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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



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STATE OF ARIZONA, ) No. 1 CA-CR 09-0046  
)  
Appellant, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ALBERT LEE MARSHALL, II, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellee. )  
)  
)  
)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-130389-001 DT

The Honorable Sally Schneider Duncan, Judge

**REMANDED**

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Andrew P. Thomas, Maricopa County Attorney Phoenix  
By Arthur G. Hazelton, Jr., Deputy County Attorney  
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By Marc A. Adair  
Attorneys for Appellee

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S W A N N, Judge

¶1 The State appeals from the trial court's order granting Albert Lee Marshall, II's ("Defendant") motion to

suppress evidence. While we conclude that the police officers in this case were justified in making a limited warrantless search of Defendant's residence, we cannot determine on the record before us whether the search conducted was properly limited. We therefore remand.

#### **FACTS AND PROCEDURAL HISTORY**

¶12 The State filed an information charging Defendant with one count of possession of marijuana for sale, a class three felony; one count of possession or use of narcotic drugs, a class four felony; one count of possession of drug paraphernalia, a class six felony; and one count of misconduct involving weapons, a class four felony.

¶13 Before trial, Defendant moved to suppress evidence seized from his residence on March 19 and 20, 2007. Defendant argued that the search warrant pursuant to which the evidence was seized was based on an illegal warrantless search of his residence. The State argued that police officers lawfully entered Defendant's residence under the exigent circumstances exception to the warrant requirement because they reasonably believed that a person within the residence was in need of immediate aid or assistance, and in the course of that lawful search observed in plain view the evidence upon which the search warrant was obtained.

¶14 At the evidentiary hearing on Defendant's motion, the State presented the testimony of Officer Jenson of the Phoenix Police Department. Officer Jenson testified that on the evening of March 19, 2007, he and his partner, Officer Hernandez, responded to a call that there had been a shooting at a residence. When the officers arrived at the residence, Y.M. flagged them down. As Y.M. led the officers to the front door of the residence, he told them only that his cousin had been shot. Officer Jenson described the interaction with Y.M. as a "very quick, very chaotic situation" that lasted only a matter of seconds.

¶15 When the officers arrived at the door, Officer Jenson saw that it was open and saw Defendant lying in blood inside the residence, being tended to by A.B. and T.P. It appeared as though Defendant had been shot. Officer Jenson noticed two or three bullet holes that had penetrated the door and one or two bullet holes in the wall directly across from the door. The holes in the door appeared to have come from inside the residence. Officer Jenson entered the residence into the entryway area where Defendant was lying. He smelled marijuana.

¶16 Officer Jenson asked Defendant who had shot him and Defendant responded that he had gone to answer the doorbell or a knock at the door and had started to open the door when he heard shots, dropped, and realized that he had been shot. At that

point, Officer Jenson testified, "[i]t was unknown [to the officers] as to anything with the situation," including whether the shooter had gone into the house, whether anyone was trying to enter the house through the backyard, or whether additional shots had been fired elsewhere in the residence. Officer Jenson testified that he thought he might have asked A.B. and T.P. what had happened, but they did not answer his question because they appeared worried about Defendant and had a "frantic" demeanor.

¶17 After entering the residence, Officer Jenson called for emergency services. He testified that he was not sure how long it was before emergency medical personnel were on the scene, but stated that he thought "it was probably initially after requesting, probably two minutes, three minutes," because emergency services had staged down the street. But he also estimated that he did not clear the medical personnel for entry based on his determination that the entryway was safe and secure until "[m]aybe three to five minutes" after he arrived at the scene.

¶18 Officer Jenson testified that "shortly after" he and Officer Hernandez arrived at the scene, Officer McKim arrived. Officer Jenson testified that he did not recall, but thought that Officer McKim arrived at about the same time as the emergency medical personnel. Officer McKim, perhaps accompanied by Officer Hernandez, began a sweep of the residence to verify

whether suspects, children, or additional victims were inside the residence. As the residence was swept, the emergency medical personnel tended to Defendant in the entryway.

¶19 The medical personnel's arrival had forced Officer Jenson to move further into the residence. He looked over his shoulder into the kitchen, which was visible from where Defendant was lying, and saw a handgun on the kitchen counter. According to Officer Jenson, no one had told him anything about whether Defendant had a gun. The gun was loaded, and Officer Jenson took custody of it.

