

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

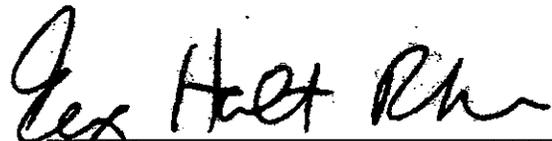
REPLY BRIEF FOR MOVANT RANDY BRUMLEY

EMILY HOLT RHORER
ASSISTANT PUBLIC ADVOCATE
DEPT. OF PUBLIC ADVOCACY
100 FAIR OAKS LANE, SUITE 302
FRANKFORT, KY 40601

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Reply Brief for Movant has been mailed, postage prepaid, to: Hon. David Williams, Clinton Circuit Court Judge, P.O. Box 660, Burkesville, Kentucky 42717; 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 April 30, 2013. The record was not checked out in preparation of this Reply Brief.


Emily Holt Rhorer

STATEMENT OF POINTS AND AUTHORITES

STATEMENT OF POINTS AND AUTHORITES..... i

PURPOSE..... ii

ARGUMENT..... 1

1. NO SUBSTANTIAL EVIDENCE TO SUPPORT FINDING OF FACT THAT THERE WAS INFORMATION MR. BRUMLEY HAD GUNS..... 1

King v. Commonwealth, 386 S.W.3d 119 (Ky. 2012)
cert. denied, 2013 WL 1704747 (U.S. Apr. 22, 2013)..... 1

U.S. v. Lyons, 687 F.3d 754 (6th Cir. 2012) passim

U.S. v. Hensley, 469 U.S. 221 (1985)..... 3, 4

2. PROTECTIVE SWEEP EXCEPTION DOES NOT APPLY. 4

Guzman v. Commonwealth, 375 S.W.3d 805 (Ky. 2012)..... 4

Maryland v. Buie, 494 U.S. 325 (1990)..... passim

U.S. v. Colbert, 76 F.3d 773 (6th Cir. 1996) passim

U.S. v. Chaves, 169 F.3d 687, 692 (11th Cir. 1999), *cert. denied* 528 U.S. 1048 (1999)... 6

U.S. v. Archibald, 589 F.3d 289, 299 (6th Cir. 2009) 6

U.S. Const. Amend. IV 7

3. EXIGENT CIRCUMSTANCES DID NOT SUPPORT ENTRY INTO TRAILER. 7

Moore v. Commonwealth, 159 S.W.3d 325 (Ky. 2005)..... 7

4. INSUFFICIENT EVIDENCE OF CHAIN OF CUSTODY..... 8

5. SUPPRESSION OF THE EVIDENCE IS REQUIRED. 10

CONCLUSION 10

PURPOSE

The purpose of this reply brief is to respond to the Appellee's arguments that require a response. The failure to address a particular issue should not be taken as a reflection that Appellant believes the issue has no merit or less merit than issues that have been addressed in this reply brief.

ARGUMENT

1. NO SUBSTANTIAL EVIDENCE TO SUPPORT FINDING OF FACT THAT THERE WAS INFORMATION MR. BRUMLEY HAD GUNS.

The trial court found exigent circumstances existed because of the sound heard from the trailer “coupled with the information given to officers that Mr. Brumley had a long gun and handgun.” Supplemental Videotape: 11/24/09; 12:35:50. Similarly the Court of Appeals stated “[t]he officers had received information that guns were in the residence.” Slip Op., 4.

Appellee repeatedly states that this evidence was “uncontroverted.” Appellee’s Brief, 7, 8. Four witnesses testified at the suppression hearing—Sheriff Ricky Riddle, KSP Trooper Tracy Haines, Clinton County Sheriff’s Deputy Josh Asberry, and KSP Trooper David Long. Yet only Trooper Haines testified that she had heard that Mr. Brumley might have guns. She believed she heard this from either a Wayne County deputy or a drug task force person, neither who testified at the hearing despite a Wayne County deputy having been subpoenaed (Deputy Jerry Coffey failed to show up for the hearing). Supplemental Videotape: 11/24/09; 11:59:12.

The Appellee criticizes the defense for not cross-examining witnesses other than Trooper Haines about knowledge of firearms, or calling its own witnesses at the suppression hearing. Appellee’s Brief 7, 8. It is elementary “[t]he Commonwealth carries the burden to demonstrate that the warrantless entry falls within a recognized exception to the warrant requirement.” King v. Commonwealth, 386 S.W.3d 119, 122 (Ky. 2012) cert. denied, 12-140, 2013 WL 1704747 (U.S. Apr. 22, 2013). Presumably the Commonwealth knew what its witnesses would testify to, and if Sheriff Riddle or

Trooper Long did have knowledge of Mr. Brumley keeping guns, the witnesses would have been questioned about this.

