RENDERED: JANUARY 22, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

MODIFIED: FEBRUARY 19, 2010; 10:00 A.M.

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000911-MR

DEBRA TAYLOR,
FORMERLY DEBRA NOONAN — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 07-CR-00227

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Debra Taylor (formerly Debra Noonan) appeals from a judgment of the Graves Circuit Court sentencing her to five years' imprisonment (with the sentence probated for five years) in accordance with a conditional guilty plea to possession of a controlled substance (cocaine), first offense. Taylor challenges the trial court's denial of her motion to suppress evidence taken from

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

her purse during a warrantless search. After reviewing the record and considering the parties' briefs, we agree with Taylor that the search violated her rights under the Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution. Therefore, the trial court erred in denying her motion to suppress, and its decision must be reversed and this case remanded for further proceedings consistent with this opinion.

The following facts were obtained from testimony given in a suppression hearing conducted on February 4, 2008, and from various documents contained within the record. In the early morning hours of July 21, 2007, the Mayfield Police Department was contacted by a confidential informant regarding crack cocaine trafficking from a home located at 219 West Walnut Street in Mayfield, Kentucky. Shortly thereafter, Mayfield police arranged for the informant to make a controlled buy at that location. The informant subsequently purchased crack cocaine from an unidentified person at the residence and delivered it to police at a designated meeting place.

Based on this information, Corporal Brent Farmer filed an affidavit requesting a warrant to search the entire property and residence at 210 West Walnut Street. Before a warrant was issued, the Graves County Attorney advised police that they could go into the residence and secure the premises while waiting for the warrant to be produced. Consequently, police went to 219 West Walnut Street and entered the residence. According to Officer Shannon Keller, police "secured the residence because there's a lot of people – some people outside and a

lot of people inside," and they decided to have everyone go outside while they waited for the search warrant.

Taylor was one of the persons inside the residence when police arrived, and she was reported to be extremely intoxicated. Taylor asked Officer Keller for permission to use the bathroom, but was told, "Nope. Come on – let's go outside." Taylor then told Officer Keller that she needed to retrieve her purse and ultimately "talked [police] into letting her use the bathroom."

After Taylor finished using the bathroom, she wanted to take her purse with her and go outside. Officer Keller stopped her and told her, "Well, we need to search it to make sure you don't have any weapons or anything." He explained that he did this "because we were going to have a crowd of people outside, and we only had a very few, limited officers." Officer Keller then reached inside the main compartment of the purse and found a "white, rock-like substance" that was later confirmed to be cocaine. Taylor was subsequently arrested at approximately 1:02 a.m. At 1:53 a.m., a Graves County district judge issued a search warrant for 219 West Walnut Street after finding that probable cause existed for a search. The ensuing search uncovered no evidence of criminal activity.

On August 27, 2007, the Graves County grand jury charged Taylor in an indictment with possession of a controlled substance (cocaine), second offense, pursuant to KRS 218A.1415. On September 10, 2007, Taylor appeared in open court with counsel and entered a plea of "not guilty" to the charge.

On October 15, 2007, Taylor filed a motion to suppress the cocaine found in her purse on the grounds that it was collected as part of an illegal search in violation of the Fourth Amendment to the United States Constitution. Taylor specifically argued that the search was illegal because the police did not have a warrant to enter and search the residence at 219 West Walnut Street at the time the cocaine was found. The trial court held a hearing on Taylor's motion on February 4, 2008, and the parties subsequently submitted additional pleadings in support of their respective positions.

On February 29, 2008, the trial court entered an order denying Taylor's motion to suppress on a variety of grounds. The court first concluded that "probable cause existed for a search warrant issued, based upon the knowledge of the police" and that "the search was made as a matter of an exigent circumstance to prevent the destruction of evidence." The court explained: "With a crowd of people near the house and people in the house, it seems that it would be incumbent upon the police to secure the property so that the illegal substances sought could not be destroyed. They were simply preserving the status quo."

The court additionally noted that because Taylor was intoxicated, her judgment might have been impaired, which was a concern because police "were in close proximity to her, and she had a purse capable of containing a weapon." The court further explained that the search "involved controlled substances, with the dangers attendant to situations where controlled substances may be sold, and there

was a crowd of people in front of the house. All of these would give rise to cause for a *Terry* type search."

