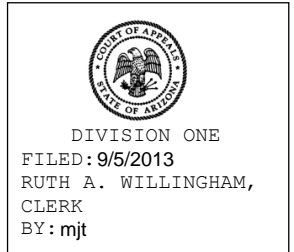


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 12-0017
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
LACRISHA KENDRICK,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-110475-001

The Honorable Paul J. McMurdie, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Lacrisha Kendrick ("Kendrick") appeals her convictions for possession of narcotics for sale, possession or use of dangerous drugs, possession of marijuana for sale, misconduct

involving weapons, and possession of drug paraphernalia, arguing that the trial court abused its discretion in denying her motion to suppress evidence. For reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶12 Police and probation officers drove to a house to arrest "S.J." for violating probation; it had been the last known address the probation officers had for S.J.¹ As the officers approached the house, a man standing in the front yard ignored their greeting, hurried inside, and locked the security door behind him. The officers knocked on the door and announced they were probation and patrol officers. During the ten minute wait before someone opened the door, the officers heard "a lot of commotion" inside; people moving about, glasses clinking, and a toilet flushing several times.

¶13 Kendrick opened the door and said that she was not on probation. When asked who else was in the residence, Kendrick stated that she did not know. The officers requested that everybody inside exit the residence. Four people walked out, including Kendrick and the man originally seen running inside the house.

¶14 The officers then conducted a protective sweep of the residence to search for S.J. and anyone else inside who might

¹ S.J. had listed the address with her probation officer. S.J., however, had moved but had not notified her probation officer of the move or her new address.

pose a danger. During the sweep, the officers did not find S.J. or anyone else, but saw drugs and drug paraphernalia in plain view. The officers used this information to obtain a search warrant, and during the subsequent search found and seized drugs, drug paraphernalia, and weapons.

¶15 Kendrick was indicted on eight counts of drug-related charges and weapon misconduct. Kendrick moved to suppress the evidence seized from her home, arguing that the protective sweep leading to the search of her home was illegal. At the evidentiary hearing, officers testified that they performed the protective sweep because they suspected S.J. may have been hiding inside. Their suspicion stemmed from: (1) the man's mysterious flight inside, (2) the commotion they heard while delayed outside the door, (3) Kendrick's statement that she did not know who else was inside, and (4) their belief that S.J. was the home's lessee. The court denied the motion to suppress, finding that the officers' testimony had "provided a reasonable basis for the officers to believe that [S.J.] (and perhaps others) could have remained in the residence either to avoid contact with the police or to compromise officer safety."

¶16 Kendrick waived her right to a jury trial. After a bench trial, she was convicted of possession for sale of narcotic drugs, possession or use of dangerous drugs, possession of marijuana for sale, misconduct involving weapons, and

possession of drug paraphernalia. Kendrick was sentenced to concurrent sentences of 3.5 years' incarceration with 52 days' presentence incarceration credit. Kendrick filed a timely notice of appeal. This Court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A)(3) (2010).²

ISSUES AND STANDARD OF REVIEW

¶17 Kendrick argues that the trial court erred by denying her motion to suppress evidence. Specifically, she contends that the officers' protective sweep violated her constitutional protections against the warrantless search of her residence and subsequent seizure of evidence therefrom. She also argues that the sweep was a pretext for the search.

¶18 In reviewing an order denying a motion to suppress, we consider only evidence from the suppression hearing, see *State v. Aguilar*, 228 Ariz. 401, 401, ¶ 2, 267 P.3d 1193, 1193 (App. 2011), and view this evidence in the light most favorable to upholding the ruling, see *State v. Rodriguez*, 205 Ariz. 392, 402, ¶ 34, 71 P.3d 919, 929 (App. 2003). Moreover, in reviewing the ruling, "we evaluate discretionary issues for an abuse of discretion but review legal and constitutional issues de novo."

² We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

State v. Huerta, 223 Ariz. 424, 426, ¶ 4, 224 P.3d 240, 242 (App. 2010).

DISCUSSION

¶9 The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures.³ See U.S. Const. amend. IV. Police generally may not search a home or seize evidence without a warrant “unless the government demonstrates that [the circumstances] fall within certain established and well-defined exceptions to the warrant clause.” *United States v. Murphy*, 516 F.3d 1117, 1120 (9th Cir. 2008) (internal quotation marks and citation omitted); see also *State v. Fisher*, 226 Ariz. 563, 565, ¶ 7, 250 P.3d 1192, 1194 (2011) (“[B]ecause the touchstone of the Fourth Amendment is reasonableness, the Supreme Court has recognized several exceptions to the warrant requirement.” (internal punctuation marks and citation omitted)).

