

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE LEE BROWN,

Defendant-Appellant.

UNPUBLISHED

December 15, 2009

No. 286716

Wayne Circuit Court

LC No. 07-009589-FH

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

Following a conditional plea pursuant to MCR 6.201(C)(2), defendant was convicted of felony-firearm, MCL 750.227b(1). He was sentenced to two years' imprisonment. Defendant appeals by order of the Michigan Supreme Court as if on leave granted. We reverse and remand.

On April 19, 2007, at approximately 2:45 a.m., Officers Ronald Hopp, James McDonald, and LePerire,¹ and Sergeant Mike Jackson of the Detroit Police Department were parked in a police vehicle a few blocks from defendant's home, when they heard several gunshots. They drove in the direction of the gunshots, and heard a single shot come from behind defendant's residence. The officers parked their vehicle and heard several more shots as they positioned themselves around the house. Officer Hopp positioned himself near the back of the home where he saw defendant standing inside a doorway of a second-story balcony on the backside of the house, holding a rifle with a strap. He radioed this information to the other officers. Shortly thereafter, Sergeant Jackson, along with other officers from a different police department, entered the residence and detained defendant in the front room of his second floor apartment. They conducted a sweep of the apartment, and "secured" it to make sure no other persons were inside. Officer McDonald then entered the apartment and searched for the gun with the other officers. Officer Hopp subsequently entered the home and identified defendant; he also briefly searched for the gun in the back bedroom. Officer McDonald eventually found the gun in the attic, which he accessed by propping a bedpost against a wall in a back bedroom closet and climbing it like a ladder. He found the gun, loaded, in the front of the attic above the entrance on

¹ This officer's first name was not provided in the preliminary examination transcript or the lower court file.

the second floor, in between a window and a blanket covering the window. Officer Hopp identified it as the gun he saw in defendant's possession earlier. The officers did not obtain a search warrant at any point.

Defendant filed a motion to suppress the evidence as obtained in violation of his Fourth Amendment protection against illegal searches and seizures. The trial court denied defendant's motion, reasoning that exigent circumstances allowed the officers to enter defendant's apartment, and that Officer Hopp's observations of defendant with a gun provided sufficient probable cause for the search under the plain view doctrine. Further, it affirmed the search because it was limited to logical places where a gun could be found.

On appeal from a motion to suppress, the findings of fact by the trial court are reviewed for clear error, *People v Stevens*, 460 Mich 626, 650-651; 597 NW2d 53 (1999), and issues of law are reviewed de novo, *People v Wilson*, 257 Mich App 337, 381; 668 NW2d 371 (2003), vacated in part 469 Mich 1018 (2004). Constitutional issues are also reviewed de novo. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009). Under both the United States Constitution and the analogous portion of the Michigan Constitution, searches and seizures without a warrant are per se unreasonable, unless any of the specific and well-delineated exceptions apply. *People v Champion*, 452 Mich 92, 97-98; 549 NW2d 849 (1996). The burden is on the prosecution to prove one of the exceptions. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003).

With regards to the exigent circumstances exception, the Michigan Supreme Court has held:

[P]olice may enter a dwelling without a warrant if the officers possess probable cause to believe that a crime was recently committed on the premises, *and* probable cause to believe that the premises contain evidence of perpetrators. The police must further establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect. If the police discover evidence of a crime following the entry without a warrant, that evidence may be admissible. [*In Re Forfeiture of \$176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993) (emphasis added).]

Here, the officers heard several gunshots coming from the neighborhood of defendant's home. They heard another shot from the backside of defendant's home. As they left their vehicle and approached the house, they heard several more gunshots, and one officer testified, "It was like, almost like we was under fire. We thought we were under fire. That's how close it was[.]" It was at this time Officer Hopp saw defendant with a gun in the doorway of the second floor balcony. Probable cause exists when fact, circumstance or information is such that it would create an honest belief in the mind of a reasonably prudent person that criminal activity is afoot, or contraband is present. *People v Anthony*, 120 Mich App 207, 211; 327 NW2d 441 (1982). There is no question probable cause existed under this standard.

According to these facts, the officers also had reason to fear for their own safety, thereby satisfying one of the exigencies. "[T]he validity of an entry for a protective search without a

warrant depends on the reasonableness of the response, *as perceived by police.*” *People v Cartwright*, 454 Mich 550, 559; 563 NW2d 208 (1997). Similar to the Supreme Court’s ruling in *Cartwright*, it would have been tactically unsound for these officers to sit and wait for a warrant in light of the gunshots and knowledge that defendant was armed. For all they knew, they were under attack. Based on this perception, there were sufficient exigent circumstances for the officers to enter defendant’s home without a warrant, and to detain him for purposes of a protective sweep. *Cartwright, supra* at 560; *People v Beuschlein*, 245 Mich App 744, 757; 630 NW2d 921 (2001).

