RENDERED: November 3, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002867-MR

JONATHAN MCMANUS — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 98-CR-00185

COMMONWEALTH OF KENTUCKY — APPELLEE

TO BE HEARD WITH: NO. 1999-CA-003071-MR

ADAM LEVI KEISTER — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 98-CR-00185

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING
** ** ** ** **

BEFORE: McANULTY, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: Jonathan McManus brings Appeal No. 1999-CA-002867-MR from a September 9, 1999, judgment of the McCracken Circuit Court, and Adam Levi Keister brings appeal No. 1999-CA-003071-MR from a November 22, 1999, judgment of the McCracken Circuit Court. We reverse.

The facts of both Appeal No. 1999-CA-002867-MR and Appeal No. 1999-CA-003071-MR are, for our purposes, identical and shall be recited below.

On July 30, 1998, McCracken County Deputy Sheriff Jon Hayden received information concerning McManus and Keister. Apparently, a Murray, Kentucky, detective received the information from a Murray patrolman. The information was basically that McManus and Keister were growing marijuana at the Paducah, Kentucky, residence they shared. The information originated from Keister's estranged wife.

The sheriff's department found the address of the residence from a prior civil summons. No surveillance was conducted of the residence, nor was there an attempt to verify the information received from Keister's estranged wife. Rather, in the late evening hours of August 6, 1998, Deputy Hayden and two other deputies went to the residence without a search warrant. Deputy Hayden later admitted that he lacked probable cause to secure the issuance of a search warrant.

The deputies knocked on the door, and McManus answered. He stepped out onto the porch and spoke to the deputies. Deputy Hayden told him that they received information of marijuana being grown in the residence. Deputy Hayden asked McManus for consent

to search; however, McManus denied same. Apparently, Deputy Hayden then advised McManus if there was marijuana inside the house, he needed to get rid of it. McManus was also informed that the deputies would probably be back.

The deputies left the residence and peered into a front window from a nearby sidewalk. The deputies then observed McManus and another individual running within the residence carrying large growing lights, pots, and planting trays. The deputies observed this activity for some five minutes. Deputy Hayden then contacted Chief Deputy Terry Long about the activity. Long instructed Hayden that if he believed evidence was being destroyed, to secure the residence by a warrantless entry. Thereupon, the deputies forced entry into the residence without a warrant.

McManus and Keister were both indicted upon the charges of enhanced cultivation of marijuana over five plants (KRS 218A.1423), enhanced trafficking in marijuana over eight ounces (KRS 218A.1421), and enhanced possession of drug paraphernalia (KRS 218A.500). McManus was separately indicted upon the charge of tampering with physical evidence (KRS 524.100) and first-degree possession of a controlled substance - cocaine (KRS 218A.1415). Keister was also separately indicted as being a second-degree persistent felony offender (KRS 532.080(2)).

McManus and Keister both moved to suppress the evidence. They argued that the deputies' warrantless entry into the residence violated the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution.

Following a hearing, the circuit court disagreed and denied the motions. McManus and Keister entered conditionally pleas of guilty pursuant to Ky. R. Crim. P. (RCr) 8.09. McManus and Keister were both sentenced to ten years' imprisonment. These appeals follow.

We shall address Appeal No. 1999-CA-002867-MR and Appeal No. 1999-CA-003071-MR simultaneously. Both appeals center upon the circuit court's denial of the motion to suppress.

McManus and Keister contend the circuit court committed reversible error by denying their motion to suppress. Specifically, they contend the circuit court erred by concluding: (1) that exigent circumstances existed to justify the deputies' warrantless entry into their residence; and (2) even if such exigent circumstances did exist, the officers may not rely upon such exigency as they created same. We shall address these contentions seriatim. Our review is, of course, under the substantial evidence rule enunciated in RCr 9.78.

We initially observe that the protections afforded by the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution are coextensive. See Holbrook v. Knopf, Ky., 847 S.W.2d 52 (1992); Crayton v. Commonwealth., Ky., 846 S.W.2d 684 (1992). Generally, a warrantless search is deemed unconstitutional unless it falls under one of the exceptions to the warrant requirement. See Cook v. Commonwealth, Ky., 826 S.W.2d 329 (1992). One such exception includes where probable cause and exigent circumstances exist. See United States v. Morgan, 743 F.2d 1158 (6th Cir. 1984), *cert.*

denied, 471 U.S. 1061, 105 S. Ct. 2126, 85 L. Ed. 2d 490 (1985). The burden of proof rests upon the government to show that probable cause and exigent circumstances indeed existed. See Vale v. Louisiana, 399 U.S. 30, 90 S. Ct. 1969, 26 L. Ed. 2d 409 (1970); Gillum v. Commonwealth, Ky. App., 925 S.W.2d 189 (1995). Exigent circumstances has been defined as when "police action literally must be 'now or never' to preserve evidence of the crime." See Roaden v. Kentucky, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973).

We do not think that mere possession of drugs or contraband in a residence necessarily gives rise to exigent circumstances justifying warrantless entry. In the case at hand, the deputies observed growing lights, pots, and planting trays being moved throughout the residence. The deputies observed no marijuana. We believe the Commonwealth failed to establish that the observed growing lights, pots, and planting trays could be destroyed before a warrant could have been obtained. Simply stated, we do not think that exigent circumstances existed to justify the deputies' warrantless entry into McManus and Keister's residence.

Even if such exigent circumstances existed, we do not believe the Commonwealth may properly rely upon such exigencies to justify the warrantless entry. It is well settled that exigencies deliberately manufactured by the government violate the Fourth Amendment of the United States Constitition, especially if the government's actions are intentionally taken to avoid the warrant requirement. See United States v. Rico, 51

F.3d 495 (5th Cir. 1995), *cert. denied*, 516 U.S. 883, 133 L. Ed. 2d 150, 116 S. Ct. 220 (1995), and Morgan, 743 F.2d 1158.

The deputies testified that they lacked probable cause to secure a warrant on the evening they visited the residence. The deputies made their presence known to McManus and told him of the information regarding marijuana in the residence. A consent search was denied by McManus. At this time, McManus was told to get rid of the marijuana and that the deputies would be back. The deputies then exited to the sidewalk and watched the events that they themselves triggered.

Considering the totality of the circumstances, we are of the opinion that the exigent circumstances were indeed created by the deputies on the evening in question to justify entry into the residence. We believe the law enforcement tactics involved were, to say the least, questionable. As such, we conclude the manufactured exigencies violate the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution. See Morgan, 743 F.2d. 1158.

In sum, we are of the opinion that the circuit court committed reversible error by denying McManus and Keister's motions to suppress.

Under the precepts of Johantgen v. Commonwealth, Ky. App., 571 S.W.2d 110 (1978), we reverse as a conviction is impossible absent evidence obtained by the unconstitutional entry and seizure.

For the foregoing reasons the judgments of the McCracken Circuit Court are reversed.

ALL CONCUR.

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