¶10 One exception to the warrant requirement is the protective sweep, first recognized by the United States Supreme Court in *Maryland v. Buie*, 494 U.S. 325, 327 (1990), and

³ Although Kendrick argues that the search of her home and seizure of evidence therefrom violates both the Fourth Amendment and its counterpart provision in Article 2, Section 8, of the Arizona Constitution, she presented no separate arguments based on the state constitutional provision. We therefore address her claim only under the United States Constitution. *State v. Dean*, 206 Ariz. 158, 161 n.1, ¶ 8, 76 P.3d 429, 432 n.1 (2003) (citing *State v. Nunez*, 167 Ariz. 272, 274 n.2, 806 P.2d 861, 863 n.2 (1991)).

discussed by our supreme court in *Fisher*, 226 Ariz. at 565, ¶ 8, 250 P.3d at 1194. A protective sweep is a search of an area near where an arrest may be made "as a precautionary matter and without probable cause or reasonable suspicion," so that the police can act without fear that they may be attacked. *Buie*, 404 U.S. at 334. A sweep of a nearby residence is permissible, however, "only if the officers have a reasonable belief supported by 'specific and articulable facts' that a home 'harbor[s] an individual posing a danger to the officers or others.'" *Fisher*, 226 Ariz. at 566, ¶ 12, 250 P.3d at 1195 (quoting *Buie*, 404 U.S. at 327). Moreover, protective sweeps are allowed because society has a "legitimate and weighty" interest in officer safety. *Arizona v. Johnson*, 555 U.S. 331, 324 (2009) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977)).

¶11 In *Fisher*, the Arizona Supreme Court held that a protective sweep to find a gun was an unreasonable search because the officers failed to "articulate specific facts to establish a reasonable belief that someone might be in the apartment."⁴ 226 Ariz. at 567, ¶ 15, 250 P.3d at 1196. Specifically, the officers already had the person they sought

⁴ In *Fisher*, the Arizona Supreme Court assumed, but did not decide, that protective sweeps are also authorized "when a suspect is detained and questioned but not yet arrested outside of a residence." *Fisher*, 226 Ariz. at 566, ¶ 10, 250 P.3d at 1195.

(who was also the residential lessee) detained outside; three people had exited the apartment; the police did not ask whether anyone else was inside; all residents were cooperative and there was no other evidence, such as noises from within, that anyone else might be inside. *Id.* at 564-65, ¶¶ 2-4, 250 P.3d at 1193-94. As a result, the court stated that the police could not "conduct protective sweeps based on mere speculation or the general risk inherent in all police work." *Id.* at 567, ¶ 15, 250 P.3d at 1196.

¶12 Here, in contrast, the officers articulated specific facts that led them to reasonably believe someone was still in the house when they conducted the protective sweep. Their suspicions were first alerted when the man in the front yard saw them, ignored their greetings, bolted into the home and locked the door behind him. They knocked and then had to wait for a lengthy time period given that someone had just entered the house. While waiting, they heard what sounded like many people hurriedly moving about inside. When Kendrick finally answered the door, and was asked who else was inside the residence, she responded that she did not know. Finally, the officers had not yet located S.J., the probationer, who they believed lived at the house. *See Murphy*, 516 F.3d at 1120-21 (finding a protective sweep valid when officers detained one inhabitant outside a rental unit and conducted a warrantless search within

to find the unit's renter, for whom there was an outstanding arrest warrant); see also *United States v. Taylor*, 248 F.3d 506, 514 (6th Cir. 2001) (approving a protective sweep when officers heard scuffling noises from inside before being admitted into the apartment and suspect's demeanor indicated he was hiding something). Consequently, the trial court did not err by denying the motion to dismiss based on the facts presented at the evidentiary hearing.

¶13 We also reject Kendrick's argument that the protective sweep was invalid because it was a "pretext to search for contraband without a search warrant." The Fourth Amendment applies an objective standard of review to officer conduct, and the protective sweep was proper if the officers had the requisite legal justifications. See *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) ("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify [the] action.'" (emphasis added) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978))). For the reasons

stated above, the officers had an articulated and objective justification for the sweep.

CONCLUSION

¶14 For the foregoing reasons, we affirm.⁵

_____/S/_____
DONN KESSLER, Presiding Judge

CONCURRING:

_____/S/_____
MAURICE PORTLEY, Judge

_____/S/_____
PETER B. SWANN, Judge

⁵ Given our reasoning above, we do not address the State's alternative argument that the search was permissible to prevent the destruction of contraband.