

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MISTY RENEE RIVERS,
Appellant.

No. 2 CA-CR 2015-0291
Filed February 23, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Gila County
No. S0400CR201100493
The Honorable Timothy M. Wright, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By David A. Sullivan, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Following a bench trial, Misty Rivers was found guilty of misdemeanor possession of marijuana and placed on unsupervised probation for twelve months. On appeal, she claims the trial court erred by denying her motion to suppress evidence found after a police officer's warrantless entry into her motel room in order to conduct a protective sweep. Because our supreme court has approved such entry and subsequent protective sweep, we affirm.

Factual and Procedural Background

¶2 In reviewing a denial of a motion to suppress, we review only the facts adduced at the suppression hearing and view them in the light most favorable to upholding the trial court's ruling. *State v. Manuel*, 229 Ariz. 1, ¶ 11, 270 P.3d 828, 831 (2011). Police officer Richard Shaw and another officer were dispatched to a motel after a report of a "domestic dispute." When they arrived at the room, Shaw contacted Rivers and her husband and entered, without force but without an invitation. Rivers and her husband appeared upset and were standing about a meter apart between the two beds in the room, but were not physically fighting and Rivers was not "bruised or marked in any way." Shaw asked them what was going on and was told they were arguing about the husband's viewing of pornographic material. Shaw then conducted a protective sweep of the room, during which he saw marijuana on top of a vanity near the bathroom. He asked to whom the marijuana belonged and Rivers admitted she owned it.

¶3 Rivers moved to suppress the marijuana found during Shaw's protective sweep, arguing it was an illegal warrantless search because he "had no articulable facts to support any risk or

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danger arising from inside the [m]otel room.” The trial court found that the officer’s entry was “necessary,” the subsequent protective search was reasonable, and it denied Rivers’s motion, relying on *State v. Greene*, 162 Ariz. 431, 784 P.2d 257 (1989). The court also denied Rivers’s motion to reconsider that denial.

¶4 Following a bench trial, Rivers was convicted of misdemeanor possession of marijuana. The trial court suspended the imposition of sentence and placed her on twelve months’ probation. We have jurisdiction over her appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Discussion

¶5 Rivers argues the trial court erred by denying her motion to suppress the marijuana because it was discovered during an unlawful protective sweep after the officer’s warrantless entry. We review a trial court’s ruling on a motion to suppress evidence for an abuse of discretion, but review legal and constitutional issues de novo. *State v. Huerta*, 223 Ariz. 424, ¶ 4, 224 P.3d 240, 242 (App. 2010).

¶6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” is protected by the Fourth Amendment to the United States Constitution.¹ U.S. Const. amend. IV. “[A]lthough ‘searches and seizures inside a home without a warrant are presumptively unreasonable,’ that presumption may be overcome.” *Michigan v. Fisher*, 558 U.S. 45, 47 (2009), quoting *Groh v. Ramirez*, 540 U.S. 551, 559 (2004). Warrantless searches must fall into “one of the specific

¹Rivers cites Article 2, Section 8 of the Arizona Constitution in her opening brief, but does not develop any separate argument based on that provision or explain how any analysis under it should differ from the Fourth Amendment analysis. “Because a single reference to the Arizona Constitution is insufficient to preserve a claim, we do not address whether the [entry and] protective sweep violated the Arizona Constitution.” *State v. Fisher*, 226 Ariz. 563, n.3, 250 P.3d 1192, 1194 n.3 (2011).

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and well-established exceptions to the warrant requirement," such as exigent circumstances which carry "'a substantial risk of harm to the persons involved or to the law enforcement process . . . if the police were to delay a search until a warrant could be obtained.'" *Greene*, 162 Ariz. at 432-33, 784 P.2d at 258-59, quoting *United States v. Robertson*, 606 F.2d 853, 859 (9th Cir. 1979).

¶7 In *Greene*, our supreme court held that a domestic dispute call itself "creates a sufficient indication that an exigency exists allowing the officer to enter a dwelling if no circumstance indicates that entry is unnecessary." *Id.* at 433, 784 P.2d at 259. It noted the threat of rapidly escalating physical injury or damage is common in domestic dispute calls and requiring a search warrant before entering "would be a meaningless delay that could lead to the occurrence of otherwise preventable violence." *Id.* And once an officer has lawfully entered, he may take steps "'reasonably related to the routine investigation of the offense and the identification of the perpetrator,' which steps could . . . include[] a protective walk-through of the dwelling." *Id.* (internal citation omitted), quoting *State v. Fleishman*, 157 Ariz. 11, 15, 754 P.2d 340, 344 (App. 1988).

¶8 Here, Shaw was responding to a report of a "domestic dispute," which "has to do with potential violence between two or more parties." When he arrived, he did not know how many people were involved, or whether children were present. He encountered Rivers and her husband upon entering the room, but the curtains were closed and he could not have "determine[d] whether or not there were more parties involved" before entering. Shaw, who had over twenty years of experience in law enforcement at the time, also could not have determined if there was an immediate threat to his safety; he testified that "[t]hings can happen in a split second behind either corners or doors."

