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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001991-MR

DONNA HACK — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 13-CR-00025

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Donna Hack appeals the Graves Circuit Court's opinion and order dated July 11, 2013, denying her motion to suppress evidence seized after a warrantless entry into her garage. After careful review, we reverse the decision of the Graves Circuit Court and remand for further proceedings consistent with this opinion.

FACTS

Appellant, Donna Hack, was indicted by the Graves County grand jury charging her with first-degree trafficking in a controlled substance (methamphetamine), and possession of drug paraphernalia. Hack filed a motion to suppress, and a suppression hearing was held. By order dated July 11, 2013, the trial court denied in part and granted in part the motion to suppress.[1] Hack subsequently entered an *Alford*[2] plea, reserving the right to appeal the denial of her suppression motion.

The underlying events giving rise to Hack's motion to suppress occurred on August 11, 2012. Sometime after midnight, the Graves County Sheriff's Office received an anonymous complaint of a noxious odor emanating from the residence of Donna Hack. The caller reported that his or her eyes and throat were burning from what he or she thought was a methamphetamine lab. At approximately 2:00 a.m., five officers drove to the location to investigate. Upon arrival, the officers did not smell the noxious odor that is consistent with methamphetamine manufacture; however, they did see a fire burning in Hack's yard. When the officers entered the driveway in order to investigate, they observed Hack sitting next to an open fire between her home and garage. A male subject was also observed darting into a doorway at the side of the garage. The officers

[1] The motion to suppress was a joint motion. The portion of the motion granted by the trial concerned one of Appellant's codefendants.

[2] *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

entered the garage and found, in plain view, several items of evidence for which suppression is sought.

STANDARD OF REVIEW

Under Kentucky Rules of Criminal Procedure (RCr) 9.78, the trial court's findings of fact after conducting an evidentiary hearing are conclusive if supported by substantial evidence. Based on the factual findings of the trial court, the appellate court conducts a *de novo* review of the application of the law to the facts to determine whether the decision was correct. *Commonwealth v. Neal,* 84 S.W.3d 920 (Ky. App. 2002).

ANALYSIS

Both the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution protect the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. *Adcock v. Commonwealth,* 967 S.W.2d 6, 8 (Ky. 1998). Hack contends that the actions of Graves County police officers on August 11, 2012, violated her Fourth Amendment right, and the trial court erred when it failed to grant her motion to suppress evidence found as a result of this violation. We agree.

Hack first claims that police violated the Fourth Amendment by pulling into the driveway of her home at 2:00 a.m.; she insists that because the investigating officers could not smell the noxious odor related to a methamphetamine lab, the anonymous tip was not corroborated and as such, the "knock and talk" procedure was unwarranted. This Court agrees that the

anonymous tip was unreliable; however, the police properly conducted a knock and talk to discover the source of the fire burning on the Appellant's property.

The standard to apply when analyzing the reliability of an anonymous tip is whether the information in the anonymous tip contains sufficient indicia of reliability. "The U.S. Supreme Court has recognized that if the anonymous tip is 'suitably corroborated,' then it is possible for the tip to establish the required degree of suspicion[.]" *Henson v. Commonwealth*, 245 S.W.3d 745, 748 (Ky. 2008); (quoting *Florida v. J.L.,* 529 U.S. 266, 270, 120 S.Ct. 1375, 1378, 146 L.Ed.2d 254 (2000)). Had the officers smelled the distinct odor of a methamphetamine lab in the air, the tip would have been sufficiently corroborated, providing officers with reasonable suspicion that illegal activities were taking place on Hack's property. However, at the suppression hearing, both officers testified that they had been trained to smell meth labs and that when they did an initial drive by Hack's home, they could smell nothing associated with meth making or cooking.

Upon receipt of the anonymous tip, the police had a duty to respond and investigate to ensure the safety of the public; however, once the police realized that the tip was unreliable, absent an emergency or some other reason for having access to the homeowner, the officers were not justified invading the curtilage of Hack's property at 2 a.m.