¶10 Officer Hernandez had already exited the residence when the officer acting as the on-scene supervisor, who had since arrived at the scene, called Officer McKim outside to help interview a gathering of civilians. As Officer McKim exited the residence, he told Officer Jenson that he had not completed the sweep and a back bedroom still needed to be checked. After the emergency medical personnel removed Defendant from the residence, Officer Jenson, who was the only officer remaining in the residence, went to the back bedroom to complete the sweep. He estimated that approximately ten minutes had passed between his arrival at the scene and his completion of the sweep.

¶11 To complete the sweep, Officer Jenson entered the open door to the back bedroom and looked into an open walk-in closet. Inside the closet, he saw in plain view a large clear plastic

bag that appeared to contain marijuana. He did not take the bag, but reported it to the on-scene supervisor. A search warrant was subsequently obtained and executed, leading to the discovery of additional contraband.<sup>1</sup>

¶12 After presenting Officer Jenson's testimony, the State rested. Defendant called Y.M., A.B., and T.P. to testify. Their testimony established that Y.M. and A.B. were inside the residence when Defendant was shot, and T.P. arrived a short time later with her husband.

¶13 Y.M. testified that after Defendant was shot, he called 911 and told the operator that Defendant had been shot and the shooter had fled. When Officers Jenson and Hernandez arrived, Y.M. told them that no one else was in the residence and that there was a gun by Defendant in the hallway. A.B. testified that she also called 911 and told the operator that Defendant had been shot through the door, and told Officers Jenson and Hernandez upon their arrival that she, Y.M., and Defendant were the only people there.<sup>2</sup> T.P. similarly testified that she told Officers Jenson and Hernandez that no one else was in the residence.

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<sup>1</sup> The State concedes that the warrant was premised on Officer Jenson's observation of the bag of marijuana.

<sup>2</sup> It is undisputed that T.P. was also present when the officers arrived.

¶14 All three witnesses further testified that they saw officers take custody of a gun that was beside Defendant in the entryway. Y.M. and A.B. testified that they never saw an officer recover a gun from the kitchen,<sup>3</sup> and all three witnesses agreed that the kitchen, or at least the kitchen counter, was not visible from where Defendant was lying.

¶15 The court found that the police officers lawfully entered the residence because "[t]hey responded to a call" and "ha[d] a bleeding person on the floor." Regarding the sweep of the residence, the court found that "there weren't exigent circumstances," and stated that the only question was "whether or not an arrest has to be a predicate to a protective sweep." The court recessed the matter for supplemental briefing on that issue only.

¶16 When the hearing continued, the court indicated that it had considered the briefing and reviewed additional cases, and ruled that the sweep was invalid. The court explained:

I think that there are not adequate articulable suspicions and facts to support what happened here, and the reason for that is as follows: The officers got to the scene. The defendant was bleeding and there were two other occupants of the residence who reported that there was no one else present. Then other family members and/or friends arrived, two more people, before the police arrived, and there was basically an independent, corroborated consensus that

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<sup>3</sup> T.P. was not asked whether she ever saw officers recover a gun from the kitchen.

no one else was present. And I don't find that there was a basis for the extent of the sweep that occurred.

. . . .

[A]nd I understand the need to secure a scene, but the scene could have been secured without having gone through all of the premises, and I don't see any reason to believe that there were victims present, perpetrators present or witnesses present other than those who were identified based on the record that exists. And so I don't find a basis for the sweep

. . . .

. . . .

There's no evidence of anybody ever even entering the home. This was a doorway shooting. Other people who were deeper in the interior of the home did not identify any intruder into the house. So beyond the shooting at the doorway, there was no breach of that household or no evidence that anybody else had entered the home. And while a violent act had taken place at the entry of the home, you have people telling the officers no one else is there.

. . . .

I had some understanding and I appreciate the policy reasons articulated by the State, but I think the case law is otherwise now that I've studied the case law. And I don't think that there were, when I reflected on the testimony, articulable independent reasons for this protective sweep to have taken place the way it did. . . . I'm going to suppress.

¶17 Counsel for both parties were given an opportunity to comment on the ruling for the record. Defense counsel stated that in his view, a protective sweep was prohibited simply because such a sweep may be conducted only incident to an arrest. For this argument, counsel relied on *Maryland v. Buie*, 494 U.S. 325 (2000), but acknowledged that the scope of the rule



announced in *Buie* is the source of a federal circuit split and no Arizona case has addressed the issue. The court responded:

I do not think that a protective sweep necessarily has to be incident to an arrest. I think there would have to be articulable reasons, though, for the intrusion. Incident to an arrest is one. But I think if there was evidence of a perpetrator in that home or another witness in that home or a potential victim in that home that the officers would have been permitted to go through that residence. But those are not [the] facts before me.

