DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2007

MANUEL HERRERA-FERNANDEZ,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D06-3743

November 28, 2007

STONE, J.

Herrera-Fernandez appeals a judgment and sentence for trafficking in cannabis. Police seized over 10,000 pounds of cannabis from Herrera-Fernandez's garage during a warrantless search. The trial court entered an order denying Herrera-Fernandez's motion to suppress physical evidence. We affirm, as the inevitable discovery doctrine renders the evidence admissible.

Herrera-Fernandez was arrested when two law enforcement officers, one from the Drug Enforcement Agency (DEA) and one from the local police department, visited his home. A reliable informant notified the DEA agent that the address harbored a "grow house" for cultivating marijuana. This tip was confirmed when Herrera-Fernandez opened the front door and both officers smelled the odor of live marijuana. Accordingly, the officers placed Herrera-Fernandez under arrest and performed a protective sweep to locate a cousin who Herrera-Fernandez said was in the laundry room. After finding the cousin in the laundry room, the officers continued their sweep, entering the garage and discovering sixty-three live marijuana plants. The officers subsequently sent for a search warrant.

We do not rely on the validity of the protective sweep to uphold the seizure. Such sweeps, when justified by the circumstances, are not "a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger . . . ." *Maryland v. Buie*, 494 U.S. 325 (1990); *see also Newton v. State*, 378 So.

2d 297, 299 (Fla. 4th DCA 1979). In *Nolin v. State*, 946 So. 2d 52 (Fla. 2d DCA 2006), the court reversed a conviction where the evidence supported only the officers' initial warrantless entry and limited sweep for safety, not a full blown protective sweep. *See also Vasquez v. State*, 870 So. 2d 26 (Fla. 2d DCA 2003). Herrera-Fernandez told the police that his cousin was in the laundry room, and the record is clear that the police found the cousin exactly where Herrera-Fernandez said he would be. The police, however, continued looking, without any basis to believe that anyone was in the house, other than the accounted cousin and family members. Indeed, officers discovered the marijuana farm after they located the cousin and after they dispelled any reasonable suspicion of danger.

Nevertheless, the inevitable discovery exception to the exclusionary rule deems the evidence at issue admissible. *See generally Carter v. State*, 868 So. 2d 1276, 1278 (Fla. 4th DCA 2004) (discussing the seminal cases *Nix v. Williams*, 467 U.S. 431 (1984), and *Moody v. State*, 842 So. 2d 754, 759 (Fla. 2003)).

In *Conner v. State*, 701 So. 2d 441 (Fla. 4th DCA 1997), our court affirmed the judgment and conviction of a defendant who, like Herrera-Fernandez, pled no contest, but appealed the trial court's denial of a dispositive motion to suppress. We found consent to a warrantless search invalid, but the contraband seized from a safe during that search admissible, because sufficient probable cause for a search warrant existed, leading to the inevitable discovery of the safe's contents (large amounts of marijuana and a handgun). *Id.* at 443.

We have also considered *State v. Rabb*, 920 So. 2d 1175, 1180 (Fla. 4th DCA 2006), and deem it distinguishable. In *Rabb*, this court upheld a trial court order suppressing evidence seized pursuant to a search warrant that lacked probable cause. *Id.* at 1188. The state argued that it had probable cause to believe that Rabb was growing marijuana in his house based, inter alia, on an anonymous tip and a "drug detector dog alert on [Rabb's] residence."[1] *Id.* at 1178. First, we concluded that the officers' use of a trained narcotics dog was an unreasonable search and, thus, could not constitute probable cause to support a search warrant. *Id.* at 1187. Second, we dismissed the remaining evidentiary bases for

[1] The *Rabb* probable cause affidavit listed four evidentiary bases for probable cause; the two other bases were "the cultivation of cannabis books and video's [sic] located in [Rabb's] vehicle, [and] the cannabis located in [Rabb's] vehicle as well as his person." *Id.* at 1178.

probable cause, specifically noting that the anonymous tip was unverified and uncorroborated. *Id.* Therefore, explaining that the officers did not have "lawfully obtained evidence that established probable cause," we held that "the issuance of the search warrant for Rabb's house was in error." *Id.* at 1188.

