

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001117-MR

CRYSTAL LYNN GUZMAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 08-CR-01495

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON AND MOORE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, Crystal Lynn Guzman, appeals from a one-year sentence probated for three years pursuant to a conviction resulting from a conditional guilty plea to charges of Possession of a Controlled Substance, First

¹ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and the Kentucky Revised Statutes (KRS) 21.580.

Degree, First Offense, and Possession of Drug Paraphernalia, First Offense. On appeal, Guzman argues that the police illegally engaged in a “protective sweep” of her residence, absent consent or exigent circumstances. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

On September 10, 2008, Officer Chy’ Anne Krugler of the Lexington Police Department responded to a call which came in from one of Guzman’s neighbors, a Ms. Wallace², at approximately 1:10 a.m. Wallace alleged that Guzman was dealing in drugs and engaging in prostitution. The apartment was apparently rented to Guzman’s boyfriend, who was incarcerated at the time. Wallace stated that she saw Guzman headed toward her apartment with a white man and a black man that night and that she told them if they were doing something illegal, she would call the police. Wallace told Krugler that the black man said “some ugly things” and told her to mind her own business.

As the officers were interviewing Ms. Wallace at her apartment, she told him that the black man, Paul Demerit, had left Guzman’s apartment and was headed down the stairs. Officer Krugler and Officer McAllister decided to talk to Demerit, who said he was just hanging out at Guzman’s apartment with a friend. Krugler testified that Demerit appeared to be intoxicated on “some kind of narcotics.” Demerit gave permission to search his person and his vehicle; the police did not find any contraband. A background check of Demerit revealed he did not have any active arrest warrants but was on probation for trafficking.

² Ms. Wallace is not identified in the record by her first name.

Thereafter, the officers proceeded to Guzman's apartment for a "knock and talk." Krugler testified they knocked on the door several times, loudly and persistently, and that it took several minutes for Teddy Hendren, the white male previously seen with Guzman and Demerit, to open the door. Hendren told the police that he did not live there and was visiting a friend. Krugler testified that while she was waiting outside, she could hear moving inside the apartment and that she heard people walking around. Krugler stated that after Hendren opened the door, she saw Guzman lying on a mattress on the floor that was directly in front of the door. When Krugler asked why it had taken so long to answer the door, Hendren stated that he and Guzman had been having sexual intercourse.

Guzman gave the officers permission to come inside. The officers entered the apartment, at which time Guzman quickly dressed herself under the covers and turned on a small lamp that was beside the mattress. According to Krugler, once the light was on, Krugler noticed a wide doorway that had a "big blanket tacked up over it."³ When Krugler saw the blanket, she asked Guzman if there was anyone else in the apartment "out of concern with the circumstances of them running around."⁴ Guzman said that there were no other people, but Krugler then conducted a protective sweep of the apartment to ensure that there was no one who could harm the officers.

³ See VR 02/19/09, 3:51:00-3:51:10.

⁴ See VR 02/19/09, 3:51:14-3:51:23.

The protective sweep apparently consisted of Krugler briefly going into each room to check and see if anyone was hiding. Krugler described the sweep as “walk in, look around, make sure there’s no hiding spot, and walk out.”⁵ Krugler testified that she went into two bedrooms, the bathroom, and the kitchen. Krugler stated that while in the kitchen, she immediately saw a large kitchen spoon on top of a lot of dishes in the sink. Krugler stated that the spoon was burnt on the bottom, which she believed indicated narcotic use. Krugler testified that she picked up the spoon and noticed white residue all over it. She then returned to the living room.

Both Guzman and Hendren denied any knowledge of the spoon. Officer Krugler then explained that she had found paraphernalia in the apartment, and asked Guzman for permission to search for narcotics. Guzman asked what would happen if she refused and Krugler indicated that she would leave her partner, Officer McAllister, in the apartment while she left to obtain a search warrant. Guzman subsequently granted permission to search. The officers then conducted a search, primarily in the living room, which revealed cocaine and various items of drug paraphernalia.

Guzman moved to suppress evidence found as a result of the search, claiming that the evidence was seized as the result of an illegal search and seizure. Specifically, Guzman claimed that the protective sweep conducted at her apartment unreasonably exceeded the scope of any permission that had been granted for

⁵ See VR 02/19/09, 4:06:38.

officers to enter the apartment. A suppression hearing was held on February 19, 2009.

At the conclusion of the hearing, the trial court found that the officers initially had reasonable suspicion to conduct an investigation based on the complaint. The court further found that it was clear that the officers were police when they were invited into the apartment, and that once inside the apartment, the blanket covering the opening to a room raised suspicion and justified the protective sweep conducted by the officers. Further, the court found that while conducting the sweep, the paraphernalia was in the plain view of the police, and that Guzman consented to a search of the apartment after the paraphernalia was found. Accordingly, the court overruled the suppression motion.

Subsequently, on March 6, 2009, Guzman entered a conditional guilty plea in which she reserved the right to appeal the court's ruling on the motion to suppress. On May 22, 2009, the trial court sentenced Guzman to one year on the charge of Possession of a Controlled Substance in the First Degree and twelve months on the charge of Possession of Drug Paraphernalia, and probated the sentence for a period of three years. This appeal followed.

