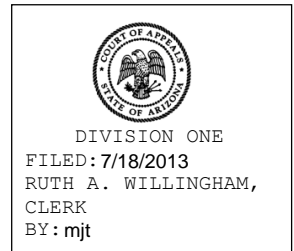


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);  
Ariz.R.Crim.P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 12-0475  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
MATTHEW WARD DOTY, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Mohave County

Cause No. CR2011-00304

The Honorable Steven F. Conn, Judge

**AFFIRMED**

Thomas C. Horne, Arizona Attorney General Phoenix  
By Joseph T. Maziarz, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
And Craig W. Soland, Assistant Attorney General  
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender Kingman  
Attorney for Appellant

O R O Z C O, Judge

¶1 Matthew Ward Doty (Defendant) appeals his conviction and sentence for possession of drug paraphernalia. He contends

the trial court erred in denying his motion to suppress evidence seized by police during a protective sweep. For the following reasons, we affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶2 On March 15, 2011, at approximately 8:30 p.m., Deputy DeVries and Deputy Williams of the Mohave County Sheriff's Office went to a single-wide trailer in Golden Valley, Arizona (Residence). The deputies were looking for J.H., who they learned was inside the Residence.<sup>1</sup> Deputy Giralde arrived shortly thereafter to assist the other deputies.

¶3 For approximately thirty minutes, the deputies called out to J.H. and requested that he exit the Residence. During that time, Deputy DeVries spoke to the owner of the Residence (Owner) by telephone. Owner told Deputy DeVries that Defendant lived at the Residence and should be the only one there. The deputies ran a record check and learned that Defendant had an outstanding warrant from a traffic case.

¶4 At approximately 9:00 p.m., J.H. voluntarily left the Residence and was arrested. Deputies then requested that Defendant also exit the Residence and informed him that they had a warrant for his arrest. After Defendant stated that he was not going to come outside. Deputies advised Defendant that if

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<sup>1</sup> The deputies were searching for J.H. to arrest him on a matter unrelated to this case.

he did not come out, would kick in the front door and place him under arrest.

¶15 Defendant continued to refuse the deputies' commands for him to exit the Residence. Deputy Williams and Deputy DeVries ultimately kicked in the front door to the Residence. Deputy Williams testified that it was dark inside the Residence, and he had to turn on a tactical light that was mounted on his duty weapon in order to see. The deputies encountered Defendant in a hallway and advised him that he was under arrest. Deputy Williams ordered Defendant to lie on the ground. Defendant refused to comply with this request and told the deputies to get out of the Residence. Defendant proceeded to strike Deputy Williams multiple times on his upper chest, head, face, and neck.

¶16 Because Deputy Williams was unable to subdue Defendant, Deputy DeVries deployed his Taser. However, one of the Taser's probes disconnected from Defendant's skin, which rendered the initial Taser application ineffective. Defendant resumed struggling with Deputy Williams, and Deputy DeVries subsequently "drive-stunned" Defendant twice by applying the Taser directly to Defendant's back. The deputies were then able to handcuff Defendant.

¶17 While Deputy DeVries and Deputy Giralde took Defendant outside and placed him in Deputy DeVries' vehicle, Deputy

Williams remained inside "to continue a safety sweep of the Residence." Deputy Giralde returned, and he and Deputy Williams conducted the protective sweep. At that time, Deputy DeVries also returned inside to take pictures of an indentation in the drywall in the hallway, which he believed had occurred during the altercation between Defendant and Deputy Williams. During the sweep, Deputy Giralde observed two pipes that contained white burnt residue and appeared to be for methamphetamine use on a desk in a bedroom near the hallway where Defendant had been arrested.

¶18 The State charged Defendant with resisting arrest, aggravated assault, and possession of drug paraphernalia. Before trial, Defendant filed a motion to suppress evidence of the drug paraphernalia found during the protective sweep. Defendant alleged that the sweep was illegal because the deputies did not have specific facts that someone who posed a safety threat was inside the Residence after Defendant was arrested. The motion to suppress focused solely on the drug paraphernalia charge, which the parties agreed to sever from the other two charges.<sup>2</sup>

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<sup>2</sup> The case proceeded to trial on the other two charges. The jury was unable to reach a verdict on the aggravated assault charge, and the State later dismissed the charge with prejudice. However, the jury convicted Defendant of resisting arrest.

¶9 After an evidentiary hearing, the trial court denied Defendant's motion to suppress. Defendant subsequently submitted the drug paraphernalia charge to the trial court for a determination based on a stipulated record.<sup>3</sup> Upon consideration of the evidence, the trial court found Defendant guilty of possession of drug paraphernalia. The court sentenced Defendant to a probation term of slightly less than three years.

¶10 Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031 (2010), and -4033.A.1 (2010).

