

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002050-MR

TROY HAMILTON

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE JR., JUDGE
ACTION NO. 00-CR-00106

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
** **

BEFORE: GUIDUGLI, HUDDLESTON, KNOPF, JUDGES.

KNOPF, JUDGE: Following the denial of his motion to suppress evidence, Troy Hamilton conditionally pled guilty to trafficking in marijuana¹ and marijuana cultivation,² both class-D felonies, and to possession of a defaced firearm³ and possession of marijuana,⁴ class-A misdemeanors. By judgment entered September 11, 2001, the Pike Circuit Court sentenced him to a term of five

¹KRS 218A.1421.

²KRS 218A.1423(2).

³KRS 527.050.

⁴KRS 218A.1422.

years in prison. Hamilton claims that police officers violated his rights under Section 10 of the Kentucky Constitution and the Fourth Amendment to the United States Constitution when they engaged in an extensive warrantless search of his residence. The trial court erred, Hamilton contends, when it denied his motion to suppress evidence discovered during that search. Although we agree with the trial court that the most damning evidence against Hamilton was admissible and therefore affirm the judgment to the extent that it convicts and sentences Hamilton for the marijuana offenses, we are obliged to reverse the misdemeanor conviction for firearm defacement and remand for additional proceedings.

At about 3:00 a.m. January 31, 2000, two Kentucky State Police officers responded to an emergency call in Jonancy, Pike County, Kentucky. Two callers reported that a shooting had occurred outside the residence of Troy Hamilton near the bottom of Doc Bill Branch Road and that the victim, Ricky Newsome, had sought assistance at Roger Caudill's residence near the top of the road. The officers found Newsome at the Caudill residence. He was intoxicated, uncooperative, and had sustained a serious injury to his left arm. Mr. Caudill told the officers that Newsome had knocked on his door, declared that he had been shot and needed help, and then had collapsed onto the floor where the officers found him. The officers summoned an ambulance, and, after medics had departed with Newsome, followed a trail of blood back down the snowy road to the residence at the bottom of the hollow, arriving there at about 3:30 a.m.

In the driveway of the residence they found a white, late-model car with its parking lights on and a shattered rear window. Near the car they noticed two large areas where the snow was apparently covered with blood. While the officers were still in the driveway, Troy Hamilton came out of the residence onto a porch and identified himself. The officers frisked him and informed him of his Miranda rights.⁵ After indicating that he understood those rights, he explained that he had shot Newsome after Newsome had threatened to get a gun and to burn down Hamilton's house. One of the officers then went inside the residence and briefly interviewed Hamilton's live-in girlfriend, Kathy Lawson, who had placed one of the emergency calls. She apparently confirmed that there had been a drunken altercation between Hamilton and Newsome inside the residence, that Newsome had exited threatening violence, that Hamilton had armed himself with a gun and followed Newsome outside, and that shortly thereafter she had heard gun shots. That officer then returned to the porch and informed Hamilton that he was to be detained.

Because the early morning was cold, both officers accompanied Hamilton inside the residence so that he could get a coat. Hamilton directed them to the coat and to the gun he had used, a twelve-gauge Winchester shotgun. As one of the officers retrieved the gun, he noticed on the floor of an adjoining room a small plastic bag containing a black substance he believed might be hashish. One of the officers also searched the coat before giving it to Hamilton, and in a pocket found a plastic bag

⁵Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

containing what appeared to be a small amount of marijuana. The officers then took Hamilton from the residence and secured him in one of their cruisers. This was at about 4:00 a.m.

Both officers testified at the suppression hearing that they had noticed what appeared to be fresh footprints in the snow leading around to the rear of the residence and that Hamilton had told them that the footprints were not his. Once Hamilton was secured, therefore, one of the officers, fearing that another person might be on the premises, followed the prints around the house. At the rear of the residence, this officer came upon several small bags of processed marijuana lying on the ground in plain view near a heat pump, stalks of raw marijuana hung to dry in an unlocked storage shed just behind the heat pump, and guns and more processed marijuana lying on the ground near a car parked on the hillside not far above the shed. The officers also walked through the entire residence, again, according to their testimony, to ensure that no one else was present. They noted what appeared to be marijuana seeds and roaches, firearms, illegal alcohol,⁶ and drug paraphernalia. The officers seized none of this apparent contraband, but awaited a detective. At approximately 4:30 a.m., the detective arrived who was to investigate the alleged assault. After his arrival, one of the officers approached Lawson with a consent-to-search form. Lawson executed the form at 5:00 a.m. There ensued a thorough search of the residence and its immediate surroundings, the search yielding additional alcohol, drug paraphernalia, and weapons. A second

⁶Hamilton's residence is in a dry territory.

detective, from the narcotics division, arrived about 6:30 A.M. He apparently seized and processed all of the drug-related evidence.

According to this detective's written report, when he first arrived at the scene, one of the officers told him that Lawson had verbally consented to a search as soon as the officer had found the little bag of suspected hashish, about the time of Hamilton's arrest at 4:00 a.m. At the suppression hearing, however, Lawson denied this. She testified that as soon as the officers found the marijuana in Hamilton's coat and the little bag of supposed hashish on the floor, they had immediately begun looking around for more drug evidence and badgering her for consent to search. Three times during the next hour, she said, she had refused their demands for consent, and only when the officers threatened her with arrest and the loss of her child had she executed the consent form. By then, for all intents and purposes, she testified, the search had already taken place.

