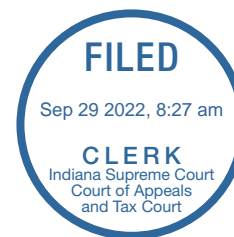


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Casey J. O'Hara,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 29, 2022

Court of Appeals Case No.
22A-CR-537

Appeal from the Delaware Circuit
Court

The Honorable John M. Feick,
Judge

Trial Court Cause No.
18C04-2104-F2-11

Brown, Judge.

[1] Casey J. O’Hara appeals the denial of his motion to suppress. We affirm.

Facts and Procedural History

[2] On March 29, 2021, O’Hara called 911 because he “was unsure what [his] girlfriend took and [she] wasn’t waking up.” Transcript Volume II at 11. Muncie Police Officer Eric Peterson and responders from the Muncie Fire Department arrived at O’Hara’s apartment building, and O’Hara directed them to his second-floor apartment and to a back bedroom where Officer Peterson saw an unconscious female next to the bed. While in that bedroom, Officer Peterson “saw some digital scales sitting on the side table beside the bed,” “a cup with some pills,” “[t]wo different types of pills sitting on the counter,” and “a plate that had some marijuana shape or residue on it.” *Id.* at 22. He indicated the pills were in a clear cup and were located “on . . . the dresser off to the left . . . [r]ight beside as [he] was standing to the victim’s right.” *Id.* at 23. O’Hara said that the pills were Percocet and that he obtained them from a friend.

[3] Muncie Police Officer Daniel Vogel arrived at the scene and saw the personnel from the fire department taking care of the patient. He had been told from dispatch “that it might have been fentanyl or Percocet” and observed “a cup full of loose pills, assorted pills” in the bedroom where O’Hara’s girlfriend was located. *Id.* at 39. Officer Vogel saw “another bedroom that shared a wall with where she was at.” *Id.* at 35. According to Officer Vogel, he “went into that room to make sure there weren’t any other patients who needed medical

assistance or any other people who could potentially harm first responders.” *Id.* He did not see any other people in the second bedroom. According to Officer Vogel, there was an open closet in the second bedroom, he “used a flashlight to check the closet,” and “[d]own on the floor was a large glass jar with plant material. There was US currency, and there was a floor safe.” *Id.* at 39. Also according to Officer Vogel, there was a bag “in line with where [he] walked,” he “didn’t want to step on it,” and he “did dump some of the contents out to make sure that it wasn’t anything that was going to break open and harm [him] or possibly have anything to do with the other things that [they] were learning as [they were] inside the apartment.” *Id.* at 40. Officer Vogel returned to the bedroom where O’Hara’s girlfriend was located and observed a digital scale and a glass pipe on the nightstand. Officer Vogel called Sergeant Mike Nickens and, at Sergeant Nickens’s request, asked O’Hara if he was willing to consent to a search of the apartment, and O’Hara denied the request. Officer Vogel informed O’Hara that the police were waiting for a search warrant and that, at that time, he was not free to leave. At some point, O’Hara ran, and Officer Vogel and another officer caught up with and tackled him.

[4] Sergeant Nickens signed an Affidavit for Search Warrant stating in part:

3. That the affiant and other members of the Muncie/Delaware County DTF [Drug Task Force] were contacted about a 19yr old female that had overdosed at . . . apartment 1A

4. Officer Vogel arrived on scene and observed a female laying in one of the bedrooms that appeared to be overdosing on an unknown substance.

5. Officer Vogel advised that [sic] affiant over the phone that in the room with the female victim was he observed a cup with multiple types of pills inside, a white powder on the TV, and two hand gun cases.

6. Officer Vogel cleared the rest of the apartment and observed a large jar with a plant like substance that through his training and experience he recognized to be marijuana sitting next to a large gun safe.

7. Officer Vogel also advised that he could smell the odor of fresh marijuana inside the apartment.

8. Officer Vogel attempted to ask the tenet [sic], Casey O'Hara, for consent to search the apartment due to the drugs in plain view. O'Hara ran from officers, fought with them and once taken into custody O'Hara kicked out a window to one of the Ball State Police Vehicles. . . .

Defendant's Exhibit M. The court issued a search warrant. Sergeant Nickens completed a Law Enforcement Return on Search Warrant stating law enforcement executed the search warrant and found: approximately 85 grams of psychedelic mushrooms, "2.5 tablets scored GO37," "21 tablets scored 10325/RR," "5 tablets scored T 189," "339 Curepen THC 1000mg vape cartages," 635 grams of marijuana, "348 grams of THC wax," "112 grams of THC chocolate," "66 THC gummies," "2 pre rolled marijuana cigarettes," "18 plastic containers containing prepackaged marijuana," "7 prepackaged marijuana bags," "Vacuum sealed bag containing more prepackaged marijuana," "1 Century Arms AK-47 . . . with mag and 28 rounds," "1 Ruger 9mm handgun . . . with 2 mags and 7 rounds," "2 I phones," two digital scales, one box of open top sandwich bags, several clear empty capsules, "[o]ne rolled \$20 with a powdery residue inside," and "\$9,813.00 in US currency not including the above \$20." Defendant's Exhibit O.

