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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 01/24/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0260
) 1 CA-CR 11-0264
Appellee,) 1 CA-CR 11-0265
) (Consolidated)
v.)
) DEPARTMENT D
NORBERT JOSHUA HAMILTON,)
) **MEMORANDUM DECISION**
Appellant.) (Not for Publication -
) Rule 111, Rules of the
) Arizona Supreme Court)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2010-143749-001DT, CR2009-153831-001DT,
CR2009-162526-001DT
(Consolidated)

The Honorable Glenn M. Davis, Judge

REVERSED AND REMANDED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
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B R O W N, Judge

¶1 Norbert Joshua Hamilton appeals from his convictions and resulting sentences for aggravated assault and misconduct involving weapons. Hamilton argues the trial court abused its discretion in denying his motion to suppress evidence seized by police following a protective sweep. Because we conclude that the evidence should have been suppressed, we reverse Hamilton's convictions and sentences and remand to the trial court.

BACKGROUND

¶2 Police officers responded to a radio broadcast of an individual threatening people with a gun near an apartment complex. According to the information received by the officers, the assailant was described as a black male with long hair, wearing a white tank top and yellow basketball shorts. Acting on additional information given to them by a resident of the apartment complex, four of the officers walked to the apartment where the assailant resided. They knocked on the door, but received no answer for several minutes. During that time, Officer Main looked over a wall and could see part of someone's leg and shoe through the back sliding door. After approximately five minutes, Hamilton answered the door. In response to a question as to what took him so long, he said he was sleeping.

¶3 Hamilton's clothing matched the description the officers had been given and, according to Main, Hamilton's white

shoes matched the shoe the officer had observed through the sliding door. Hamilton had a cell phone in one hand and appeared to be typing on it before he complied with a demand to open the security gate. He was then handcuffed and placed in "investigative detention" approximately six to ten feet outside the front door of the apartment.

¶14 Responding to police questions, Hamilton stated he was alone and that he did not have any weapons. The officers checked him for weapons, but found none. Three officers then entered the apartment to conduct a protective sweep. During their search, Main discovered a handgun in a hole underneath the kitchen sink.

¶15 Hamilton moved to suppress the gun seized during the protective sweep, asserting that the police officers were not justified in conducting the sweep under the standard set forth in *Maryland v. Buie*, 494 U.S. 325, 327 (1990), because they had no reasonable belief there was anyone else in the apartment. Alternatively, Hamilton argued the gun was not in plain view. The State countered that this court's decision in *State v. Fisher (Fisher I)*, 225 Ariz. 258, 236 P.3d 1205 (App. 2010), justified the warrantless entry into the home because the gun allegedly used in the assault was unaccounted for and officers had reasonable suspicion to believe there could be additional

people inside Hamilton's apartment. Following a hearing, the trial court denied Hamilton's motion, reasoning as follows:

Based upon the matters presented, it's clear that the officers in question had caught a person that, at least, matched some of the description, it was appropriate to detain that person. And under the circumstances, given the delay, given that there was somebody with a weapon, and given that, at least to the point they are detaining the defendant, it wasn't - he didn't have the weapon.

The court also found (1) it was reasonable for the officers to search the cabinet under the kitchen sink because the area was large enough for someone to hide in and (2) the gun was in plain view.

¶16 A jury found Hamilton guilty as charged. The trial court then sentenced Hamilton to presumptive, concurrent terms of imprisonment of 7.5 years and 4.5 years, respectively, and this timely appeal followed.

DISCUSSION

¶17 We review the denial of a motion to suppress evidence for an abuse of discretion. *State v. Dean*, 206 Ariz. 158, 161, ¶ 9, 76 P.3d 429, 432 (2003). An abuse of discretion occurs when "no reasonable judge would have reached the same result under the circumstances." *State v. Armstrong*, 208 Ariz. 345,

354, ¶ 40, 93 P.3d 1061, 1070 (2004).¹ We consider only the evidence presented at the suppression hearing, viewing that evidence in the light most favorable to sustaining the trial court's ruling. *State v. Gay*, 214 Ariz. 214, 217, ¶ 4, 150 P.3d 787, 790 (App. 2007). We defer to the court's factual findings, but review de novo the ultimate legal determination against the background of current law. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996).

¶18 The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "Unlawful entry into a home is the 'chief evil' against which the provision protects." *State v. Guillen*, 223 Ariz. 314, 316, ¶ 10, 223 P.3d 658, 660 (2010). Warrantless searches are per se unreasonable unless an exception to the warrant requirement exists. *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception is a protective sweep conducted by police officers in connection with an arrest or investigatory detention. See *Buie*, 494 U.S. at 327.

