[J-43-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	64 W.D. Appeal Dkt. 1998
	:	
Appellee,	:	Appeal from the Order of the Superior
	:	Court at No. 1096PGH97 on April 30,
	:	1998, affirming the Order of the Court of
	:	Common Pleas of Westmoreland County,
v.	:	Criminal Division, at Nos. 3870C & 3871C
	:	1995 on March 27, 1997.
	:	
	:	
RANDOLPH W. WRIGHT,	:	
	:	
Appellant.	:	
	:	
	:	ARGUED: March 9, 1999

CONCURRING AND DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: DECEMBER 23, 1999**

I agree with the Majority that Section 2711(b) of the Crimes Code, 18 Pa.C.S. § 2711(b), must be interpreted in harmony with the Fourth Amendment. However, I believe that the Majority incorrectly concludes that the warrantless search of appellant's home violated the Fourth Amendment. Further, I would find that the admission of the firearms used in the commission of the crime constituted harmless error. Therefore, the judgment of sentence should be affirmed.

This Court has recognized that exigent circumstances will justify a warrantless search where police believe in good faith that a life-threatening emergency exists. Commonwealth v. Maxwell, 505 Pa. 152, 163, 477 A.2d 1309, 1315, cert. denied, 469 U.S. 971 (1984). The definition of exigent circumstances includes "[t]he need to protect or

preserve life or avoid serious injury." United States v. Echegoyen, 799 F.2d 1271, 1278 (9th Cir. 1986), quoting, Mincey v. Arizona, 437 U.S. 385, 392 (1978). One of the factors to be considered in determining whether exigent circumstances exist is danger to persons inside a dwelling. Commonwealth v. Roland, 535 Pa. 595, 637 A.2d 269 (1994), citing Minnesota v. Olson, 495 U.S. 91, 100 (1990).

In the case *sub judice*, the presence of loaded firearms in a house to which appellant's nine-year-old son could return at any time created a potentially life-threatening situation that justified the warrantless search. Although appellant's son was taken to a neighbor's home immediately after his father shot his mother in the head, it was possible that he could return for any number of reasons, including to retrieve personal items or school books or simply to be in his own home.[1] The potential for appellant's son to return to the home and locate the loaded firearms and possibly corrupt the crime scene was an exigent circumstance justifying Trooper Fuller's search for the firearms used in the assault. See, United States v. Antwine, 873 F.2d 1144, 1147 (8th Cir. 1989)(warrantless search for weapon justified where children would be unattended in house); United States v. Al-Azzawy, 784 F.2d 890, 895 (9th Cir. 1985), cert. denied, 476 U.S. 1144 (1986)(exigent circumstances justified a warrantless search of a trailer that police believed contained explosives because appellee's children could return to trailer). Contrast, Parkhurst v. Trapp, 77 F.3d 707, 711 (3d Cir. 1996)(facts did not support finding of exigency that plaintiff might have harmed son where plaintiff was in jail and the guns in the home had been confiscated).

[1] Although, as the majority notes, the child was eventually taken in by his grandparents, at the time of the search the child was still across the street at a neighbor's house. N.T. 10/4/95 at 14.

Moreover, I do not believe that the fact that police may have "secured the scene" would have given them the authority to bar the child from his own home, where he was entitled to be, absent a warrant to seal the scene. In Al-Azzawy, supra, the United States Court of Appeals for the Ninth Circuit held that police were justified in conducting a warrantless search in order to ensure the safety of the appellee's premises because the police could not arrest all of the individuals who were entitled to enter the trailer, including appellee's two small children. Given that appellant's son was in near proximity and had the right to return to his home at any time, it was necessary for Trooper Fuller to remove a potentially loaded firearm from the home to ensure the child's safety.

Trooper Fuller's actions were clearly intended to protect appellant's son should he return to the home. This conclusion is strengthened by the fact that, in addition to seizing the two firearms found under a mattress, Trooper Fuller turned over all of the other firearms in the home to a relative. N.T. 10/4/95 at 20. See, Antwine, supra; (finding it significant that the search was limited to the scope of the exigency); Echegoyen, supra at 1279 (fact that officers turned off the burners, ventilated the premises, and summoned the firefighters to inspect the property buttressed conclusion that they entered the premises because of exigent circumstance – i.e. risk of fire or explosion). Because the police were not authorized to exclude the child from the premises and they had no way of knowing when he might walk across the street and enter his home, it was imperative that Trooper Fuller locate and remove any loaded firearms. Therefore, the warrantless search was justified by exigent circumstances.

Furthermore, even if the search were unconstitutional, the admission of the firearm used in the commission of the crime at trial was harmless error.[2] Under the harmless error

[2] Although the Commonwealth has not argued for affirmation on the basis of "harmless error," it is axiomatic that this Court may assign any correct basis for affirmation of the order (continued…)

doctrine, this Court will affirm the trial court's judgment of sentence in spite of error by the trial court if this Court concludes beyond a reasonable doubt that the error did not contribute to the jury's verdict. Commonwealth v. Edwards, 535 Pa. 575, 580, 637 A.2d 259, 261 (1993); Commonwealth v. Cannon, 453 Pa. 389, 394, 309 A.2d 384, 388 (1973), citing Chapman v. California, 386 U.S. 18 (1967). In this matter, the only evidence that appellant argues should be suppressed as the fruit of the allegedly unconstitutional search is the firearm itself. However, the Commonwealth introduced additional evidence from a number of other sources that established, beyond a reasonable doubt, that appellant shot his wife in the head and was guilty of the crimes charged.