Appellee states “Brumley spins” Deputy Asberry’s testimony about guns, and argues “[n]either the question nor the answer constitutes an affirmative statement against receiving information about guns.” Appellee’s Brief 8-9. Appellee quotes what Deputy Asberry testified to, and the Deputy was asked if he was “privy to any other information about Mr. Brumley or danger, any danger prior to his being placed under arrest,” and the Deputy said no. What could the Commonwealth Attorney possibly be referring to other than guns? And really this statement is more revealing than if Asberry had been asked, “did you know Brumley might have guns,” since what Asberry essentially testified was that approaching the trailer that night, he had not been given any information to cause him to *fear* the Appellant.

Appellee states the fact Asberry was “not [] given the information that the other officers possessed does not change the fact that the other officers—the ones who made entry into Brumley’s residence—had the information.” Appellee’s Brief 9. Who are these other officers who had the information? The record only reflects Trooper Haines had this information. If another officer had this information, he or she should have been called to testify at the suppression hearing.

The “collective knowledge” cases cited by the Appellee can be distinguished from the case at bar. In U.S. v. Lyons, 687 F.3d 754 (6th Cir. 2012), a huge DEA investigation into a multi-state prescription drug ring and allegations of Medicare fraud was underway. A residence that had been turned into a doctor’s office was under surveillance by the DEA. Wiretaps were also utilized, and on the day in question, DEA agents overheard a

call in which the “office manager,” Young, asked a doctor, Williams, if he was accepting any visitors that day. Based on what agents overheard, they notified the surveillance team that they could expect a female, later determined to be Ms. Lyons, driving a gray vehicle with out-of-state plates to arrive at the house, and soon a gray minivan with Alabama plates pulled into the driveway. *Id.*, 760. The gray minivan and a car driven by Williams were unobservable for a period of time as they pulled far into the driveway. The minivan then drove off. DEA agents decided to have the Michigan State Police effect a traffic stop of Ms. Lyons’ minivan, and an agent, Graber, “provided the troopers with a description of the minivan, its plate number, and its driver. According to Agent Graber’s suppression hearing testimony, he also gave the troopers ‘limited, but substantial’ details regarding the DEA’s investigation into QRMP and the basic facts leading the DEA to believe narcotics would be found in the minivan.” *Id.*

The 6th Circuit found the DEA had reasonable suspicion of criminal activity, and this could be imputed to the state troopers actually effecting the stop under the “collective knowledge” doctrine:

Whether conveyed by police bulletin or dispatch, direct communication or indirect communication, the collective knowledge doctrine may apply whenever a responding officer executes a stop at the request of an officer who possesses the facts necessary to establish reasonable suspicion. By imputing the investigating officer’s suspicions onto the responding officer, without requiring the responding officer to independently weigh the reasonable suspicion analysis, the collective knowledge doctrine ‘preserves the propriety of the stop’ and avoids crippling restrictions on our law enforcement.

Lyons, 766 (citations omitted). Similarly the other case cited by the Appellee, U.S. v. Hensley, 469 U.S. 221 (1985), involves the question of whether one police agency can

rely on a bulletin issued by another police agency that an individual is wanted on suspicion of committing a felony.

Both Hensley and Lyons illustrate the “collective knowledge” doctrine is simply inapplicable to the situation at bar. This case does not involve the question of whether a traffic stop was valid and if there was probable cause because the Clinton County Sheriff’s Department stopped a car driven by Brumley at the request of the FBI. Or the issue of whether the Clinton County Sheriff’s Department could arrest Brumley because a deputy saw a “wanted” flyer issued by the Somerset Police Department. The focus here is on whether there were exigent circumstances to support warrantless entry into Mr. Brumley’s trailer because of “information” he had guns.

2. PROTECTIVE SWEEP EXCEPTION DOES NOT APPLY.

The Appellee argues that the protective sweep exception recognized by this Court in Guzman v. Commonwealth, 375 S.W.3d 805 (Ky. 2012), applies to this case so the “higher standard” of probable cause and exigent circumstances need not even be considered, despite the fact that the latter was the theory the trial court and Court of Appeals considered. Appellee’s Brief 12.

The protective sweep exception has also been referred to as “the warrants exception.” It was established in Maryland v. Buie, 494 U.S. 325 (1990), and provides that when executing an arrest:

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. Beyond that, however, we hold that there must be articulable facts which, 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., 334. The Appellee argues that in the case at bar the second type of protective sweep applies. Appellee's Brief, 16.