Despite the exigency that allowed them inside, the officers were still bound by the Fourth Amendment and guidelines regarding protective sweeps. A protective sweep must be “quick and limited, and conducted for the sole purpose of ensuring the safety of the police officers and other persons.” *Cartwright, supra* at 557. It is “not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found [and] last no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.” *Maryland v Buie*, 494 US 325, 335-336; 110 S Ct 1093; 108 L Ed 2d 276 (1990). Once the protective sweep is over, and the exigency is eliminated, the officers cannot proceed to search a home without a warrant. *Vale v Louisiana*, 399 US 30, 34-36; 90 S Ct 1969; 26 L Ed 2d 409 (1970).

As indicated above, the officers entered defendant’s home and “secured” it with a protective sweep. Officer McDonald testified: “[T]he house was secure, they went in, they did a sweep. Whoever was in the house was detained. And that’s when I came in after. A sweep was done. He was the only person in there. I was advised that the house was secure, I can come in. Which means there was no possibility of anybody else getting out because there was nobody else there but the Defendant.” (Questions from defense counsel omitted.) With the house secure, they started looking for the gun. Similarly, Officer Hopp testified: “I don’t remember if they had him seized or not. I went inside they said they were talking to him. I went in there and I.D.’d him as the person. I looked in a couple of rooms and then I left the location and went outside. I looked in a back bedroom and that’s about it. The back bedroom and then I walked outside.” (Questions from defense counsel omitted.) According to this testimony, the officers appeared certain the house was secure before their motivations changed to a warrantless search for the gun. This was unreasonable, and the officers should have obtained a search warrant first. *Vale, supra* at 34-36. Cf *People v Olajos*, 397 Mich 629; 246 NW2d 828 (1976). Where the Court upheld a warrantless search for a weapon in the defendant’s home even though he had already been drawn out of the home and arrested outside. In that case, the police were uncertain as to whether another weapon and potential shooter remained inside. *Id.* at 636. Contrastingly, nothing in this case indicates any confusion or uncertainty on the part of the Detroit Officers. They were certain the premise was secure and defendant was the only person present.

With regards to the plain view exception, *Champion, supra* at 104, provides “that if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant.” The item can then be introduced as evidence. *People v McDonald*, 13 Mich App 226, 234; 163 NW2d 796 (1968). The incriminating nature of an object is immediately apparent if probable cause to seize the item exists without search. *Champion, supra* at 102-103.

The criminal nature of the gun was readily apparent when Officer Hopp saw it in defendant's possession. Because he was responding to an emergency, he was in a lawful position at the time he saw the gun. Clearly the first two elements of plain view were present, and if he could have obtained the gun at that time, the seizure would have been lawful. Instead, when the police entered defendant's home, the gun was not present, or otherwise within plain view. As indicated above, it was found one floor above the room where defendant was detained, hidden between a window and a blanket covering the window. Thus, after the officers entered defendant's home, neither of the first two elements of plain view were present. The trial court recognized this, but reasoned that the earlier observations by Officer Hopp were still at play, and provided sufficient probable cause to justify the search for the gun. This reasoning is in direct conflict with the established case law concerning plain view, which provides that "no amount of probable cause can justify warrantless search or seizure absent 'exigent circumstances'" or some other exception to the warrant requirement. *People v Hopko*, 79 Mich App 611, 621; 262 NW2d 877 (1977), quoting *Coolidge v New Hampshire*, 403 US 443, 468; 91 S Ct 2022; 29 L Ed 2d 564 (1971). Plain view "is exclusively a seizure rationale," and, therefore, alone, is never enough to justify warrantless search. *Champion, supra* at 101. Absent exigent circumstances or some other exception, no amount of probable cause can justify a warrantless search for an immediately apparent criminal item. *Hopko, supra* at 62.

Although Officer Hopp's observations were made at a time when exigent circumstances existed, those observations cannot be suspended in mid air and applied to a later time when exigencies were not present, and when the observations made at the time of defendant's arrest did not establish probable cause to seize the gun. Furthermore, Officer Hopp's observations, without exigent circumstances, did not justify the warrantless search. Therefore, the officers were not in a lawful position when they seized defendant's gun and the third necessary element for the plain view exception was never met. *Champion, supra* at 104. As such, the gun was improperly seized and the trial court erred when it denied defendant's motion to suppress.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens