

RENDERED: MAY 13, 2005; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002076-MR

FRANK LAWRENCE MAGOLIS

APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT  
HONORABLE ROBERT A. MILLER, JUDGE  
ACTION NO. 02-CR-00145

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING IN PART, VACATING IN PART  
AND REMANDING

\*\* \*\* \* \* \*

BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Frank Lawrence Magolis has appealed from a final judgment and sentence of the Grayson Circuit Court entered on September 4, 2003, pursuant to a conditional plea of guilty to the charges of manufacturing methamphetamine,<sup>1</sup> possession of anhydrous ammonia in an unapproved container and for the purpose of manufacturing methamphetamine,<sup>2</sup> wanton endangerment in the

---

<sup>1</sup> Kentucky Revised Statutes (KRS) 218A.1432.

<sup>2</sup> KRS 250.489.

first degree,<sup>3</sup> possession of marijuana,<sup>4</sup> and possession of a controlled substance in the first degree (methamphetamine).<sup>5</sup> Having concluded that to the extent the seizure of some evidence exceeded the scope of a limited consensual search or a constitutional warrantless safety search under exigent circumstances, the trial court erred in part by denying Magolis's motion to suppress. Accordingly, we must reverse the trial court's judgment in part and vacate it in part and remand this matter for additional findings.

On October 15, 2002, the Grayson County Sheriff's Office received a tip that Anthony Bowman, who had an outstanding arrest warrant, was staying at 1010 Shain Road in Caneyville, Grayson County, Kentucky. Magolis, Dana Mercer,<sup>6</sup> and Mercer's two children were living in the house. Deputy Sheriff Jeff King, Deputy Sheriff William Whobrey, Special Deputy Sheriff Roscoe Swift, and Kentucky State Police (KSP) Trooper David Norris arrived at the house at approximately 10:30 p.m. Dep. King knocked on the front door, while Dep. Whobrey and Dep. Swift went behind the house to watch the back door. Mercer

---

<sup>3</sup> KRS 508.060.

<sup>4</sup> KRS 218A.1422.

<sup>5</sup> KRS 218A.1415.

<sup>6</sup> Mercer was charged with similar offenses and entered a conditional guilty plea to the same offenses as Magolis. This Court in an Opinion rendered on June 18, 2004, in Case No. 2003-CA-001801-MR, vacated the trial court's judgment and remanded the case for further proceedings. See 2004 WL 1367462. The case before us has been prolonged by various procedural delays.

answered the door, told Dep. King that Bowman was not there, and denied his request to enter the house. The officers did not have a search warrant.

Meanwhile, Magolis, who unbeknownst to the police at the time was on probation for two felony convictions,<sup>7</sup> exited the house through the back door. Magolis was carrying a large jar or jug; and when he became aware of the deputies' presence in the backyard, he quickly turned around and went back inside the house. The officers then heard the sound of breaking glass coming from a room in the back of the house, where a box fan was running in a raised window. Testimony was given that Dep. Swift used a flashlight to look into that window and saw broken glass on the floor of the back bedroom. The officers smelled what they believed to be a strong odor of ether coming from the back bedroom and observed in plain view on the back porch two starter fluid cans with holes punched in them and a can of Coleman fuel. Starter fluid is a common source for ether used in manufacturing methamphetamine.

Since the officers believed Magolis might be operating a methamphetamine lab inside the house, they contacted Grayson County Detective Tony Willen, who had some expertise in dealing

---

<sup>7</sup> Magolis was convicted in the Christian Circuit Court on July 10, 2002, of wanton endangerment in the first degree and possession of anhydrous ammonia in an unapproved container. His two, two-year sentences were run consecutively for a total of four years and he was placed on probation for five years.

with methamphetamine labs. Approximately 20 minutes later, Det. Willen and KSP Detective Danny Payne, who also had some methamphetamine lab expertise, arrived together at the scene. Both detectives testified that they smelled a strong odor of ether coming from the rear of the house. Since ether is a noxious and volatile liquid, the officers decided that any children should be immediately removed from the house.

The details of the events that followed are not clear. Det. Willen and Det. Payne were the only witnesses to testify at the suppression hearing, and their testimony differed as to when they and others entered the house and for what purpose some officers entered. The discrepancies in their testimony are major and significant in determining which items of evidence, if any, were in plain view of an officer who had a constitutional right to be in the house. For this reason, we will review the two detectives' testimony in detail, but on remand it will be for the trial court to determine the facts of this case.