On appeal, Guzman asserts that the Fourth Amendment and Section 10 of the Kentucky Constitution mandate suppression of the evidence seized at her apartment following the aforementioned search by the officers. She argues, in reliance on *Payton v. New York*, 445 U.S. 573, 586, 590 (1980), that warrantless searches inside someone's home are presumptively unreasonable unless the

occupants consent or exigent circumstances exist to justify the intrusion and that neither is the case in the matter *sub judice*. Guzman correctly notes that a protective sweep exception exists where there is a serious and demonstrable potentiality for danger,⁶ but argues that no such potential existed in this matter and that the officers lacked probable cause to believe other individuals were in the apartment. Accordingly, she asserts that the search was in violation of her rights and that the trial court should therefore have granted her suppression motion.

In response, the Commonwealth argues that the trial court properly overruled the motion to suppress, stating that its findings, which are not disputed, are clearly supported by substantial evidence through the testimony of Officer Krugler. The Commonwealth asserts that when the totality of the circumstances are considered, it is evident that the officers had sufficient reason to believe there may have been individuals in the apartment who posed a danger, thereby justifying the protective sweep.

In addressing the issues raised by the parties on appeal, we note that when reviewing the trial court's decision on a motion to suppress, we must first determine whether the trial court's findings of fact are supported by substantial evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002), and Kentucky Rules of Criminal Procedure (RCr) 9.78. If they are, then they are conclusive. *Id.* Based upon those findings of fact, we must then conduct a *de*

⁶ See *Commonwealth v. Elliott*, 714 S.W.2d 494, 496 (Ky.App. 1986).

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.*

Further, we note that the appellate court should review the facts only for clear error and should give due weight to inferences drawn from those facts by the trial judge and the local law enforcement officers. *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky.App. 2000)(citing *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911(1996)). The burden is on the appellant to demonstrate that the ruling of the trial court on the suppression motion was clearly erroneous. *See Harper v. Commonwealth*, 694 S.W.2d 665 (Ky. 1985). In the absence of any showing to the contrary, the reviewing court must assume the trial court ruled correctly. *Id.*

A protective sweep is a recognized exception to the warrant requirement. *See Maryland v. Buie*, 494 U.S. 325, 327, 110 S.Ct. 1093, 1094, 108 L.Ed.2d 276 (1990). In *Buie*, our United States Supreme Court held that the Fourth Amendment permits 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. *Id.* at 337.⁷ *See also U.S. v. Hatcher*, 680 F.2d 438, 442 (6th Cir. 1982).

We also note that our courts have previously recognized the importance of law enforcement officials having the ability to safely and effectively perform their duties. *Davis v. Commonwealth*, 120 S.W.3d 185, 190 (Ky. App. 2003). To that end, courts should use caution in limiting the ability of police officers to protect themselves as they carry out missions which routinely incorporate danger. *United States v. Hatcher*, 680 F.2d 438, 444 (6th Cir. 1982)(quoting *United States v. Coates*, 495 F.2d 160, 165 (D.C. Cir. 1974)).

Below, Officer Krugler testified that she was concerned by the noises and scuffling that she had heard prior to the time the door was opened and decided to conduct a protective sweep based upon her concern over the combination of the scuffling noises, the delay in opening the door, the observance of an individual, seemingly intoxicated and with a criminal record leaving the apartment, and the large blanket tacked up over the doorway.

These factors, must also be viewed in conjunction with the fact that the officers were on the scene to investigate a complaint of dangerous criminal

⁷ In citing *Buie*, we recognize that it referred specifically to protective sweeps occurring incident to arrest. Nevertheless, the fact that the protective sweep occurred prior to the arrest in this case has not been raised as a basis to find the sweep invalid. Regardless, other courts have found the same concerns for officer safety to be present even before a suspect is arrested. *See United States v. Taylor*, 248 F.3d 506 (6th Cir. 2001)(police officers making an arrest may, without violating Fourth Amendment, conduct a limited protective sweep to ensure the safety of those officers applies with equal force to a police officer left behind to secure the premises while a warrant to search those premises is obtained), and *United States v. Gould*, 364 F.3d 578, 584 (5th Cir. 2004)(holding that protective sweep as authorized by *Buie* decision of United States Supreme Court need not always be incident to arrest).

activities⁸ in the early morning at an apartment about which they had previously received reports. Additionally, these allegations were corroborated by their interaction with Demerit, who appeared to be intoxicated on narcotics after leaving the apartment and who was on probation for drug trafficking. Considering the totality of the circumstances, we are in agreement with the court below that those factors served as a basis for the officers to have a reasonable, articulable suspicion that there could be other individuals in the apartment who might prove dangerous. Accordingly, we believe that the protective sweep was justified.

Wherefore, for the foregoing reasons, we hereby affirm the May 26, 2009, Final Judgment and Sentence of Probation entered by the Fayette Circuit Court, the Honorable Pamela R. Goodwine, presiding.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Erin Hoffman Yang
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

John Paul Varo
Assistant Attorney General
Frankfort, Kentucky

⁸ To this end, we note that Wallace's testimony that a lot of men were "in and out" of Guzman's apartment only further substantiates the reasonableness of the officer's decision to conduct a protective sweep.