¶18 The court filed a minute entry granting Defendant's motion to suppress "[b]ased on the evidence and arguments presented and for the reasons stated on the record," and the State timely appealed. We have jurisdiction under Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4032(6) (Supp. 2009).<sup>4</sup>

¶19 The State subsequently filed a motion to dismiss the charges against Defendant without prejudice, and that motion was granted. Defendant does not argue on appeal that we lack jurisdiction to decide the suppression issue.

#### DISCUSSION

¶20 We review the trial court's ruling on a motion to suppress evidence for a clear abuse of discretion. *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996).

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<sup>4</sup> We cite to the current versions of statutes when no revisions material to our decision have occurred since the relevant time.

"We look only to the evidence presented at the suppression hearing, and we view the facts in the light most favorable to upholding the trial court's ruling." *State v. Moore*, 183 Ariz. 183, 186, 901 P.2d 1213, 1216 (App. 1995) (citations omitted). "[W]e defer to the trial court's factual findings, including findings on credibility and [on] the reasonableness of the inferences drawn by the officer, but we review de novo mixed questions of law and fact and the trial court's ultimate legal conclusion[]" whether a search was lawful. *State v. Teagle*, 217 Ariz. 17, 22, ¶ 19, 170 P.3d 266, 271 (App. 2007) (citations omitted).

¶21 A warrantless search of a residence is unlawful under the Fourth Amendment of the United States Constitution unless an established exception to the warrant requirement applies. *State v. Fisher*, 141 Ariz. 227, 237, 686 P.2d 750, 760 (1984). It is the State's burden to show that an exception applies. *Id.*; see also Ariz. R. Crim. P. 16.2(b).

#### **I. Implicit Consent Exception**

¶22 The State argues for the first time on appeal that the officers' search of Defendant's residence was lawful because it was a routine investigation of the crime, to which Defendant implicitly consented.

¶23 It is settled law that a criminal defendant who fails to raise an argument or objection at trial may nonetheless

obtain fundamental error review on appeal. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) ("A defendant who fails to object at trial forfeits the right to obtain appellate relief except in those rare cases that involve 'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984))). But the right to fundamental error review has never been extended to the State. Because the State did not advance this argument in its response to Defendant's motion to suppress or at the suppression hearing, we do not address it here.

## **II. Emergency Aid Exception**

¶24 "The emergency aid exception to the warrant requirement . . . provides that officers of the state may enter a dwelling without the benefit of a warrant where they reasonably believe there is someone within in need of immediate aid or assistance."<sup>5</sup> *Fisher*, 141 Ariz. at 237, 686 P.2d at 760.

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<sup>5</sup> In Arizona, the emergency aid exception is distinct from the exigent circumstances exception. "Though both doctrines could justify a warrantless entry in a given factual setting, the nature of the circumstances that prompt the entry and the presence or absence of probable cause sufficient to obtain a search warrant determine which doctrine will apply." *Fisher*, 141 Ariz. at 240, 686 P.2d at 763. Unlike the exigent circumstances exception, the emergency aid exception does not

In *Fisher*, the Arizona Supreme Court set forth three basic facts that a court is required to find to uphold a search under the emergency aid exception: (1) the officers had reasonable grounds to believe that an emergency existed and required their immediate assistance to protect life or property; (2) the search was not primarily motivated by the intent to arrest and seize evidence; and (3) there was a reasonable basis, approximating probable cause, to associate the emergency with the area searched. *Id.* at 237-38, 686 P.2d at 760-61. Since *Fisher*, the United States Supreme Court has made clear that police officers' subjective motivations are irrelevant in the Fourth Amendment context. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006). The touchstone is "reasonableness," evaluated under an objective standard. *Id.*

¶25 Of necessity, the physical and temporal limitations of a search conducted pursuant to the emergency aid exception have not been defined with geometric precision. As a general matter, "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" *Fisher*, 141 Ariz. at 239, 686 P.2d at 762 (quoting *Terry v. Ohio*, 392 U.S. 1, 26 (1968)). In *State v. Jones*, our supreme court upheld an

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require probable cause which would justify a search warrant, and the justification for the exception is rooted in the need to ensure public safety rather than the need to preserve evidence. *Id.*

emergency-aid search of a trailer that lasted "about ninety seconds, just long enough to determine that the children [whose welfare was in question] were not present." 188 Ariz. 388, 396, 937 P.2d 310, 318 (1997). And in *Mazen v. Seidel*, our supreme court characterized searches conducted in response to fires or medical emergencies as "protective sweeps." 189 Ariz. 195, 197, 940 P.2d 923, 925 (1997) (emphasis added).