Both Det. Willen and Det. Payne conceded that neither Magolis nor Mercer gave consent to search the house or the outbuilding, that a search warrant was not obtained, and that a general search of the premises occurred after Billy Edwards of the DEA drug task force arrived. But their testimony concerning which officers entered the house for the exigent purpose of

removing the children and which items of evidence, if any, were in plain view during that time is conflicting.

Det. Willen testified that once the decision was made to remove the children from the house, all the officers entered at once, performed a safety search of the house, and removed all occupants. He stated that during the safety search of the house, some officers noticed in the back bedroom, where the box fan was located, chemicals, containers, tubing and other items that are commonly used in the manufacture of methamphetamine. Det. Willen testified that during this safety search he remained in the living room area where no contraband was in plain view.

However, Det. Payne testified that after some discussion between Mercer and himself, Mercer allowed Magolis's stepfather, Doran Burgin, to enter the house first and to remove the children and some of their belongings. Det. Payne claimed that he remained stationed at the front door while Burgin removed the children and some of their belongings from the house. While Burgin was employed as a deputy jailer in Grayson County, Det. Payne testified that Burgin was not at the scene in his official capacity. Det. Payne further testified that after all the people had been removed from the house, he contacted Edwards and notified him that cleanup and disposal of hazardous substances from a methamphetamine lab might be required. Det. Payne testified that Edwards told him to perform a "walk

through" of the house to determine whether there was sufficient evidence of an active methamphetamine lab so as to require Edwards to drive to Grayson County.<sup>8</sup> Det. Payne also testified that during this initial "walk-through" search, the first time he claims to have entered the house, he saw a case for a long barrel gun on the back of a couch in the living room.<sup>9</sup> This gun case was the only evidence that Det. Payne saw during the initial "walk through" search, but apparently other evidence of methamphetamine manufacturing was observed, or Edwards would not have been asked to come to the scene. Det. Payne further testified that other items commonly used to manufacture methamphetamine were found in a small side room of the house near the back bedroom, but it appears that this room was not searched during the initial "walk through" search requested by Edwards, but was searched during the general search that occurred after Edwards arrived. Additionally, Det. Payne stated that another officer searched an outbuilding next to the house and found a modified liquid propane container which held anhydrous ammonia. It is unclear if the outbuilding was searched as part of the initial "walk through" search or during

---

<sup>8</sup> Det. Payne did not state where Edwards was located, but he did say "if there is not an active lab there, then we try not to get Billy [Edwards] to come all the way down to E-town [Elizabethtown] to these cases. We contacted him. He said, 'do a walk-through'; and we looked at it and determined that he needed to be there."

<sup>9</sup> He said the case was made of hard plastic and was intended for a long barrel gun such as a rifle or a shotgun.

the general search after Edwards's arrival. However, since we have determined that the only evidence that was seized constitutionally was the evidence in plain view during the exigent safety search for people inside the house, whether the other evidence was in plain view during either the initial "walk through" search or the general search is irrelevant. All evidence seized during those two searches must be suppressed.

Magolis was indicted for manufacturing methamphetamine enhanced by possession of a firearm, possession of anhydrous ammonia in an unapproved container and for the purpose of manufacturing methamphetamine, wanton endangerment in the first degree, possession of marijuana enhanced by possession of a firearm, possession of a controlled substance (methamphetamine) enhanced by possession of a firearm, and being a persistent felony offender in the second degree (PFO II). Magolis filed a motion to suppress all the evidence seized during the searches on the grounds that no exigent circumstances existed to justify the warrantless searches. Following a suppression hearing on February 18, 2003, the trial court entered an order on July 9, 2003, denying Magolis's motion.

On July 22, 2003, Magolis entered into a plea agreement with the Commonwealth wherein the PFO II charge was dismissed, all firearm-related charges were amended to remove the firearm enhancements, and Magolis reserved the right to

appeal the denial of his suppression motion. On September 4, 2003, Magolis was sentenced to 15 years' imprisonment on his conditional guilty plea to the amended charges. This appeal followed.