The trial court found that the officers had not validly obtained Lawson's consent and therefore agreed to suppress any evidence discovered in drawers and cupboards during the officers' full evidentiary search after her execution of the consent form. The court believed, however, that the officers had had a right to make a protective sweep of the residence, both inside and outside, and that the evidence discovered in plain view during that sweep would be admissible. Hamilton contends that the trial court applied the notion of a permissible, warrantless protective

sweep too broadly. We agree, but not to the extent that Hamilton would like.

At the core of the constitutional guarantees against unreasonable searches and seizures is protection against the state's unjustified intrusion into private homes.⁷ With a handful of narrow exceptions, agents of the state must obtain a search warrant before they may enter a residence or its immediate surroundings to look for evidence.⁸ As Hamilton points out, there is no "crime scene" exception to this general warrant requirement.⁹ Police officers may enter the scene of a fresh crime, including a residence, to look for perpetrators, victims, or conditions they reasonably suspect of posing a substantial and immediate risk of harm.¹⁰ They may secure the scene while a warrant is sought.¹¹ And they may seize evidence in plain view during such an entry.¹² They may not, however, extend their entry beyond what is necessary for these limited purposes, and, of course, they may not search for evidence, absent a bona fide

⁷Mincey v. Arizona, 437 U.S. 385, 57 L. Ed. 2d 290, 98 S. Ct. 2408 (1978).

⁸United States v. Dunn, 480 U.S. 294, 94 L. Ed. 2d 326, 107 S. Ct. 1134 (1987).

⁹Mincey v. Arizona, *supra*; Flippo v. West Virginia, 528 U.S. 11, 145 L. Ed. 2d 16, 120 S. Ct. 7 (1999); Thompson v. Louisiana, 469 U.S. 17, 83 L. Ed. 2d 246, 105 S. Ct. 409 (1984).

¹⁰Mincey v. Arizona, *supra*.

¹¹Segura v. United States, 468 U.S. 796, 82 L. Ed. 2d 599, 104 S. Ct. 3380 (1984); United States v. Taylor, 248 F. 3d 506 (6th Cir. 2001).

¹²Mincey v. Arizona, *supra*.

exigency, until they have a warrant or valid consent.¹³ The state bears the burden of justifying a warrantless search.¹⁴

The trial court believed that the officers' protective sweep of Hamilton's entire home was a legitimate part of their securing the scene of the shooting and arrest. Their warrantless seizure of evidence in plain view during that sweep, therefore, did not, according to the trial court, offend our constitutions. In Maryland v. Buie,¹⁵ however, a case that considered protective sweeps in conjunction with in-home arrests, such as the one before us, the United States Supreme Court limited the right of police officers to make such sweeps. Protective sweeps are not to be automatic, the Court said. Rather, the searching officer must possess "a 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."¹⁶

We agree with the trial court that the footprints leading to the back of Hamilton's residence justified the officers' protective sweep of that area. The evidence discovered in plain view behind the house and in the unlocked storage shed, therefore, was admissible, as the trial court ruled. We do not agree, however, that the officers justified their sweep of the

¹³Bilida v. McCleod, 211 F. 3d 166 (1st Cir. 2000); Middleton v. State, 714 N. E. 2d 1099 (Ind. 1999).

¹⁴Vale v. Louisiana, 399 U.S. 30, 26 L. Ed. 2d 409, 90 S. Ct. 1969 (1970); Colbert v. Commonwealth, Ky., 43 S.W.3d 777 (2001).

¹⁵494 U.S. 325, 108 L. Ed. 2d 276, 110 S. Ct. 1093 (1990).

¹⁶494 U.S. at 337, 108 L. Ed. 2d at 288, 110 S. Ct. at 1099-1100. *See also* United States v. Colbert, 76 F. 3d 773 (6th Cir. 1996); United States v. Morgan, 743 F. 2d 1158 (6th Cir. 1984).

inside of Hamilton's home. They articulated no facts from which they might reasonably have suspected that a third person was there. On the contrary, Lawson's testimony strongly suggests that rather than suspecting any danger, the officers merely balked at having to obtain an inconvenient warrant. Their "sweep" of the inside of the residence, therefore, was unlawful, and even evidence found in plain view during that "sweep" should have been suppressed.

That evidence included the allegedly defaced firearm, a gun with a modified barrel. At oral argument, the parties stipulated that the gun had been found in a bedroom. In light of our ruling that the search of the residence was illegal, therefore, Hamilton will be permitted to withdraw his guilty plea to the defaced-firearm charge. The other charges, however, remain unaffected. Accordingly, we reverse the September 11, 2001, judgment of the Pike Circuit Court to the extent that it convicted Hamilton of possessing a defaced firearm and remand to permit Hamilton to withdraw that portion of his guilty plea. In all other respects, we affirm the judgment.

ALL CONCUR.

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