¶26 Logically, a search conducted for the purpose of locating persons who may be in need of immediate life-saving assistance is limited to "a cursory inspection of those spaces where a person may be found" and can "last[] no longer than is necessary to dispel" the officers' reasonable concerns. *Buie*, 494 U.S. at 335-36 (limiting the scope of "protective sweep" searches conducted for the purpose of protecting the safety of officers and others).

¶27 Here, the court found that the officers' entry of Defendant's residence was lawful because "[t]hey responded to a call" and "ha[d] a bleeding person on the floor."

¶28 Here, the officers responded to the scene of a violent crime. They found Defendant shot and bleeding inside his residence. There were bullet holes in the door and wall. A loaded gun was lawfully recovered from inside the residence. We have no difficulty in these circumstances concluding as a matter of law that the warrantless entry was justified under the

emergency aid exception, and that the exception justified an appropriately limited search of the entire residence for additional victims.

¶29 The trial court noted that persons present at the scene told the officers that no one else was in the residence. We attribute no legal significance to these on-the-scene witness statements and believe the officers would have been remiss had they failed to secure the scene in reliance on such statements. *Cf. Graham v. Connor*, 490 U.S. 386, 396-97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving . . . .") (discussing the Fourth Amendment reasonableness requirement in excessive force cases).

¶30 From the transcript of the hearing, it is difficult to discern whether the trial court rejected the legal propriety of the entire search - the so-called "protective sweep" - or whether the court merely objected to its parameters.<sup>6</sup> From the

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<sup>6</sup> The court stated that it did not find a basis for the "extent of the sweep that occurred," and stated that "the scene could have been secured without having gone through all of the premises" and there were not adequate articulable reasons for the sweep "to have taken place the way it did." But the court also stated, relying heavily on its finding that the officers were informed by witnesses that no one else was in the residence, that it did not find a basis for "the sweep." From this, it could be inferred that the court concluded no sweep of any extent was justified.

court's comments, we understand that it may have been concerned that the duration and scope of the search exceeded that justified under the emergency aid exception. We share that concern, but cannot adequately evaluate it on this record.

¶131 Officer Jenson estimated that approximately ten minutes elapsed between the police's arrival at the scene and the conclusion of the search. It is unclear from his testimony, however, how long the search actually lasted because it is unclear when Officer McKim initiated the search and how much time he spent searching before Officer Jenson continued and completed the search. That information is critical to the determination whether the search was properly limited, and whether it can objectively be justified as a search for victims.

¶132 We recognize that a *per se* durational limit cannot be placed on a limited search for victims. Factors such as the length of time that elapsed between the officers' arrival and the time the search commenced, the size and layout of a residence, and the presence of locked doors or other impediments to rapid search are all relevant to the determination whether a search for victims inside a residence was confined to its proper scope.

¶133 We remand to permit the trial court to clarify its factual findings and determine whether the search in this case exceeded its proper scope.

### III. Protective Sweep Exception

¶34 Because the protective sweep exception appeared to be a primary focus in the proceedings below, and is also emphasized in the parties' briefs on appeal, we address it briefly here. Under Arizona law, where police officers are lawfully present in a residence and reasonably believe that there is an immediate danger to their safety, they may make a warrantless "protective sweep" of the residence. *State v. Main*, 159 Ariz. 96, 99, 764 P.2d 1155, 1158 (App. 1988). In some circumstances, such a sweep may be lawful even where the officers are lawfully present *outside* of the residence. *State v. Kosman*, 181 Ariz. 487, 491-92, 892 P.2d 207, 211-12 (App. 1995) (where the defendant had been arrested immediately after exiting his residence, if an officer lawfully outside of the residence smelled or believed he smelled burning marijuana emanating from the open door, a protective sweep was justified).

¶35 In *Buie*, the United States Supreme Court held that police officers may conduct a "properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." 494 U.S. at 336. A protective sweep is properly limited to those spaces where a person may be found and "lasts 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 335-36.

¶36 We need not decide whether *Buie* limited its holding to in-home arrest situations. As we have already discussed, under the emergency aid exception the officers were justified in conducting a proper search for victims, the parameters of which are congruent with the parameters of a proper protective sweep.

**CONCLUSION**

¶37 For the reasons set forth above, we remand.

/S/

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PETER B. SWANN, Presiding Judge

CONCURRING:

/S/

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LAWRENCE F. WINTHROP, Judge

/S/

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MICHAEL J. BROWN, Judge