¶9 Accordingly, Shaw was authorized to enter and, once inside, conduct a limited protective sweep. *Id.* Because of the small size of the motel room, checking the entire room and bathroom was reasonable. *Cf. State v. Sardo*, 112 Ariz. 509, 516, 543 P.2d 1138, 1145 (1975) (search of entire motor home for other possible persons was reasonable under circumstances); *State v. Mead*, 120 Ariz. 108, 111, 584 P.2d 572, 575 (App. 1978) (cursory search for possible occupants

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of trailer who could have posed danger to law enforcement officers reasonable). And, during the protective sweep, the marijuana was “directly in [his] line of . . . sight” on top of the vanity and he thus could properly seize the marijuana. See *United States v. Bradley*, 321 F.3d 1212, 1214-15 (9th Cir. 2003) (upholding admission of evidence seen during protective sweep following lawful, warrantless entry based on emergency doctrine); *United States v. Salvador*, 740 F.2d 752, 759 n.7 (9th Cir. 1984) (once lawfully inside house, authorities may properly conduct protective sweep and seize evidence in plain view). Accordingly, the trial court did not err in denying the motion to suppress.

¶10 Rivers argues that *Greene* does not sanction the protective sweep here because it states that a domestic dispute call can provide the exigency necessary for a protective sweep “if no circumstance indicates that entry is unnecessary.” 162 Ariz. at 433, 784 P.2d at 259. But *Greene* reasoned that a domestic dispute call itself “creates a sufficient indication that an exigency exists allowing the officer to *enter* a dwelling if no circumstances indicates that *entry* is unnecessary.” *Id.* (emphasis added). *Greene* thus stands for the proposition that the domestic dispute call, absent any indications to the contrary, authorizes the initial entry, and once the officer is lawfully inside, he may conduct a protective sweep. *Id.*

¶11 Here, at the time the officer entered the motel room, no circumstances indicated the initial entry was unnecessary. He was responding to a domestic dispute call that involved an unknown number of persons and he could only see two individuals, visibly upset, standing near each other. Others, particularly any children, could have been present in the room or the bathroom, and could have been victims of domestic violence. And either of the adults could have been armed or weapons could have been within reach. The officer’s entry was reasonable and lawful in order to ensure any “possibility for physical harm or damage [did not] escalate[] rapidly.” *Greene*, 162 Ariz. at 433, 784 P.2d at 259. And as already noted, once lawfully inside, he was allowed to conduct a protective search, during which he saw the marijuana in plain view. See *id.*; see also *Bradley*, 321 F.3d at 1214-15; *Salvador*, 740 F.2d at 759 n.7.

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¶12 Rivers contends, however, the protective sweep was not justified and should be analyzed pursuant to the standard for a protective sweep laid out in *Maryland v. Buie*, 494 U.S. 325, 334 (1990) and *State v. Fisher*, 226 Ariz. 563, ¶¶ 8-9, 250 P.3d 1192, 1194-95 (2011). In *Buie*, the United States Supreme Court found police may conduct two types of limited protective sweeps in connection with an in-home arrest: a search of places immediately adjoining the place of the arrest from which an attack could be launched, and a broader sweep based on articulable facts which would warrant a reasonable officer to believe that the area to be swept harbors an individual posing a danger. 494 U.S. at 334; *see also Fisher*, 226 Ariz. 563, ¶ 9, 250 P.3d at 1194-95. As relevant here, Rivers argues Shaw, under *Buie*, “had no articulable facts that would lead a reasonably prudent police officer to believe that another individual posing a threat was inside the motel room.” She therefore reasons Shaw had no reason to conduct the sweep.

¶13 In *Fisher*, our supreme court found that *Buie* set forth the constitutional standard for warrantless entry to conduct a search incident to an arrest. 226 Ariz. 563, ¶¶ 7-9, 250 P.3d at 1194-95. It also cited *Greene* as an example of a case upholding “protective sweeps based on exigent circumstances,” and did not question or overrule *Greene* in light of *Buie*. *Id.* ¶ 11. Nor did it explicitly say the holding from *Greene*—that domestic dispute calls themselves may provide sufficient exigency to justify entry—was subject to the *Buie* analysis. Recently, our supreme court cited *Greene* again for the proposition that “[e]xigent circumstances exist when ‘a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search until a warrant could be obtained.’” *State v. Wilson*, 237 Ariz. 296, ¶ 9, 350 P.3d 800, 802 (2015), *quoting Greene*, 162 Ariz. at 433, 784 P.2d at 259. Again, the court did not explicitly address the central holding of *Greene* or question its validity.

¶14 Because *Greene* applies only in the domestic dispute situation and *Buie* and *Fisher* apply to an in-home arrest situation, *Greene* controls the outcome here. Rivers has not recognized this distinction or shown why *Buie* and *Fisher* should apply. Based on the arguments presented, we cannot say the trial court erred in

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relying on *Greene* to deny Rivers's motion to suppress the marijuana found in her motel room.

Disposition

¶15 For the foregoing reasons, we affirm Rivers's conviction and sentence.