On April 14, 2008, Taylor reached a plea agreement with the Commonwealth and moved to enter a conditional guilty plea to an amended charge of possession of a controlled substance (cocaine), first offense. As part of the agreement, the Commonwealth recommended that Taylor's sentence (five years' imprisonment) be probated for five years and that she be accepted into the drug court program. Taylor reserved the right to appeal the trial court's denial of her motion to suppress. On April 22, 2008, the trial court entered a judgment and other orders consistent with the parties' plea agreement and the Commonwealth's recommendations. This appeal followed.

An appellate court's standard of review on a trial court's denial of a motion to suppress is set forth in *Commonwealth v. Neal*, 84 S.W.3d 920 (Ky. App. 2002):

> [W]e first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.

Id. at 923; *see also* Kentucky Rules of Criminal Procedure (RCr) 9.78. After reviewing the record, we conclude that the trial court's findings of fact are supported by substantial evidence; moreover, Taylor raises no arguments challenging those findings. Thus, our attention is focused solely upon whether the

court properly applied the law to the established facts. *Ornelas v. U.S.*, 517 U.S. 690, 696-97, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996), *quoting Pullman-Standard v. Swint*, 456 U.S. 273, 289, n.19, 102 S.Ct. 1781, 1791, n.19, 72 L.Ed.2d 66 (1982); *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998).

As a preliminary matter, the Commonwealth has raised the question of whether Taylor has "standing" to challenge the search in question because she was not a tenant of the subject property. "To establish standing to attack a search, one must establish a legitimate expectation of privacy in the searched property." *Foley v. Commonwealth*, 953 S.W.2d 924, 934 (Ky. 1997); *see also Rawlings v. Kentucky*, 448 U.S. 98, 104-05, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980); *Sussman v. Commonwealth*, 610 S.W.2d 608, 611-12 (Ky. 1980). With this said, however, the issue of "[s]tanding must have been raised before the circuit court, and the Commonwealth should secure a ruling from the court, before this Court will entertain a standing challenge." *Hause v. Commonwealth*, 83 S.W.3d 1, 11 (Ky. App. 2001); *see also Southers v. Commonwealth*, 210 S.W.3d 173, 174 (Ky. App. 2006); *Clark v. Commonwealth*, 868 S.W.2d 101, 102-03 (Ky. App. 1993), *overruled on other grounds by Henry v. Commonwealth*, 275 S.W.3d 194 (Ky. 2008).

At the end of its order denying Taylor's motion to suppress, the trial court explicitly stated that it "does not need to proceed as to whether the Defendant has standing to object to the search conducted, for even if she had standing to object to the search, the search was not prohibited." Thus, it failed to determine

the issue of whether Taylor had a legitimate expectation of privacy in the premises of 219 West Walnut Street. Since the Commonwealth did not seek supplemental findings of fact and conclusions of law as to this issue, we may not entertain its standing argument on appeal. *Hause*, 83 S.W.3d at 11; *Southers*, 210 S.W.3d at 174; *Clark*, 868 S.W.2d at 102-03. Therefore, we are obligated to consider Taylor's claims of error.

Taylor first argues that her motion to suppress should have been granted because police unlawfully entered the subject property without a warrant and without the authority to enter implicitly conferred by the warrant requirement. "The Fourth Amendment of the United States Constitution and Section Ten of the Kentucky Constitution protect citizens from unreasonable searches and seizures without a warrant." *Hallum v. Commonwealth*, 219 S.W.3d 216, 221 (Ky. App. 2007). "It is a 'basic principle of Fourth Amendment Law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980). Therefore, "[b]efore agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S.Ct. 2091, 2098, 80 L.Ed.2d 732 (1984); *see also Commonwealth v. McManus*, 107 S.W.3d 175, 177 (Ky. 2003). "[A]bsent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed

and there is probable cause to believe that incriminating evidence will be found within." *Payton*, 445 U.S. at 587-88, 100 S.Ct. at 1381; *see also Southers*, 210 S.W.3d at 176 ("Absent probable cause **and** exigent circumstances, law enforcement officers may not enter an individual's private residence in order to conduct a warrantless search.") (Emphasis in original).

