

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-542
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v.

Forsyth County
Nos. 09 CRS 61680-81
10 CR 11453

RICKY LEMONT CORBITT

Appeal by Defendant from judgment entered 13 January 2011
by Judge Richard W. Stone in Forsyth County Superior Court.
Heard in the Court of Appeals 26 October 2011.

*Attorney General Roy Cooper, by Assistant Attorney General
John R. Green, Jr., for the State.*

Michele Goldman for Defendant.

STEPHENS, Judge.

Following a search of his residence by Winston-Salem Police
Department ("WSPD") officers that uncovered cocaine, drug
paraphernalia, and a firearm, Defendant Ricky Lemont Corbitt was
arrested and indicted on one count each of trafficking in
cocaine, possession of cocaine with intent to distribute,
possession of drug paraphernalia, possession of a firearm by a
felon, and attainment of the status of habitual felon. Corbitt

subsequently filed a motion to suppress "all evidence obtained after officers entered [his] residence." Corbitt's motion was denied following a 10 January 2011 hearing in Forsyth County Superior Court, the Honorable Richard W. Stone presiding. Thereafter, Corbitt pled guilty to the charges and reserved his right to appeal the denial of his motion to suppress. Judge Stone accepted Corbitt's guilty plea and sentenced Corbitt to 85 to 111 months in prison. Corbitt gave notice of appeal in open court.

Corbitt argues on appeal that the trial court erred in denying his motion to suppress evidence of the contraband found in his apartment. The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). We review conclusions of law *de novo*. *Id.*

The evidence presented at the hearing regarding WSPD's entry into Corbitt's residence tended to show the following: A month after receiving an anonymous tip reporting that "drugs were being sold" at Corbitt's residence, WSPD officers "responded to [Corbitt's residence] to conduct a knock and

talk." When WSPD Officer Hashon Geddings knocked on the front door - which was open except for "a screen door" with "a slight tint to it" that allowed Officer Geddings to see "shadow figures" but not "face figures" - he recognized an odor that he knew "from [his] training and experience to be burnt marijuana coming from within the residence." Officer Geddings then noticed "several shadow figures" move at a quick pace to the left side of the residence; the figures returned to the living room two seconds later. "[A]pproximately a minute later[,] somebody opened the screen door." At that point, Officer Geddings and others "entered the residence to secure it and lock it down to apply for a search warrant." Inside the residence, the officers conducted a "protective sweep" and found a gun and digital scales on Corbitt's bedroom furniture. Thereafter, the officers obtained a search warrant for the residence, executed the warrant, and found cocaine in the residence.

The trial court made findings based on this evidence, and, based on those findings, concluded as follows: (1) "[o]nce legally at the open door of the residence, the smell of burnt marijuana in itself is probable cause to search the residence"; (2) "[t]he officers have exigent circumstances to search a residence when they are on the porch of the residence and there

is an odor of burnt marijuana coming from the residence, as they have reasonable grounds to believe evidence of criminal activity is being destroyed by consumption"; and (3) "[t]he exigent circumstances in this case [are] compounded by the observation of the officers of furtive [movement] within the house and unusual noises." The trial court further concluded that the officers were lawfully inside Corbitt's residence, that the subsequent protective sweep was lawful, and that the evidence should not be suppressed.

On appeal, Corbitt first argues that the trial court erroneously concluded that WSPD's warrantless entry into and search of his residence was lawful. Specifically, Corbitt contends that the offense for which WSPD officers entered Corbitt's residence to preserve evidence - which Corbitt asserts could only have been "the most minor possession of marijuana offense" - was not grave enough to justify warrantless entry. Corbitt bases this argument on the United States Supreme Court's decision in *Welsh v. Wisconsin*, 466 U.S. 740, 754, 80 L. Ed. 2d 732, 746 (1984), which held that the Fourth Amendment to the United States Constitution prohibits warrantless home entry for the purpose of preserving evidence of a "noncriminal, civil forfeiture offense." However, because even the most minor

possession of marijuana offense is a criminal offense in North Carolina, *Welsh* is inapposite. Corbitt's argument is overruled.

Corbitt further contends that WSPD's conduct was unlawful because the circumstances did not support a warrantless search. We disagree.

A warrantless search is lawful if probable cause exists to search and the exigencies of the situation make search without a warrant necessary. *State v. Mills*, 104 N.C. App. 724, 730, 411 S.E.2d 193, 196 (1991). Because the trial court found, and Corbitt does not dispute, that Officer Geddings smelled marijuana, and because the plain smell of drugs by an officer is evidence to conclude there is probable cause for a search, *State v. Downing*, 169 N.C. App. 790, 796, 613 S.E.2d 35, 39 (2005), the only issue is whether the exigencies of the situation made a warrant unnecessary. A determination of whether exigent circumstances are present must be based on the totality of the circumstances. *State v. Nowell*, 144 N.C. App. 636, 643, 550 S.E.2d 807, 812 (2001), *aff'd per curiam*, 355 N.C. 273, 559 S.E.2d 787 (2002).