Magolis contends that the warrantless entry and search of his home violated his right under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution to be free from an unreasonable search and seizure. The principal interest of the Fourth Amendment is to protect a person's interest in being free from unreasonable governmental intrusions into his home.<sup>10</sup> As a general rule, the Fourth Amendment and Section 10 of the Kentucky Constitution prohibit the police from entering and searching a residence absent exigent circumstances, proper consent, or a search warrant.<sup>11</sup>

Our standard of review in reviewing a trial court's decision on a motion to suppress evidence is well-established. We must "first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive."<sup>12</sup> Based on those findings of fact, we must then conduct a de novo review of the trial court's application

---

<sup>10</sup> Steagald v. United States, 451 U.S. 204, 211, 101 S.Ct. 1642, 1647, 68 L.Ed.2d 38 (1981) (citing Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)). See also Coleman v. Commonwealth, 100 S.W.3d 745 (Ky. 2002).

<sup>11</sup> Steagald, 451 U.S. at 211-12.

<sup>12</sup> Kentucky Rules of Criminal Procedure (RCr) 9.78.



of the law to those facts to determine whether its decision is correct as a matter of law."<sup>13</sup>

In denying the motion to suppress, the trial court seemed to base its decision, at least in part, on three grounds: (1) Magolis's status as a probationer; (2) the consent given to Burgin to enter the house to get the children; and (3) exigent circumstances related to the safety of the occupants of the house, the possible destruction of evidence, and the safety of the police officers. As to Magolis's being on probation, the trial court stated:

A close examination of the supervisory conditions executed by Magolis indicates he agreed to warrantless searches by his probation and/or parole officer. The form he signed does not extend to other police officers. Apparently there was no communication between the officers involved herein and the probation officer. While Magolis had a diminished expectation of privacy as a result of his probation/parole conditions, he had not completely waived his Fourth Amendment rights. This diminished expectation of privacy is, however, a factor to be considered in the analysis of all factors to be considered.

In addressing the question of Magolis's probationary status, we find persuasive People v. Sanders,<sup>14</sup> where the Court stated:

---

<sup>13</sup> Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002) (citing Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998); and Commonwealth v. Opell, 3 S.W.3d 747, 751 (Ky.App. 1999)).

<sup>14</sup> 73 P.3d 496, 505-06 (Cal. 2003) (citing In re Martinez, 463 P.2d 734 (Cal. 1970)).

[P]olice cannot justify an otherwise unlawful search of a residence because, unbeknownst to the police, a resident of the dwelling was on parole and subject to a search condition. . . . [T]his result flows from the rule that whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted and is consistent with the primary purpose of the exclusionary rule - to deter police misconduct.

Thus, the Commonwealth cannot justify the warrantless searches by relying on the after-the-fact discovery that Magolis was a probationer. While the trial court in upholding the searches did not totally rely upon Magolis's waiver of his Fourth Amendment protection, to the extent it ruled he had a "diminished expectation of privacy," it erred and we reverse on this issue. On remand, Magolis's probationary status shall not be considered in the trial court's determination of what evidence was in plain view during the safety search for occupants performed under exigent circumstances.

The trial court also erred by ruling that since Mercer gave permission for Burgin to enter the house for the limited purpose of removing her children and some of their belongings that consent was given for a search of the house. The trial court stated:

In addition, Mercer permitted Deputy Jailer Burgin, a police officer, to enter the premises to remove the children. In the process of doing so, he was permitted to at least observe in the portions of the

premises he went through that Bowman was not present. Both Defendants argue he entered only in the limited capacity as a family member to remove the children. What his presence indicates at a minimum is that both Mercer and Magolis had a diminished expectation of privacy in the residence once he was permitted to enter. Burgin is a police officer with county wide arrest powers. Once inside, what he observed was information the police are entitled to use as justification and to buttress their probable cause for entry without a search warrant.

In Commonwealth v. Fox,<sup>15</sup> our Supreme Court noted that consent is assessed by considering under the circumstances whether it was objectively reasonable for a police officer to have understood consent to have been given. When a consensual search is properly authorized, "the scope of the search is limited by the terms of its authorization."<sup>16</sup>

Accordingly, we agree with Magolis that when Mercer allowed Magolis's stepfather, who happens to be a deputy jailer, to enter the residence for the limited purpose of removing Mercer's children and some of their belongings, that authority to search did not constitute consent to a general search of their house. Thus, we reverse the trial court to the extent that it ruled Magolis's "diminished expectation of privacy in

---

<sup>15</sup> 48 S.W.3d 24, 28 (Ky. 2001) (citing Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991)).