Here, the trial court concluded that the "search was made as a matter of an exigent circumstance to prevent the destruction of evidence." The threat of imminent destruction of evidence is a recognized exigent circumstance creating an exception to the warrant requirement. *Hallum*, 219 S.W.3d at 222. Thus, "[w]here officers have probable cause to believe that a crime has occurred and that evidence from that crime is in imminent danger of being destroyed, it is reasonable for law enforcement officers to secure the place where the evidence is located in order to prevent its imminent destruction." *Posey v. Commonwealth*, 185 S.W.3d 170, 173 (Ky. 2006); *see also Segura v. U.S.*, 468 U.S. 796, 810, 104 S.Ct. 3380, 3388, 82 L.Ed.2d 599 (1984). Under such exigent circumstances, police activity must be limited in scope to ensure that it addresses only those circumstances. *Hallum*, 219 S.W.3d at 222. The Commonwealth ultimately bears the burden of demonstrating that exigent circumstances existed so as to justify a warrantless entry. *McManus*, 107 S.W.3d at 177. This burden is a "heavy" one that requires the demonstration of an "urgent need." *Welsh*, 466 U.S. at 749-50, 104 S.Ct. at 2097.

Here, there is little question that police had probable cause to believe that a crime had occurred at 219 West Walnut Street since a confidential informant

went into the residence there and purchased crack cocaine from an unknown individual therein. Therefore, police had probable cause for a search of the residence. The question then becomes whether exigent circumstances existed that merited police securing the house from within while waiting for a search warrant to be issued.

Taylor contends that no exigent circumstances were present in this case that justified police entering the residence without a search warrant. In particular, she asserts that the trial court's conclusion that "the search was made as a matter of an exigent circumstance to prevent the destruction of evidence" is wholly unsupported by the record because no evidence was introduced to suggest that destruction of evidence was imminent. The Commonwealth argues in response that the number of people inside and outside the residence at approximately one o'clock in the morning, taken together with the police's knowledge of ongoing sales of cocaine in the residence, created exigent circumstances allowing police to enter for the purposes of preserving the status quo. The Commonwealth further expresses a concern that under these circumstances, "[i]t was logical to conclude that any evidence in the form of drugs might quickly disappear via a sale, consumption, or destruction if anyone discovered the police had the house under surveillance."

We agree with Taylor that the mere fact that a suspected drug deal has taken place within a home – standing alone – does not *ipso facto* justify a warrantless entry into that home. "[N]o exigency is created simply because there

is probable cause to believe that a serious crime has been committed[.]" *Welsh*, 466 U.S. at 753, 104 S.Ct. at 2099. We also agree that the record before us is devoid of any evidence that the destruction of evidence was imminent. The Commonwealth instead argues that any evidence of drugs "might" have disappeared if anyone had discovered that police had the house under surveillance.

However, this argument is inherently speculative in nature since there is nothing within the record to suggest that anyone had discovered – or was even on the verge of discovering – that police had the residence in question under surveillance or that evidence was in imminent danger of being destroyed. Instead, the only possible ground for a warrantless entry in this case was the mere possibility that a suspect might sell additional drugs to consumers. Ultimately, the Commonwealth failed to present any evidence "that even intimated that the officers reasonably believed that destruction, removal or concealment of contraband material was imminent or threatened." *State v. Peterson*, 525 S.W.2d 599, 607 (Mo. Ct. App. 1975); *see also State v. Wells*, 928 P.2d 386, 390 (Utah Ct. App. 1996). Instead, the record reflects that police entered the residence at 219 West Walnut Street without a warrant simply because there was evidence that a drug transaction had taken place there and a crowd of people was present on the scene. This Court does not believe that these facts satisfy the required showing of an "urgent need" to enter a home based upon alleged exigent circumstances. *See Welsh*, 466 U.S. at 749-50, 104 S.Ct. at 2097.