In this case, when Herrera-Fernandez opened his front door, the officers smelled live marijuana. Herrera-Fernandez allowed the officers to enter the residence. Unlike the unverified and uncorroborated anonymous tip in *Rabb*, the citizen tip from an identified informant in the instant case is more reliable. Furthermore, the dog sniff in *Rabb* was found to constitute an illegal search and, thus, could not be used to establish probable cause for a search warrant. Here, the two officers smelling live marijuana did not amount to an unreasonable search and is a proper evidentiary basis for probable cause. Therefore, because probable cause existed to support a search warrant for Herrera-Fernandez's house, the officers would have inevitably discovered the contested evidence. Finally, the tipsy coachman doctrine allows us to affirm a trial court's ruling that reaches the right result but for a different reason, if the record supports the alternate reason. *Arthur v. Milstein*, 949 So. 2d 1163, 1166 (Fla. 4th DCA 2007).

We do not reach the state's other argument that the wife consented to the search. The judgment and sentence are affirmed.

POLEN, J., concurs.
GROSS, J, dissents with opinion.

GROSS, J., dissenting.

Although I agree with the result reached by the majority, I dissent because I am unable to distinguish this case from *State v. Rabb*, 920 So. 2d 1175 (Fla. 4th DCA 2006).

In *Rabb*, police officers received an anonymous tip that a residence contained a cannabis growing operation. They surveilled the residence. The defendant emerged. The police followed him and made a valid traffic stop. On the front seat of the defendant's car, they found a cannabis cultivation video and two cannabis cultivation books. There was a cannabis cigarette in the ashtray. The police went to the front door of the defendant's residence with a drug dog. The officers smelled the odor of cannabis coming from the residence. The drug dog alerted to cannabis in the residence. The police used all of this information to obtain a search warrant. This court held that (1) the dog sniff was an illegal

search and (2) there was insufficient probable cause absent the dog sniff to justify the issuance of a warrant. No Fourth Amendment doctrine saved the case, not good faith, not inevitable discovery.

In this case, a police officer met a confidential informant face-to-face and learned that marijuana was *possibly* being grown at a house in Pembroke Pines. Recognizing that there was not enough information to secure a search warrant, the police decided to initiate a "knock and talk" at the residence. They went to the front door, knocked, and announced that they were police officers. The defendant opened the door. The officers smelled live, not-burning, marijuana. They arrested the defendant and the rest is history.

The only difference between the officer sniff in this case and the one in *Rabb* is that the *Rabb* officers made the sniff when the front door was closed. That should not make a difference; if the officers heard sounds of a person screaming for help, it would not matter for Fourth Amendment analysis if the front door was open or closed. If the closed door sniffs were not good enough for the search warrant in *Rabb*, the open door sniff should not support the warrantless arrest of the defendant in this case.

It is odd that the Fourth Amendment jurisprudence of this court so favors "knock and talk,"[2] a technique that encourages law enforcement to bypass the warrant requirement. When the *Rabb* officers tried to do everything by the Fourth Amendment book, this court suppressed the evidence. Faced with a Rambo law enforcement technique and no greater quantum of probable cause, we affirm an arrest and a warrantless entry into a home.

The effect of this case is to limit *Rabb* to its facts—the case only applies to a dog or officer sniff at a closed front door of a residence. Since I believe that *Rabb* was wrongly decided, I welcome any case that limits its application.

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Appeal from the Circuit Court for the Seventeenth Judicial Circuit,

[2]A "knock and talk" is "a procedure used by police officers to investigate a complaint where there is no probable cause for a search warrant. The police officers knock on the door, try to make contact with persons inside, and talk to them about the subject of the complaints." *Murphy v. State*, 898 So. 2d 1031, 1032 n.4 (Fla. 5th DCA 2005).

Broward County; Jeffrey Levenson, Judge; L.T. Case No. 06-1598 CF10A.

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Not final until disposition of timely filed motion for rehearing