its initiation...’” Mincey v. Arizona, 437 U.S. 385, 393 (1978) (citing Terry v. Ohio, 392 U.S. 1, 25-26 (1968)). While Mr. Brumley does not believe there was any exigency created by a “rustling” noise, if this Court should disagree the exigency was extinguished by the removal of the dog. Any

warrantless entry into the home after that point was unreasonable and could not fall under the exigent circumstance exception to the warrant requirement.

4. This Court should reject the trial court's and Court of Appeals' findings of the applicability of the exigent circumstance-officer safety exception to the warrant requirement.

This is not a case where there was danger to third parties known to be in the trailer or even the risk of destruction of evidence. There was no fear that Mr. Brumley was about to flee as he was under arrest. This was not a case where the police had probable cause to believe that criminal activity was afoot. Both an exigent circumstance and probable cause were required for the police to enter the trailer after Mr. Brumley emerged and was arrested, and neither of these prongs been proven. This evidence must be suppressed, with instructions to the trial court to dismiss the case against Mr. Brumley. §§2, 7, and 10, Ky. Constitution; 4th and 14th Amendments, U.S. Constitution.

2. THE COURT OF APPEALS MISCONSTRUED THE ARGUMENT REGARDING CHAIN OF CUSTODY OF THE EVIDENCE SEIZED FROM THE BRUMLEY TRAILER.

Preservation. This issue is preserved by Mr. Brumley's motion to suppress the evidence seized from his home for lack of a proper chain of custody. TR, 71-73. A hearing was held on March 31, 2010. At the conclusion of the hearing, the trial court overruled Mr. Brumley's motion, holding that the Commonwealth had met its burden under KRE 901A. CD: 3/31/10; 7:35:00.

On direct appeal, the Court of Appeals held the admission of the evidence was proper:

Brumley's claim of lack of proper chain of custody concerns photographs of five HCl generators – soda bottles that were modified to produce hydrogen chloride gas. At the suppression hearing, a Kentucky State Police trooper testified that she and another trooper had been the first officers to enter the trailer. After they determined that no people were inside, they exited and informed Sheriff Riddle that they had observed components of a methamphetamine lab, including the HCl generators. Sheriff Riddle oversaw collection and inventory of items for evidence. Sheriff Riddle testified that there was a gap of approximately ten minutes between the time the KSP troopers observed the HCl generators and the time that he entered the trailer. Brumley alleges that this ten-minute gap was a break in the chain of custody sufficient to render the evidence inadmissible. We disagree.

Chain of custody is a term of art in Fourth Amendment analysis utilized to describe temporal and spatial control of an object of evidence in order to assure its authenticity and integrity. Thomas v. Commonwealth, 153 S.W.3d 772, 781 (Ky. 2004). Gaps in an object's chain of custody go to weight rather than admissibility. Gaps can be overcome by "a reasonable probability that it has not been altered in any material respect." Id. (Internal citations omitted). The proof of chain of custody for physical items "which are clearly identifiable and distinguishable" is not as stringent as the proof for ephemeral substances such as human blood or tissue. Rabovsky v. Commonwealth, 973 S.W.2d 6, 8 (Ky. 1998).

In this case, the items at issue were clearly identifiable and distinguishable. They were modified soda bottles that were sitting on the kitchen stove when the first officers entered the trailer. Brumley has not offered any evidence to support the suggestion that they were altered in any way during the ten-minute period when no one was in the trailer. The deputy who logged the inventory testified that the photographs were those of the HCl generators taken at the scene. While it appears that someone may have come back and attempted to burn some items after the first team of officers left but before the hazardous materials team arrived the next day, Brumley's argument is only related to the ten minutes involved at the time of his arrest. We are not persuaded that the court committed error by admitting photographs of the bottles into evidence. The jury was made aware of Brumley's allegation and was properly permitted to determine the weight of the evidence.

Slip Op. at 4-6.

Relevant Facts and Argument. Mr. Brumley is not alleging that a ten-minute gap of time is the reason that the chain of custody has not been established. As trial counsel

argued at the suppression hearing, the problem is that it is unknown who found the items and when the items were located by whoever found them. CD: 3/31/10; 7:32:00.

The Court of Appeals' recitation of the facts as adduced at the suppression hearing is incorrect. At the suppression hearing, the Commonwealth called three witnesses. KSP Trooper Tracy Haines was the first witness. She testified that she, along with several other officers, assisted Sheriff Riddle in serving the arrest warrant on Mr. Brumley. CD: 3/31/10; 7:09:36. She entered the trailer to search for the source of a rustling sound. A dog was located and taken outside. She did not collect any evidence or take an inventory of evidence. Id., 7:10:45. She believed the sheriff's department collected the evidence. She remained outside once she saw no persons were in the trailer. Id., 7:11:50.