As put succinctly by the Supreme Court of Michigan in its well-researched and well-reasoned opinion in *People v. Blasius*, 459 N.W.2d 906 (Mich. 1990), "[t]o validate searches of a residence on the basis of hypothetical possibilities of destruction or removal would essentially nullify Fourth Amendment protections." *Id.* at 915. Thus, "the police must present facts indicating more than a mere possibility that there is a risk of the immediate destruction or removal of evidence" before entering a home on the basis of exigent circumstances. *Id.* Ultimately, this requires a showing of an "objectively reasonable basis to believe the risk of destruction or removal of evidence is imminent – that immediate action is necessary before they can obtain a warrant[.]" *Id.*

As noted, we do not believe that such a showing was made in this case. Because the Commonwealth bears the burden of demonstrating that exigent circumstances existed so as to justify a warrantless entry, *McManus*, 107 S.W.3d at 177, and has failed to meet this burden, we must conclude that the entry of police into the residence at 219 West Walnut Street without a warrant was unreasonable and in violation of the United States Constitution and the Kentucky Constitution. Therefore, the evidence uncovered here as a direct result of that entry and subsequent search of Taylor must be suppressed as "fruit of the poisonous tree" because the "exclusionary rule" prohibits the admission of evidence seized in searches and seizures that are deemed unreasonable under the Fourth Amendment. *See Wong Sun v. U.S.*, 371 U.S. 471, 484-85, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963).

In response to this potential ruling, the Commonwealth alternatively argues that the evidence taken from Taylor's purse is not subject to the exclusionary rule because of the applicability of the "independent source" and "inevitable discovery" doctrines. The Commonwealth failed to present this argument to the trial court below, which inherently hinders our ability to consider it because no findings of fact or law were made on these issues. Nevertheless, after careful consideration, we do not believe that these doctrines are applicable here.

The United States Supreme Court has held that "the exclusionary rule has no application [where] the Government learned of the evidence 'from an independent source.' " *Id.*, 371 U.S. at 487, 83 S.Ct. at 417, *quoting Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920). However, the Commonwealth's reliance upon this doctrine is easily dispensed with because the evidence in question here was not discovered by some lawful means wholly independent of the police's entry into the residence. Instead, it was found only because the police were in the home without a warrant. Thus, the independent source doctrine was inapplicable here.

The inevitable discovery doctrine was established by the U.S. Supreme Court in *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). The Supreme Court adopted this rule to permit the admission of evidence unlawfully obtained by police upon proof by a preponderance of the evidence that the same evidence would have been inevitably discovered by lawful means. *Id.*, 467 U.S. at 444, 104 S.Ct. at 2509. Proof of inevitable discovery "involves no

speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings." *Id.*, 467 U.S. at 444 n.5, 104 S.Ct. at 2509 n.5. The burden for establishing inevitable discovery rests with the prosecution. *Id.*, 467 U.S. at 444, 104 S.Ct. at 2509.

The Commonwealth argues that police would have inevitably discovered the cocaine in Taylor's purse when they executed the search warrant. The warrant authorized police to search "[t]he entire property and residence including closets, drawers, containers, and crawl spaces," and its language mimicked that set forth in the affidavit seeking a warrant. The Commonwealth contends that the purse was a "container" subject to being searched when the warrant was issued, and it inevitably would have been searched by police.

Ultimately, however, we believe that this argument is too speculative in nature to merit application of the inevitable discovery doctrine. It is unclear from the record whether Taylor was a mere visitor or an occupant of 219 West Walnut Street; therefore, it is equally unclear whether the search warrant would have authorized a search of Taylor's personal effects – particularly given that the warrant did not specifically name any individuals as suspects or subject them to a search. We also note that the record contains no indication that police had probable cause or reasonable suspicion to believe that Taylor was engaged in criminal activity; thus, a search of her purse would not have been justified on those grounds. Unfortunately, the Commonwealth has failed to provide us with any

applicable authority to support its position that Taylor's purse was subject to a search pursuant to the warrant under these circumstances, and the factual record is simply too incomplete for this Court to consider the question in any further detail. Consequently, we conclude that the Commonwealth has failed to meet its burden of establishing inevitable discovery and its argument must, therefore, be rejected. *See Nix*, 467 U.S. at 444, 104 S.Ct. at 2509.

For the foregoing reasons, the order of the Graves Circuit Court denying Taylor's motion to suppress is reversed, and this case is hereby remanded to that court for further proceedings consistent with this opinion and RCr 8.09.

ALL CONCUR.

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