#### DISCUSSION

¶11 We review the denial of a motion to suppress evidence for an abuse of discretion. *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996). Abuse of discretion occurs when "the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983). However, we review the court's legal conclusions de novo. *State v. Sanchez*, 200 Ariz. 163, 165, ¶ 5, 24 P.3d 610, 612 (App. 2001). We consider only the evidence presented

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<sup>3</sup> The record consisted of the evidence presented during the jury trial on the resisting arrest and aggravated assault charges, the evidence presented during the suppression hearing, and police and lab reports.

at the suppression hearing, and we view the evidence in the light most favorable to sustaining the trial court's ruling. *State v. Gay*, 214 Ariz. 214, 217, ¶ 4, 150 P.3d 787, 790 (App. 2007).

¶12 The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." A warrantless search of a residence is unlawful under the Fourth Amendment unless an exception to the warrant requirement exists. *State v. Fisher*, 141 Ariz. 227, 237, 686 P.2d 750, 760 (1984). One exception to the warrant requirement is for protective sweeps conducted "incident to an arrest and conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

¶13 The Supreme Court explained in *Buie* that "incident to the arrest the officers [can], as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334. However, to justify a broader sweep, "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* Thus, *Buie*

authorizes two types of protective sweeps: the first involving the area immediately adjacent to the place of arrest, which does not require reasonable suspicion, and the second involving other areas, which requires a reasonable belief, supported by articulable and specific facts, that the area harbors someone who could pose a safety threat. *Id.*

¶14 Defendant contends this case is similar to *State v. Fisher*, in which the Arizona Supreme Court held that a protective sweep was improper under the second *Buie* exception. 226 Ariz. 563, 566-67, ¶¶ 9, 15, 250 P.3d 1192, 1195-96 (2011). In that case, the protective sweep occurred after the defendant and two other people voluntarily exited the defendant's apartment. *Id.* at 564-65, ¶¶ 3-4, 250 P.3d at 1193-94. Although there was an unaccounted-for weapon, the police failed to articulate specific facts that indicated another person was inside the defendant's apartment. *Id.* at 565, 567, ¶¶ 4, 15, 250 P.3d at 1194, 1196. Because the police could not establish a reasonable belief that someone else was in the apartment, the court held that the protective sweep was invalid. *Id.* at 567, ¶ 15, 250 P.3d at 1196.

¶15 We find this case distinguishable from *Fisher*. Here, Defendant refused to exit the Residence, and the deputies were forced to kick in the door and arrest him inside the dark Residence. Although Defendant was only being arrested on

misdemeanor warrants, he struck Deputy Williams numerous times, and Deputy DeVries had to deploy his Taser in order to arrest Defendant. Because Defendant resisted arrest, the deputies had to return to the Residence in order to take pictures of the indentation in the drywall where the struggle between Defendant and Deputy Williams had occurred and to collect the anti-felon identification (AFID) tags that were ejected when the Taser was deployed. Thus, for the foregoing reasons, the officers in the present case were dealing with a more dangerous situation than that in *Fisher*. See *Buie*, 494 U.S. at 333 (“[A]n in-home arrest puts the officer at the disadvantage of being on his adversary’s ‘turf.’ An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.”).

¶16 Furthermore, the deputies articulated specific facts that indicated their belief that someone was in the Residence. Deputy Williams testified that there was a broken window screen, which was a possible indicator that someone had forced entry into the Residence prior to the deputies’ arrival. Although Owner had informed the deputies that only Defendant was authorized to be inside the Residence, the deputies knew that another person, J.H., had also been inside and had refused to exit the Residence for about thirty minutes. Additionally, Deputy Giralde testified that he and the other two deputies were



concerned that somebody else who could pose a threat to them was hiding in the Residence based on Defendant's apprehensive demeanor and the fact that Defendant was combative.

¶17 Based on the evidence presented during the suppression hearing, we find that the protective sweep conducted by the deputies was justified pursuant to the second *Buie* exception. Accordingly, the trial court did not abuse its discretion in denying Defendant's motion to suppress.<sup>4</sup>

**CONCLUSION**

¶18 For the foregoing reasons, we affirm Defendant's conviction and sentence.

/S/

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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

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RANDALL M. HOWE, Presiding Judge

/S/

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MAURICE PORTLEY, Judge

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<sup>4</sup> Defendant also contends that the protective sweep was improper under the first *Buie* exception because the search was not of an area immediately adjoining the area of arrest or of an area from which an immediate attack could have been launched. Because we determined that the trial court properly denied the motion to suppress under the second *Buie* exception, we need not address Defendant's arguments pertaining to the first exception. See *Forszt v. Rodriguez*, 212 Ariz. 263, 265, ¶ 9, 130 P.3d 538, 540 (App. 2006) (This court "may affirm the trial court's ruling if it is correct for any reason apparent in the record.").