The Kentucky Supreme Court has held that "the knock and talk procedure is a proper police procedure and may be used to investigate the resident

of the property, provided the officer goes only where he has a legal right to be." *Quintana v. Commonwealth,* 276 S.W.3d 753, 755 (Ky. 2008). However, the Court has also recognized that officers may invade the curtilage "only to the extent that the public may do so, and the public may not do so without reasonable limitations." *Commonwealth v. Ousley,* 393 S.W.3d 15, 29 (Ky. 2013). One of those limitations is the time of the invasion. "Thus, just as the police may invade the curtilage without a warrant only to the extent that the public may do so, they may also invade the curtilage only *when* the public may do so. Absent an emergency, such as the need to use a phone to dial 911, no reasonable person would expect the public at his door at the times the police searched[.]" *Id.* at 31.

Were the anonymous tip the impetus for the 2 a.m. knock and talk, law enforcement would have indeed gone beyond the scope of that doctrine. However, at the suppression hearing officers testified to seeing a fire burning on Hack's property when they initially drove past. A burn ban was in effect in the county and officers, for the safety of the surrounding citizens, had a duty investigate the residence in order to have the fire extinguished. The doctrine that allows knock and talks "subsumes as a matter of common sense that there is a reason for having access to the homeowner. . . ." *Id.* at 29. The fire burning in Hack's yard gave the officers valid reason to enter the protected curtilage of the Appellant's home in order to speak with her concerning the fire.

Appellant argues that even if the police had a right to conduct a knock and talk, they exceeded the scope of the knock and talk by not approaching the

front door, exiting the area which is impliedly open to public use. The trial court concluded that if the officers could see the Appellant when they pulled up and she could see them, they could speak to her under the knock and talk doctrine.

The Kentucky Supreme Court in *Quintana v. Commonwealth,* 276 S.W.3d at 758 held that "the approach to the main entrance of a residence is properly 'invadable' curtilage. . .because it is an area that is open to the public." The Court set limits on the scope of the permissible invasion in *Commonwealth v. Ousley,* 393 S.W.3d at 30, stating "it remains permissible for officers to approach a home to contact the inhabitants. *The constitutionality of such entries into the curtilage hinges on whether the officer's actions are consistent with an attempt to initiate consensual contact with the occupants of the home."* (Quoting *United States v. Perea-Rey*, 680 F.3d 1179, 1187-88 (9th Cir. 2012)). Here, when the officers pulled into the driveway, they saw Hack sitting beside the fire to the side of the home. It would have been counterintuitive for officers to continue to the front door in order to make consensual contact with the Appellant knowing she was not in the house.

We hold that while the anonymous tip was not sufficiently reliable to merit the invasion of the Appellant's curtilage at 2 a.m. without a warrant, the police properly used the knock and talk procedure to initiate contact with the Appellant in order to investigate an apparent violation of the county burn ban.

Hack next argues that law enforcement officers violated the Fourth Amendment by entering her garage without a warrant or an exception to the warrant requirement.

Generally, the police may not enter the protected curtilage of the home without a warrant or an exception to the warrant requirement. *Quintana*, 276 S.W.3d at 757. One of the exceptions to the warrant requirement that the Supreme Court has recognized is exigent circumstances. "It is well established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant." *Kentucky v. King,* 131 S.Ct. 1849, 1853-54, 179 L.Ed 2d 865 (2011). When exigent circumstances exist, a search without a warrant is only justified if probable cause also exists. *King v. Commonwealth*, 386 S.W.3d 119, 122 (Ky. 2012). Probable cause to search exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found[.]" *Ornelas v. U.S.*, 517 U.S. 690, 696, 116 S.Ct. 1657, 1661, 134 L.Ed.2d 911 (1996). Applying these well-established rules to the case at hand, the officers' entry into the garage was lawful if, based on the totality of the circumstances, probable cause existed for the officers to believe that evidence was in imminent danger of being destroyed.