¹ Reversal under this standard of review does not imply in every case that the trial judge acted unreasonably. In this case, controlling authority was reversed after the court's decision.

¶9 As explained by the Supreme Court in *Buie*, "incident to the arrest the officers [can], 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." *Id.* at 334. However, to justify a broader sweep, "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.* The State does not dispute that the second sweep described under *Buie*, which requires articulable facts supporting a threat to safety, is the type of protective sweep at issue here.

¶10 Based on our supreme court's recent decision in *State v. Fisher (Fisher II)*, 226 Ariz. 563, 250 P.3d 1192 (2011), issued after Hamilton filed this appeal, we hold that the police officers in this case were not justified in conducting the protective sweep of the apartment where Hamilton was found. In *Fisher*, police responded to a call reporting an aggravated assault. *Id.* at 564, ¶ 2, 250 P.2d at 1193. After telling the officers he had been pistol-whipped, the victim described the assailant and directed the officers to an apartment complex where the assailant lived. *Id.* After knocking on the door of an apartment, three people, including the defendant, exited.

Id. at 564-65, ¶ 3, 250 P.2d at 1193-94. All three were cooperative, none had a weapon, and the defendant matched the description of the assailant. *Id.* at 565, ¶ 3, 250 P.2d at 1194.

¶11 Because the gun allegedly used in the assault was still "unaccounted for," the officers conducted a protective sweep while the defendant was detained outside the apartment. *Id.* at ¶4. In doing so, they observed open duffle bags containing marijuana. *Id.* The defendant's subsequent motion to suppress was denied by the trial court, and the defendant was convicted of possession of marijuana. *Id.* at ¶ 5. On appeal, we affirmed, reasoning that because the weapon was unaccounted for and the police gave sufficient reasons for the sweep, "the trial court did not err in determining that the protective sweep was supported by reasonable suspicion." *Id.* (quoting *Fisher I*, 225 Ariz. at 260 ¶ 7, 236 P.3d at 1207).

¶12 Our supreme court disagreed, finding that the protective sweep violated the Fourth Amendment. *Id.* at 564, ¶ 1, 250 P.2d at 1193. Recognizing that "[o]fficers cannot conduct protective sweeps based on mere speculation or the general risk inherent in police work," the court found that the officers had failed to present specific facts indicating that another person was inside the defendant's apartment. *Id.* at 567, ¶ 15, 250 P.3d at 1196. The court explained that "[t]he

common thread among cases interpreting *Buie* is that officers must have specific articulable facts that someone who could pose a safety threat is inside a residence," *Id.* at 566, ¶ 13, 250 P.2d at 1195, and that "lack of information cannot provide an articulable basis upon which to justify a protective sweep." *Id.* at 567, ¶ 14, 250 P.3d at 1196 (quoting *United States v. Gandia*, 424 F.3d 255, 264 (2d Cir. 2005)).

¶13 As our supreme court did in *Fisher II*, we assume without deciding that a protective sweep is permissible when a suspect is under investigative detention outside of a residence and has not yet been arrested. See *id.* at 566, ¶ 10, 250 P.2d at 1195. And, similar to the circumstances in *Fisher*, the officers here did not articulate specific facts indicating there was anyone in the apartment who could pose a safety threat to them. See *id.* at 567, ¶ 15, 250 P.2d at 1196; *Gandia*, 424 F.3d at 264 (requiring more than a lack of information to justify a protective sweep). Main testified that he did not see anyone else in the apartment or hear anything to indicate someone else might be there. He also stated that Hamilton was the person whose leg he saw through the back door. Moreover, Hamilton matched the description of the assailant. Hamilton told the officers he was alone, and, as in *Fisher*, nothing in this record suggests that the officers attempted to determine whether anyone else lived in the apartment. Instead, Main's testimony at the

suppression hearing suggested that protective sweeps of residences are routine practice when there is an unaccounted-for weapon: “[i]n a situation like this where there’s a gun involved and being in an apartment, a house, we check for weapons and any additional people that might be inside.” Officer Zamora testified that the officers conducted the protective sweep because “we didn’t know if someone else was going to come out with a gun or there was someone else hurt inside.” Zamora added that the officers did not know if Hamilton “had kidnapped someone while he was running back or taking someone with him.”