The circumstances relevant to the determination of the existence of exigent circumstances are as follows: Officer Geddings knocked on the front door of Corbitt's residence;

Officer Geddings smelled marijuana; Officer Geddings saw several "shadow figures" run to another room on the side of the house and return two seconds later; and nobody in the house came to the door until after a minute.¹

This Court has previously held that "[e]xigent circumstances sufficient to make search without a warrant necessary include, but are not limited to, the probable destruction or disappearance of a controlled substance." *Id.* Further, consuming marijuana may constitute destruction of evidence of criminal activity. *Id.* (evidence that suspects were going to "smoke a joint" served as "evidence the [suspects] were going to destroy the amount of marijuana required for one 'joint'").

In this case, Officer Geddings' detection of the odor of burning marijuana and observance of the figures' furtive movements in the residence were sufficient to support a reasonably objective belief that evidence of criminal activity

¹The trial court also made findings on evidence of circumstances observed by an officer at the side of the house. These additional circumstances are irrelevant, however, because the evidence tends to show that Officer Geddings was not aware of those circumstances when he made his decision to enter the residence. *Ker v. California*, 374 U.S. 23, 40 n.12, 10 L. Ed. 2d 726, 742 n.12 (1963) ("[I]n determining the lawfulness of entry and the existence of probable cause we may concern ourselves only with what the officers had reason to believe at *the time of their entry.*" (emphasis in original)).

was about to be destroyed. That belief, combined with the ready destructibility of marijuana and the fact that Officer Geddings' knock necessarily alerted those in the residence to the police's presence, justified warrantless entry into Corbitt's residence. See *State v. Wallace*, 111 N.C. App. 581, 586, 433 S.E.2d 238, 241-42 (discussing the following factors deemed by the 4th Circuit to be relevant in determining whether exigent circumstances existed to support a warrantless search: (1) the degree of urgency involved and the time necessary to obtain a warrant; (2) the officer's reasonably objective belief that the contraband is about to be removed or destroyed; (3) the possibility of danger to police guarding the site; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband) (citing *United States v. Turner*, 650 F.2d 526, 528 (4th Cir. 1981)), *disc. review denied*, 335 N.C. 242, 439 S.E.2d 161 (1993). Accordingly, we hold that the trial court did not err by concluding that the warrantless entry into Corbitt's residence was lawful.

Corbitt next argues that the protective sweep by WSPD officers was unlawful. We disagree. Under similar circumstances - *i.e.*, warrantless entry based on plain smell of

marijuana and possible destruction of evidence - this Court has found a protective sweep justified. See *State v. Stover*, 200 N.C. App. 506, 513, 685 S.E.2d 127, 133 (2009).

Nevertheless, Corbitt asserts that *Stover* is not controlling because that protective-sweep ruling was based on *State v. Taylor*, 298 N.C. 405, 417, 259 S.E.2d 502, 509 (1979) ("The immediate need to ensure that no one remains in the dwelling preparing to fire a yet unfound weapon . . . constitutes an exigent circumstance which makes it reasonable for the officer to conduct a limited, warrantless, protective sweep of the dwelling."), which was decided prior to, and, therefore, omitted the calculus required by, *Maryland v. Buie*, 494 U.S. 325, 337, 108 L. Ed. 2d 276, 288 (1990) (allowing protective sweep for in-home arrest where officers have 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). We disagree. Firstly, irrespective of its reasoning, we are bound by the holding in *Stover*. Secondly, we conclude that the anonymous tip that illegal drugs were being sold at Corbitt's residence, along with Officer Geddings' detection of marijuana odor and his experiential knowledge that "narcotics go hand in hand with weapons," provided sufficient suspicion to justify a

sweep for threats in Corbitt's residence. Further, we note that, although *Buie* dealt with a protective sweep in conjunction with execution of an arrest warrant, several other jurisdictions allow sweeps whenever an officer is lawfully on the premises. See, e.g., *United States v. Martins*, 413 F.3d 139, 150 (1st Cir. 2005) ("We hold, therefore, that police who have lawfully entered a residence possess the same right to conduct a protective sweep whether an arrest warrant, a search warrant, or the existence of exigent circumstances prompts their entry."); *United States v. Patrick*, 959 F.2d 991, 996 (D.C. Cir. 1992) ("Once the police were lawfully on the premises, they were authorized to conduct a protective sweep based on their reasonable belief that one of its inhabitants was trafficking in narcotics."). Accordingly, we are unpersuaded by Corbitt's argument.

Based on the foregoing, we hold that the trial court's conclusions were legally correct and supported by the court's findings of fact. Accordingly, the trial court did not err by denying Corbitt's motion to suppress.

AFFIRMED.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).