There were no articulable facts that would warrant a reasonably prudent officer in believing the area to be swept harbored an individual posing a danger to those on the arrest scene. It is important that Mr. Brumley was arrested outside the trailer, and he was in custody, being searched when the officers decided to "sweep" the trailer. Courts confronted with arrests made outside the home have held that "the fact that the arrest takes place outside rather than inside the home affects only the inquiry into whether the officers have a reasonable articulable suspicion that a protective sweep is necessary by reason of a safety threat." U.S. v. Colbert, 76 F.3d 773, 776-777 (6th Cir. 1996). In Colbert, in fact, the Court held that a protective sweep was unconstitutional because there was no evidence that the officers were in danger from an attack from a third-party:

[The district court] considered factors irrelevant to the inquiry into whether the police had a reasonable suspicion of danger which would support the protective sweep conducted here. The district court stressed that 'Mr. Colbert was on escape status at the time, he was wanted for murder, he was under investigation for possible involvement in drug trafficking.' These facts, however, are not appropriate facts to consider when determining whether the arresting officers reasonably believed that someone else inside the house might pose a danger to them. The facts upon which officers may justify a Buie protective sweep are those facts giving rise to a suspicion of danger from attack by a third party during the arrest, not the dangerousness of the arrested individual.

Id., 777. The Court rejected the claim that the fact Colbert's girlfriend ran out of the house in a "frantic and upset manner," Id., 77, as well as the fact that there was *no* information that anyone was in the house justified a protective sweep. "Lack of information cannot provide an articulable basis upon which to justify a protective sweep. . . In fact, allowing the police to conduct protective sweeps whenever they do not know

whether anyone else is inside a home creates an incentive for the police to stay ignorant as to whether or not anyone else is inside a house in order to conduct a protective sweep. Finally, and perhaps most importantly, allowing the police to justify a protective sweep on the ground that they had no information at all is directly contrary to the Supreme Court's explicit command in Buie that the police have an articulable basis on which to support their reasonable suspicion of danger from inside the home. 'No information' cannot be an articulable basis for a sweep that requires information to justify it in the first place." Colbert, 778.

Since Mr. Brumley was in custody and was arrested outside his trailer, this Court should focus on whether the officers had an articulable basis on which to support the reasonable suspicion of danger inside the home. The crux of the query is whether a reasonable officer would believe that another individual who posed a danger to the officers was inside the home. U.S. v. Chaves, 169 F.3d 687, 692 (11th Cir. 1999), *cert. denied* 528 U.S. 1048 (1999). Here, there was no evidence that anyone posing a threat to the officers was in the trailer. All the trial court was confronted with was that one officer heard Mr. Brumley might have guns, and there was a "rustling" that turned out to be a dog. This is not a case where it was known that other individuals inhabited the trailer, or there was evidence that the officers suspected Mr. Brumley had been holed up in the trailer with a third-party. There was no evidence that the officers had any information about the presence of a third-party whatsoever, much less a dangerous third-party. *See* U.S. v. Archibald, 589 F.3d 289, 299 (6th Cir. 2009). Again, "[i]n order to justify the protective sweep, the government bore the burden of providing sufficient facts to the district court to support a reasonable belief that a third party was present in Archibald's

home who 'pos[ed] a danger to those on the arrest scene.' *Id.*, quoting *Buie*, 494 U.S. at 334.

The *Buie* Court emphasized that a sweep should not “in any event no longer than it takes to complete the arrest and depart the premises.” *Buie*, 494 U.S. at 336. Since Mr. Brumley was outside the house and in custody when the officers entered the home, the amount of time was minimal. Certainly officers deserve, and often need, to be protected when executing felony warrants, but in the case at bar the officers were not presented with evidence justifying a protective sweep. Appellant is not “debas[ing]” police officers as Appellee states, Appellee’s Brief, 25, by asking this Court to hold officers accountable to the Fourth Amendment. As the *Colbert* Court stated, “Finally, we recognize that police officers have an incredibly difficult and dangerous task and are placed in life threatening situations on a regular basis. It would perhaps reduce the danger inherent in the job if we allowed the police to do whatever they felt necessary, whenever they needed to do it, in whatever manner required, in every situation in which they must act. However, there is a Fourth Amendment to the Constitution which necessarily forecloses this possibility. As long as it is in existence, police must carry out their often dangerous duties according to certain prescribed procedures, one of which has been transgressed here.” *Colbert*, 778.