Sheriff Riddle was the second witness. Again, he could not recall who the Wayne County deputies who were with him were. CD: 3/31/10; 7:13:11. After Mr. Brumley was arrested, officers heard something in the trailer. Troopers Long and Haines and the Wayne County deputies went into the trailer to clear it. He knew one of the Wayne County deputies was Jerry Coffey; he could not recall the name of the other. Riddle said in the "last testimony" all the names were fleshed out. Id., 7:24:32. A dog was brought outside, and Mr. Brumley tied it up. Id., 7:23:10. Riddle did not know who found the dog or where it was because he was outside. Id., 7:24:00. The trailer is approximately 14 x 70. Id.

Riddle testified an officer found an open heat stove with bottles with tubes sticking out of them in it. He was not sure who noticed the items. He just knew an officer came out and said there were HCl generators. CD: 3/31/10; 7:25:14. The court

observed the identity of who made the initial discovery was disclosed at the last hearing.

Id.

Riddle said the officers were in the trailer for 10-15 minutes before he entered the trailer. CD: 3/31/10; 7:26:00. Riddle took the inventory of the items located in the trailer. He collected some items and took some photographs. Some items were not collected until the next day when KSP Detective Murphy came to the trailer to clean it up. Id., 7:13:48.

Riddle showed photographs of the trailer taken that night, and he listed the items he collected. CD: 3/31/10; 7:15:10-7:21:20. He observed that the heat stove containing the alleged HCl generators were not collected by him that night because it was hazardous material. Id., 7:15:38. In addition, some bottles found outside with what appeared to be residue in them were not collected because they were hazardous. Id., 7:18:00. For the same reason, he did not collect a cup with residue in it that was sitting on an old a/c frame in the kitchen. Id., 7:19:45.

Sheriff Riddle's inventory was entered into evidence at the hearing. TR, 102. He took all the items on the list, with the exception of a notebook which was on the list but which he actually left at the house. He placed the items in lockup in the basement of his office. Only he has access to lockup. CD: 3/31/10; 7:22:36.

KSP Detective Eddie Paul Murphy was the final witness at the hearing. He is trained in the investigation and break down of meth labs. Id., 7:28:00. His job was to clean up the hazardous waste. He was at the trailer the next morning, after the sheriff had already collected his evidence. Id., 7:31:17.

Detective Murphy found at least five HCl generators. Two were inside the trailer in the stove. It is important to note that when Murphy collected the items they were not in the same condition as when Riddle was in the trailer. Someone had come in and burnt them. CD: 3/31/10; 7:29:20. In addition, there was a burn pile outside the trailer that had not been there when Riddle and his team left the trailer. It was still smoking. In the burn pile was three more generators. Id., 7:28:40, 7:30:02. He believed he also saw at the trailer some salt, Coleman fuel under the trailer, and ammonium nitrate fertilizer. However the only thing he collected were the HCl generators, which he took to Post and destroyed. Id., 7:30:30.

At the conclusion of the hearing, the defense noted that no one testified who discovered the specific items and when he or she did so. The Commonwealth said the information the defense alleged was missing was put forth in the prior hearing. (Another attorney from defense counsel's office had been counsel at the prior hearing.) The Commonwealth said between the two hearings, the proper chain had been proven. CD: 3/31/10; 7:33:11.

The trial court observed Mr. Bates, Mr. Brumley's attorney at this hearing, was at a disadvantage because he was not at the prior hearing. The court believed at the prior hearing "all this was unearthed." The court stated at the prior hearing there was testimony about who saw or took the items, and the chain was completed at the present hearing with Riddle's testimony that he collected the items and placed them in a locker. Id., 7:33:40. The court held the Commonwealth had met its burden under KRE 901A and case law to show the integrity of the items and that they were not altered. The motion to suppress due to a gap in the chain of custody was overruled. Id., 7:35:00.

To this day, it is unknown who discovered what evidence in the trailer and when that occurred. This is after two suppression hearings in which five different law enforcement witnesses testified. Indeed Riddle's and Haines' testimonies differed between the two hearings.

A trial court's decision as to whether an item of evidence is in essentially the same condition as it was at the time of the crime and, therefore, whether a sufficient foundation has been laid is reviewed under an abuse of discretion standard. Thomas v. Commonwealth, 153 S.W.3d 772, 781 (Ky. 2004). "The requirement of...identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." KRE 901(a).

A proper foundation requires the proponent to prove that the proffered evidence was the same evidence actually involved in the event in question and that it remains materially unchanged from the time of the event until its admission. The necessary foundation depends upon the nature of the evidence. Evidence readily identifiable and impervious to change may be admitted solely on testimony that it appears to be the actual object in an unchanged condition. However, the more fungible the evidence, the more significant its condition, or the higher susceptibility to change, the more elaborate the foundation must be. Penman v. Commonwealth, 194 S.W.3d 237, 245 (Ky. 2006), citing Thomas, supra, at 779. See e.g., Rabovsky v. Commonwealth, 973 S.W.2d 6, 8 (Ky. 1998) (a laboratory-tested blood sample).