<sup>16</sup> Walter v. United States, 447 U.S. 649, 656, 100 S.Ct. 2395, 65 L.Ed.2d 410. See also People v. Superior Court of Los Angeles County, 10 Cal.App.3d 122, 127 (1970) (stating "[t]he authority to search pursuant to a consent must be limited to the scope of the consent" [citations omitted]).

the residence once [Burgin] was permitted to enter" allowed the search to go beyond the limited scope of Burgin's removing the children and some of their belongings. Magolis's rights were only diminished to the extent of Burgin's authorized entry into the house for the limited purpose of removing the children, and no further.

Finally, we will address the trial court's ruling as to exigent circumstances.<sup>17</sup> The trial court stated:

Under the proof presented to the court herein, once Magolis ran back into the residence and immediately thereafter the jar was heard breaking and the smell of [ether] thereafter began emanating from the residence, several exigencies arose. First, there was an immediate danger to all the occupants including two young children. Second, there was a risk of evidence being destroyed by Magolis or Mercer if a delay ensued awaiting a search warrant. . . . Lastly, though discovered in the search, a rifle was discovered in the area of the couch. As a convicted felon, Magolis was not permitted possession or control of any deadly weapons or firearms. The weapons also constituted an immediate threat or risk of death or serious physical injury to the officers [emphases original].

. . .

The front storage building as well as the interior of the premises were searched to insure no other persons were on the premises. With the weapons present, there

---

<sup>17</sup> Laney v. State, 117 S.W.3d 854, 861 (Tex.Crim.App. 2003) (noting that the exigent circumstances doctrine applies when the police are acting in their crime-fighting role, and the emergency doctrine applies when the police are acting in their limited community caretaking role to protect or preserve life or avoid serious injury).

was a danger to the officers if another person had been present. The meth lab discovered in the rear bedroom presented a danger to all the officers.

Based upon the entirety of the circumstances, including the exigency of the situation, the court concludes there was probable cause and exceptions to the requirement of obtaining a search warrant justifying the warrantless search and seizure of the evidence. . . .<sup>18</sup>

A well-established exception to the search warrant requirement authorizes a police officer without a warrant to enter a residence in order to address an exigent circumstance, such as the threat of imminent injury or the imminent destruction of evidence.<sup>19</sup> However, when exigent circumstances provide sufficient grounds for a limited warrantless safety search, that safety search must be limited to only the intervention that is reasonably necessary to address the exigency.<sup>20</sup> Thus, "a warrantless search must be 'strictly circumscribed by the exigencies which justify its

---

<sup>18</sup> On July 21, 2003, Magolis filed a motion to reconsider, which was never ruled upon by the trial court.

<sup>19</sup> Commonwealth v. McManus, 107 S.W.3d 175, 177 (Ky. 2003) (citing Payton, 445 U.S. at 573). See also Hughes v. Commonwealth, 87 S.W.3d 850, 852 (Ky. 2002).

<sup>20</sup> Mincey v. Arizona, 437 U.S. 385, 393, 98 S.Ct. 2408, 2413-414, 57 L.Ed.2d 290 (1978) (quoting Terry v. Ohio, 392 U.S. 1, 26, 88 S.Ct. 1868, 1882, 20 L.Ed.2d 889, 908 (1968)). See also Strange v. City of Tuscaloosa, 652 So.2d 773, 776 (Ala.Crim.App. 1994).

initiation[,]'"<sup>21</sup> and exigent circumstances do not allow an officer to disregard the warrant requirement.<sup>22</sup>

As both Det. Willen and Det. Payne testified, it is generally known that the chemicals and chemical reactions involved in manufacturing methamphetamine, including ether, create significant health and safety risks.<sup>23</sup> Thus, the trial court's finding that these risks are serious enough to justify immediate police intervention is supported by substantial evidence and not clearly erroneous.<sup>24</sup> We also agree with the trial court's legal determination that the strong smell of ether, the punched starter fluid cans, the can of Coleman fuel, Magolis's evasive behavior, and the broken glass gave the police reasonable grounds to suspect that the manufacturing of methamphetamine had occurred, or was occurring, on the premises. However, to the extent the trial court ruled that exigent circumstances supported the searches in order to prevent the destruction of evidence and for the safety of the officers, we

---

<sup>21</sup> Mincey, 437 U.S. at 393. See also Thompson v. Louisiana, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984).

<sup>22</sup> Mincey, 437 U.S. at 393.

<sup>23</sup> United States v. Walsh, 299 F.3d 729, 734 (8th Cir. 2002).