3. EXIGENT CIRCUMSTANCES DID NOT SUPPORT ENTRY INTO TRAILER.

As to probable cause, Appellee states “[h]ere, probable cause existed to believe that the officers would be shot by someone inside the residence.” Appellee’s Brief 22. From what facts can a “fair probability,” *Moore v. Commonwealth*, 159 S.W.3d 325, 329 (Ky. 2005), of officers being shot be established, when the only evidence of guns came

from one person, Haines, who heard from someone else whose identity is still unknown, that Mr. Brumley had guns. The Appellee states the problem is that the guns were unaccounted for even though Mr. Brumley was outside the residence. Appellee's Brief 23. Yet there was no evidence that anyone was inside the trailer with the guns other than a rustling noise which turned out to be a dog. This does not establish probable cause. Appellant states that Mr. Brumley's reading of the probable cause requirement would require police officers or citizens to "become actual—not probable—human targets before probable cause is found." Appellee's Brief 24. What about just requiring knowledge that guns are actually in the residence based on more than just hearsay from one officer; knowledge that someone actually is in the residence; or a sound more than "rustling"?

Appellant does not disagree with Appellee that danger to officers' lives are an exigent circumstance, Appellee's Brief, 25-26, but Appellant does not believe the totality of the circumstances demonstrated such a danger existed in this particular case.

4. INSUFFICIENT EVIDENCE OF CHAIN OF CUSTODY.

First, it should be noted that the Appellee argued to the Court of Appeals that this issue was unpreserved, but the Court correctly decided to review the merits of the issue because it was the subject of a suppression hearing. Slip Op., 4.

Here is the problem—there is no evidence of who found the items. This might not be a problem if a limited number of officers were at the scene that night, and it was known who they were, but that is not the case here. The identity of the officers at the scene other than Riddle, Long, Haines, Asberry, and perhaps Wayne County Deputy "Jerry Coffey" is unknown. Having put the Commonwealth on notice that he was

contesting the chain of custody, it was critical that there be testimony that X person was the one who saw the “stuff” in the open stove, Supplemental CD: 7/16/10; 10:27:30; who looked in the kitchen cabinets and saw items; who searched the kitchen trash; and who discovered the items in the living room. Id., 10:29:16-10:40:00.

The facts in this case are not as clear cut as Appellee would have one believe. At the first suppression hearing (the one dealing with Mr. Brumley’s challenge to entry into the trailer), focusing just on what was testified to as to the recovery of evidence, the following was adduced. Sheriff Riddle was outside when officers effected entry into the trailer and saw items in plain view. Thus, he was not one of the officers who discovered the evidence. Supplemental Videotape: 11/24/09; 11:44:46. He did collect evidence and photograph it after the scene was cleared. Id., 11:45:30. Trooper Tracy Haines believed there were eight officers present at the scene. Id., 11:51:210. She did not see any of the drug evidence; she was focused on searching the trailer for occupants. Id., 12:00:00. She was not involved in the collection of evidence. Id. Deputy Asberry inventoried the evidence from the trailer. Id., 12:04:30. He could not recall if he actually located any of the evidence. Id., 12:11:00. Trooper David Long remained outside the trailer the entire time. Id., 12:13:30.

At the second suppression hearing (the one on the chain of custody), Trooper Haines again testified that she just searched the residence for persons. CD: 3/31/10; 7:10:45. Sheriff Riddle testified that “one officer” noticed the open stove containing items used in the manufacture of methamphetamine. Id., 7:13:48. He said he did the inventory of the items. Id. On cross-examination, he stated he did not know who found

the items. He could not say who made the initial discovery of HCl generators on a stove. Id., 7:25:14. He and his deputy seized the materials. Id., 7:26:00.

Appellant is aware that an unbroken chain of custody is not always necessary. Appellee's Brief, 34. The issue here is that there is no beginning of the chain. To not have any record of who discovered the evidence when entry was made into the trailer is hard to believe. And perhaps this would not be a big deal if only two known, identifiable officers were present, and it could be inferred that one of them must have discovered the items of evidence. However in this case, there was never a clear answer as to what officers were present on the night in question, who went into the trailer, and who discovered what items where.

5. SUPPRESSION OF THE EVIDENCE IS REQUIRED.

The evidence discovered in the trailer must be suppressed either because of the warrantless search or the problem with the chain of custody. Appellee is correct that the paraphernalia charge, based on items found on Brumley's person, might still stand. Appellee's Brief 30.

CONCLUSION

For the reasons stated in both the original brief and this reply brief, this Court should order the evidence discovered in the trailer be suppressed, or grant him any other relief to which he may appear entitled.

RESPECTFULLY SUBMITTED,

EMILY HOLT RHORER