Even with respect to substances that are not clearly identifiable or distinguishable, it is unnecessary to establish a perfect chain of custody or eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that the reasonable

probability is the at the evidence has not been altered in any material respect. Penman, supra, at 245. “All possibility of tampering does not have to be negated. It is sufficient...that the actions taken to preserve the evidence are reasonable under the circumstances.” Thomas, supra, at 778.

We simply do not know if the evidence was in the same condition as it was when officers *entered* the trailer. At the first hearing, Sheriff Riddle testified that officers went in the trailer to clear it after hearing a rustling sound. While these officers were in the trailer, “they” noticed evidence of what appeared to be a meth lab. Supplemental Videotape: 11/24/09; 11:44:46. It is unknown who the officers were. It was not, as the Court of Appeals stated, Trooper Haines because she did not see anything illegal in the trailer—all she did was look for persons in the trailer and exit it. Id., 11:59:40-12:00:10.

Deputy Sheriff Asberry could not recall if he found any of the evidence in the trailer. Supplemental Videotape: 11/24/09; 12:11:00. However, he testified at the first hearing that he was the one who took the written inventory of items found in the trailer. Id., 12:04:22. Officers would point out evidence, and he logged it in. Id., 12:11:00. He could not recall in what rooms the evidence was found inside. Id., 12:12:00.

But who were these “officers” who pointed out the evidence to Deputy Asberry? Of the named officers who appeared at the hearings in this case, none of them admitted to being the individuals to spot the evidence. Were they the Wayne County Sheriff’s deputies, or the “fish and wildlife” officers? The problem of course is that there is absolutely no chain of custody between Mr. Brumley walking out the door of the trailer, and Deputy Sheriff Asberry creating the inventory log. And it is noteworthy that at the

next hearing in the matter—the chain of custody hearing—Sheriff Riddle testified he was one who made the inventory log. CD: 3/31/10; 7:13:48. Was it Asberry or Riddle?

This case gets even more bizarre when one factors in that the heat stove where the HCl generators were discovered in the house was burned in between the time Riddle and his team left the trailer and Det. Murphy arrived. In addition, there was a burn pile that had not been there before. Of course, the burn pile is where Det. Murphy told the jury he found at least one of the HCl generators. Supplemental CD: 7/16/10; 11:04:00.

The bottom line is this. Mr. Bates, the attorney who represented Mr. Brumley at the second hearing, was only at a disadvantage to the extent that he had the wool pulled over his eyes by witnesses at the second hearing. He was not at a disadvantage for having missed information about the chain of custody from the first hearing because the fact of the matter is that there was no testimony that shed light on the chain of custody at the first hearing.

Regarding the evidence found in the trailer and collected by Sheriff Riddle, 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. Riddle said the officers were in the trailer 10-15 minutes before he went in to collect the evidence. What happened during that time? Again, we do not know who the majority of the officers even were despite Mr. Brumley's attorneys' attempts to flesh this matter out at two hearings. One officer, a Wayne County deputy, did not even acknowledge the subpoena served on him by the Commonwealth. Why? And, again, was it Riddle or Asberry who actually inventoried and collected the evidence?

As to the heat stove in the trailer and the items found in the burn pile and under the trailer by Detective Murphy several hours after Riddle and his team left the scene, we know that evidence was tampered with. Who was in the brown pick-up truck? Was there investigation into that?

This was a manufacturing methamphetamine case based on possession of chemicals or equipment. Thus *all* the items recovered by Riddle and Murphy were crucial to the Commonwealth's case. Without knowing who was in the trailer before Riddle, if it was indeed him and not Asberry who collected the evidence, and exactly what tampering occurred at the hands of the occupant(s) of the brown pick-up truck, this evidence cannot be trusted.

The trial court should have suppressed the evidence due to a faulty chain of custody. No trial should have occurred in this action with the flimsy testimony offered in support of the evidence at the pre-trial hearings. And on direct appeal, the Court of Appeals focused on a ten-minute gap of time when in actuality the problem is that it unknown who discovered the evidence to begin with, and who recovered the evidence. Without proper foundation to ensure its integrity, the admission of all the evidence violated Mr. Brumley's right to due process of law under the state and federal constitutions. 5th, 6th, and 14th Amendments, U.S. Constitution; §§ 2, 7, 11, 17, Ky. Constitution. This case must be dismissed.

CONCLUSION

For the foregoing reasons, Randy Brumley respectfully requests that this Court vacate his convictions and sentence, or grant him any other appropriate relief to which he may appear to be entitled.

RESPECTFULLY SUBMITTED,


EMILY HOLT RHORER

APPENDIX

Tab Number	Item Description	Record Location
1	Final Judgment	TR. 139-142
2	<i>Brumley v. Commonwealth</i> , Opinion Affirming Kentucky Court of Appeals 2010-CA-001617	N/A