<sup>24</sup> Kleinholz v. United States, 339 F.3d 674, 677-78 (8th Cir. 2003). See also United States v. Wilson, 865 F.2d 215, 217 (9th Cir. 1989); People v. Duncan, 720 P.2d 2, 5 (Cal. 1986); and State v. Chapman, 813 P.2d 557, 560-61 (Or.App. 1991).

hold that such findings are not supported by substantial evidence, and thus, are clearly erroneous.

The only testimony that would support a finding that entry into the house occurred for any reason other than removing occupants of the house clearly showed that the initial "walk through" search was performed for the purpose of determining whether Edwards needed to drive to Grayson County to conduct a hazardous material cleanup, and the general search conducted after Edwards arrived was executed to obtain evidence. Since all the occupants of the house had been removed and the premises had been secured by several police officers, under the Fourth Amendment the officers were required to obtain a search warrant before the initial "walk through" search and the general search were performed. The concessions by Det. Willen and Det. Payne that Edwards was the only officer at the scene qualified to secure an active methamphetamine lab make it inconceivable that their purpose in entering the house was to secure the scene for safety purposes. If Det. Payne's version of the events is accepted, only two possible purposes for the two searches are supported by the evidence: the officers either searched the house and outbuilding for Edwards's convenience in determining whether he needed to drive to Grayson County at 11:00 p.m., or they were conducting a search as part of a criminal investigation. Either purpose required a search warrant.

However, based on the officers' smelling the odor of ether and observing some materials that are commonly used in the manufacture of methamphetamine and their knowledge of the risks associated with a methamphetamine lab, the officers properly entered Magolis's residence under exigent circumstances to remove any occupants. As the officers carried out this limited safety search under exigent circumstances, any evidence in plain view was subject to seizure.<sup>25</sup> Thus, the officers' safety search should have been limited only to removing people from the residence, to observing items in plain view, and to securing any item in plain view that constituted a present danger,<sup>26</sup> but not to searching for evidence of a methamphetamine lab. To the extent the officers conducted warrantless searches for evidence throughout the residence and adjacent building, the searches were unconstitutional. However, we are limited in addressing this issue because the trial court failed to make essential, specific factual findings.

Det. Willen testified that when all the officers entered the house, he remained in the living room, and no item of contraband was in plain view. Det. Willen further testified that Det. Payne and Dep. Whobrey were the officers who went into the back bedroom area of the house to retrieve the children, and

---

<sup>25</sup> Id.; Kleinholz, 339 F.3d at 674.

<sup>26</sup> Id.



that they were the first officers to see the evidence of a methamphetamine lab in plain view inside the house.

Det. Payne's testimony was contrary to Det. Willen's testimony with regard to which items were in plain view inside the house. Det. Payne testified that he did not enter the house to retrieve the children, instead he testified that Burgin, Magolis's stepfather, was the only person permitted by Mercer to enter the house in order to remove the children and some of their belongings. There was no testimony from Burgin as to which evidence might have been in plain view in the back bedroom when he entered the house. Det. Payne also testified that a long-gun case was in plain view in the living room. As discussed previously, an officer found a container which held anhydrous ammonia in an outbuilding. Since Magolis pled guilty to possession of marijuana, we must assume that somewhere, although not indicated during the suppression hearing, the officers discovered marijuana at the residence. Thus, we hold that any evidence seized by the police that was not in plain view during the brief safety search conducted under exigent circumstances for the purpose of removing people from the house was improperly seized and should have been suppressed.

The trial court erred by failing to make an essential finding as to which version of the events it accepted. There was no testimony that Burgin saw any evidence in plain view when

he went to get the children and their belongings, but Det. Willen testified that Det. Payne and Dep. Whobrey saw evidence of a methamphetamine lab in plain view while they were inside the house retrieving the children. From our review of the record, it is unclear as to who retrieved the children during the safety search and which items, if any, were in plain view during the safety search, although it seems clear that the container in the outbuilding was not.

Thus, we must vacate this portion of the trial court's judgment and remand this matter for reconsideration of Magolis's suppression motion. The trial court should make specific findings as to who conducted the safety search and which items, if any, were in plain view during the safety search, and thus, lawfully seized under exigent circumstances. However, any evidence that was not in plain view during the safety search must be suppressed; and upon the suppression of any evidence, Magolis shall be allowed to withdraw his guilty plea, if that is his desire.

Accordingly, the judgment of the Grayson Circuit Court is reversed in part, vacated in part, and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Shannon Dupree  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General

George G. Seelig  
Assistant Attorney General  
Frankfort, Kentucky