¶14 The State argues that the record “amply supports” the trial court’s ruling. We disagree. The officers presented no specific facts indicating that any other person was in the apartment. In support of its position, the State points to the unaccounted for handgun, the movement Main had observed through the sliding door, and Hamilton’s explanation that he had been sleeping. But none of these facts provide a reasonable basis for concluding another individual was in the apartment. A missing weapon is insufficient unless that information is tied with other facts tending to show another person is in the residence who might use it. *See Fisher II*, 226 Ariz. at 567, ¶ 14, 250 P.2d at 1196 (citing *Gandia*, 424 F.3d at 264). As to the leg and shoe observed by Main, he testified that what he saw matched Hamilton. No other evidence was presented, except that

Zamora testified he did not know if the person Main saw was the same person who came to the door. But the State has not provided us with any authority supporting the notion that Zamora was entitled to enter the apartment on his own belief rather than asking Main, who was standing beside him, whether the person observed through the sliding door was Hamilton. Instead, as the State recognizes in its brief, the reasonableness of a search "is measured by the contemporaneous collective knowledge of police officers working together as a team during their investigation." See, e.g., *United States v. Cooper*, 949 F.2d 737, 745 (5th Cir. 1991); *State v. Keener*, 206 Ariz. 29, 32, ¶ 14, 75 P.3d 119, 122 (App. 2003). Moreover, the trial court gave no indication it was discounting Main's testimony as to what he observed through the sliding door. Similarly, Hamilton's explanation for his delay in answering the door, that he was sleeping, does not reasonably support an inference there was anyone else in the apartment, nor does the State present any authority suggesting otherwise. See *United States v. Archibald*, 589 F.3d 289, 300 (6th Cir. 2009) ("Clearly, *Buie* requires more than ignorance or a constant assumption that more than one person is present in a residence.").

¶15 In sum, because the officers failed to articulate specific facts indicating that someone else who could pose a safety threat was in the apartment, the trial court erred in

finding the protective sweep was proper. Based on our conclusion, we need not address Hamilton's argument that the gun found under the kitchen sink was not in "plain view."

¶16 The State maintains that any error in the admission of the gun seized during the warrantless entry should be found harmless in light of the other evidence of Hamilton's guilt presented at trial. An error is harmless "if the state, in light of all of the evidence, can establish beyond a reasonable doubt that the error did not contribute to or affect the verdict." *State v. Valverde*, 220 Ariz. 582, 585, ¶ 11, 208 P.3d 233, 236 (2009) (citation and internal quotation omitted). "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.* (citations and internal quotations omitted). The State cannot meet its burden here.

¶17 The State argues that the "actual evidentiary value of the handgun was not particularly high." The record, however, reveals that evidence relating to the handgun received considerable attention at trial. Although the State presented testimony from the victim and several witnesses who identified Hamilton both on the scene and at trial as the man who threatened the victim, their recollection of the assault was not

entirely consistent, particularly with regard to the description of the gun. The jury asked several questions about the gun, including whether it was tested for fingerprints. The State's witnesses acknowledged that the gun was not checked for fingerprints or for possible DNA testing. Additionally, Officer Morales, who was only involved in the witness identification of Hamilton, testified that she saw the gun "when one of the officers held it up and said, well, yeah, this is what we *found on him*. That was it." (Emphasis added.)

¶18 Finally, the prosecutor emphasized the fact that a gun was seized during the protective sweep to prove Hamilton's guilt on both the assault and misconduct with weapons counts. During her opening statement, the prosecutor stated that Hamilton "did not count on the fact that the police would find the gun hidden in the apartment." In response to Hamilton's motion for a judgment of acquittal, the prosecutor referenced the gun found in the apartment. During closing argument, the prosecutor asserted that the gun seized was the same gun used to commit the crimes: "So we have everyone ID'ing [Hamilton] as the guy with the gun. Where is the gun found? In an apartment that [Hamilton] says he's sleeping in, that is covered in Bob Marley Jamaican paraphernalia." She later added, "[a]nd [the gun was] found in the apartment where only he was at."

¶19 Under these circumstances, and considering that the use of a weapon is a critical element of both offenses, we cannot say that the guilty verdicts were surely unattributable to the admission of the gun seized from the apartment. See *State v. Wallace*, 219 Ariz. 1, 5, ¶ 21, 191 P.3d 164, 168 (2008) (concluding error in jury instruction was not harmless where the prosecutor repeatedly focused on the challenged instruction during closing argument); *State v. Anthony*, 218 Ariz. 439, 446, ¶ 40, 189 P.3d 366, 373 (2008) (declining to find harmless error when allegation of prior bad act was repeated theme of closing). Therefore, the improper denial of Hamilton's motion to suppress was not harmless error.

CONCLUSION

¶20 For the foregoing reasons, we reverse Hamilton's convictions and sentences and remand to the trial court for further proceedings.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

JON W. THOMPSON, Judge