[5] On April 8, 2021, the State charged O’Hara with dealing in a Schedule I controlled substance as a level 2 felony, possession of a narcotic drug as a level 5 felony, dealing in marijuana as a level 6 felony, resisting law enforcement as a class A misdemeanor, and possession of a controlled substance as a class A misdemeanor. On August 16, 2021, O’Hara filed a motion to suppress. The court held a hearing and later denied the motion. The trial court certified its interlocutory order for immediate appeal, and this Court accepted jurisdiction.

Discussion

[6] O’Hara asserts the trial court erred in denying his motion to suppress. He argues the actions of law enforcement of entering the unoccupied bedroom, searching the closet using a flashlight, and opening a plastic bag before obtaining the search warrant violated the Fourth Amendment. He contends that Officer Vogel’s actions exceeded the limits of a protective sweep.

[7] The Fourth Amendment to the United States Constitution provides in part “[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause” U.S. CONST. AMEND. IV. “Though a ‘fluid concept,’ probable cause exists when the affidavit establishes ‘a fair probability that contraband or evidence of a crime will be found in a particular place.’” *Heuring v. State*, 140 N.E.3d 270, 273 (Ind. 2020) (quoting *Illinois v. Gates*, 462 U.S. 213, 232, 238, 103 S. Ct. 2317 (1983)). “Probable cause to issue a search warrant exists where the facts and circumstances would lead a reasonably prudent person to believe that a search would uncover

evidence of a crime.” *Meister v. State*, 933 N.E.2d 875, 879 (Ind. 2010). If the search is conducted without a warrant, the State bears the burden to show that one of the well-delineated exceptions to the warrant requirement applies. *M.O. v. State*, 63 N.E.3d 329, 331 (Ind. 2016).

[8] The United States Supreme Court has defined a protective sweep as “a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.” *Maryland v. Buie*, 494 U.S. 325, 327, 110 S. Ct. 1093, 1094 (1990). As an incident to arrest officers may, “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, 110 S. Ct. at 1098. A search beyond those parameters is permissible only when there are “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.*

[9] The record reveals that Officer Vogel entered the bedroom which shared a wall with the bedroom where O’Hara’s girlfriend was located, there was an open closet in the room, and he used a flashlight to check the closet, observing a glass jar with plant material and a floor safe. Under the circumstances, including the location of the bedrooms relative to each other, the location of the first responders and the pills and digital scales in plain view, and the information

that O'Hara's girlfriend may have overdosed, we cannot conclude the protective sweep of the adjacent bedroom and closet was improper.

[10] Further, we note “[t]he inevitable discovery exception to the exclusionary rule permits the introduction of evidence that eventually would have been located had there been no error.” *Shultz v. State*, 742 N.E.2d 961, 965 (Ind. Ct. App. 2001) (quotations and citations omitted), *reh’g denied, trans. denied*. In addition, “[w]here a search warrant is based on both legally obtained information and information obtained in contravention to the Fourth Amendment, we will determine the legitimacy of the warrant only in light of the legally obtained information.” *Perez v. State*, 27 N.E.3d 1144, 1153 (Ind. Ct. App. 2015), *trans. denied*. The record reveals that the items observed during the sweep did not constitute the sole basis upon which the probable cause affidavit in support of the search warrant relied, and they would have been inevitably discovered in the execution of the search warrant. Sergeant Nickens’s affidavit stated that Officer Vogel saw a female who appeared to be overdosing and observed, in the room with the female, a cup with multiple types of pills inside and a white powder on the TV and that he could smell the odor of fresh marijuana in the apartment. We conclude that, even if the sweep of the areas other than the bedroom in which O’Hara’s girlfriend was located and removal of items from the plastic bag before obtaining the search warrant were improper, reversal is not warranted. *See Perez*, 27 N.E.3d at 1153 (holding that, despite the illegal search of the defendant’s front door, there was enough untainted information in the probable cause affidavit to support the issuance of the search warrant);

Shultz, 742 N.E.2d at 965 (observing an illegally obtained VIN was not the sole ground relied upon in the probable cause affidavit for the search warrant and holding police could have secured a warrant without the VIN and the VIN and the remaining evidence would have been inevitably and lawfully discovered in the execution of the search warrant).

[11] For the foregoing reasons, we affirm the trial court.

[12] Affirmed.

Altice, J., and Tavitas, J., concur.