First, the Commonwealth introduced the testimony of Gizella T. Miller, one of appellant's neighbors. Miller testified that she first heard the gunshots, and then she heard appellant laughing. Shortly thereafter, appellant's mother phoned Miller, requesting that Miller go next door and retrieve appellant's son because "[appellant] just shot Missy [appellant's wife] in the head." When Miller arrived next door, appellant's wife, who had blood all over her body and a gunshot wound to the head, exclaimed: "He did it again. Randy [appellant] shot me, and he put in me [sic] in the shower, Gizzy, and he tried to clean me up." N.T. 1/14/97 at 12.

The Commonwealth also introduced the testimony of Trooper Stephen M. Russo of the Pennsylvania State Police. Trooper Russo testified that, upon arriving at appellant's house, he observed a spent bullet casing by the screen door, then knocked on the door and identified himself to appellant, who responded to the knock. Trooper Russo and his partner detained appellant and proceeded into the home, where they observed the victim bleeding profusely and observed the victim's son, who appeared "shaken up." Trooper

---

(…continued)
of the court below. See Commonwealth v. Romero, 722 A.2d 1014, 1016 (Pa. 1999), citing Commonwealth v. Shaw, 494 Pa. 364, 368 n.1, 431 A.2d 897, 899 n.1 (1981).

Russo testified that, when he spoke with the nine-year-old boy, the child told him that he and his mother had been asleep in the bedroom when appellant came home and initiated an argument with his mother. According to Trooper Russo, the child stated that the argument moved into the living room, at which time the child heard two gun shots. The boy then came out of his bedroom and observed his father on top of his mother, prompting him to return to the bedroom and call the police. N.T. 1/14/97 at 22-24. Trooper Russo also testified that he questioned appellant after giving him his Miranda warnings.[3] When Trooper Russo asked appellant which gun he had used in the incident and where the gun was, appellant replied that he had used a 9mm Makarov and that it was in the gun room with his other guns. Id. at 25.[4]

Additionally, the Commonwealth introduced the testimony of Lisa Marie Schumacher, the paramedic who responded to the shooting. She testified that, upon asking the victim what had happened, the victim replied that "her husband had shot her in the head," then had "told her to go into the shower to wash the blood off." Id. at 46.

Next, the Commonwealth introduced the testimony of State Trooper Roy G. Fuller, who testified that, during the investigation, he retrieved a copy of the initial call to police from appellant's child. The jury subsequently heard the tape-recorded call, which proceeded, in relevant part, as follows:

911: Westmoreland 911.

CHILD: Oh, my Dad's trying to kill my Mom!

911: Repeat that.

CHILD: Huh?

---

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

[4] Expert testimony at trial established that the spent bullet casings on the ground outside the house were 9mm Makarov bullet casings. N.T. at 68.

911: What did your Dad do?

CHILD: He got the gun and he is laying on my Mom.

911: He is laying on your Mom?

CHILD: He's drunk.

. . . .

911: Where do you live at? You said fifth house --

. . . .

CHILD: My dad's coming!

911: Fifth house -- don't hang up the phone. Fifth house on the right coming from where?

CHILD: I can't.

(Phone hangs up.)

(911 calls back.)

CHILD: Hello.

911: Hey, this is 911. Don't hang up the phone, whatever you do.

CHILD: My Dad.

911: OK, I know your Dad.

(Phone hangs up.)

Id. at 57-60.

Trooper Fuller also testified that the victim told him that appellant had put a gun against her head while yelling and screaming at her, aimed the gun at her head and pulled the trigger. She put her head in her hands to cover herself and he fired again, at which point "it felt like her head exploded." Trooper Fuller testified that the victim also stated that appellant gave the victim a towel to try to stop the bleeding and told her not to tell the police

that he had shot her. The victim added that she was afraid of appellant and frequently lied to protect him.

Finally, the victim herself testified at trial for the defense, asserting that, although appellant had indeed come at her with a gun, she had subsequently gained control of the gun and accidentally shot herself. The victim further testified that the second shot was fired when "[appellant] was trying to come back and get away to leave me, and that is when the gun went off again."

In light of the aforementioned testimony, it is abundantly clear that the admission at trial of the weapon itself constituted harmless error that did not contribute to the verdict. The jury simply believed the version of events that the victim and her son provided to neighbors, paramedics and police immediately after the incident, and disbelieved the rather incredible version that the victim concocted at the eleventh hour in an attempt to save her husband from a criminal conviction. The presence of the firearm used to commit the crime as a Commonwealth exhibit did not render appellant's defense any less believable. Rather, it simply allowed the jurors to see the weapon that lay at the heart of the contradictory stories being proffered by the Commonwealth and the defense. The gun itself was never the issue; only how the gun was used.[5] In sum, I believe that the error in this case was patently harmless, that a new trial would simply waste valuable judicial resources, and that the judgment of sentence should be affirmed.[6]

---

[5] The majority asserts that the actual weapon was essential to the Commonwealth's case because, in order to rebut the defense theory, the Commonwealth needed to establish that the gun could not have discharged accidentally. Slip op. at 8. However, appellant himself testified at trial that the gun could not have gone off unless the trigger was pulled. N.T. 1/17/97 at 311-2-13. Although appellant argued that he did not intentionally shoot his wife, at no point did the defense present any testimony that the gun had discharged accidentally.

[6] Moreover, it is arguable that appellant impliedly consented to the search of the premises for the purpose of locating the weapon. Appellant testified that he told the troopers that the gun was in the living room and, when they said it was not there, he told them to "look on (continued…)

Madame Justice Newman joins this concurring and dissenting opinion.

(…continued)
top of the fridge." N.T. 1/17/99 at 308. One of the troopers returned to the house and returned with the gun, albeit not from the refrigerator. Thus, although appellant did not expressly consent to a search of the house, he did direct the troopers to attempt to locate the gun where he allegedly believed it to be.