The circumstances on which the officers based their finding of probable cause in this case are as follows: (1) an uncorroborated anonymous tip that methamphetamine is being manufactured at the residence; (2) a fire being

burned in the yard; and (3) a man, upon seeing officers pull into the driveway, running into the garage. The trial court found that based on these circumstances, officers were reasonable in their belief that the man ran into the garage to destroy evidence related to the manufacturing of methamphetamine. The Supreme Court noted that "flight, in and of itself, is not sufficient to constitute probable cause for otherwise anyone, who does not desire to talk to the police and who either walks or runs away from them would always be subject to a legal arrest." *U.S. v. Margeson*, 259 F.Supp. 256, 265 (D.C. Pa. 1966).

While flight from law enforcement is considered in determining probable cause, it must be considered along with all the other circumstances. Here, the other relevant circumstances are an anonymous tip that went uncorroborated, and a fire being burned in violation of a county burn ban. Under these circumstances we do not agree that it was reasonable for officers to believe that contraband was in imminent danger of being destroyed. In *Commonwealth v. McManus*, 107 S.W.3d 175 (Ky. 2003), officers received a tip from McManus' estranged wife that marijuana was being grown at McManus' residence. While leaving, after speaking with McManus, officers noticed through an open window people scurrying around carrying pots and grow lights. In finding that exigent circumstances did not exist for a warrantless search, the Kentucky Supreme Court noted that police could not have obtained a warrant based on the tip, nor could they observe marijuana or any other illegal substance that was in danger of being destroyed. In the same manner, the officers in this case could not have gotten a

warrant based on the uncorroborated anonymous tip nor did they observe any illegal substance that was in danger of being destroyed before they entered the garage. In fact, the officers observed nothing indicating the presence of contraband nor could they know in advance what, if anything, was in danger of being destroyed. An uncorroborated tip of drug manufacture, combined with a person who seemingly does not want to speak to law enforcement, absent any other suspicious circumstances, does not rise to the level of probable cause excusing a warrantless search. "All searches without a valid search warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. The burden is on the prosecution to show the search comes within an exception." *Gallman v. Commonweath*, 578 S.W.2d 47, 48 (Ky. 1979). Based on the totality of the circumstances, we are unconvinced that the Commonwealth overcame the presumption of unreasonableness.

Though not argued at the trial court level, the Commonwealth contends that law enforcement officers lawfully entered the garage to effectuate a *Terry*[3] stop. However, "[i]n instances where a trial court is correct in its ruling, an appellate court which has *de novo* review on questions of law, can affirm, even though it may cite other legal reasons than those stated by the trial court." *Fischer v. Fischer,* 348 S.W.3d 582, 589 (Ky. 2011). Accordingly, this Court may properly consider the Commonwealth's alternative legal arguments.

[3] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

It is well-settled that the police may involuntarily stop a person, absent probable cause, if the officer can point to reasonable and articulable facts indicating that criminal activity may be afoot. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct 1868, 20 L.Ed.2d 889 (1968). The level of suspicion necessary to justify a stop is considerably less than proof of wrongdoing by a preponderance of the evidence. *U.S. v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989). However, the officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity. *Terry*, 392 U.S. at 27, 88 S.Ct. at 1883.

The Commonwealth argues that officers, having reasonable suspicion of criminal activity, had the right to enter Hack's garage in order to effectuate a *Terry* stop. In support of its argument, the Commonwealth relies on *Brewer v. Commonwealth,* 2013 WL 3105037 (Ky. App. 2013)(2012-CA-001312-MR), which is an unpublished decision. Pursuant to Kentucky Rules of Civil Procedure (CR) 76.28(4), *Brewer* is not controlling.

The Kentucky Supreme Court recently held that, "the resident's expectation of privacy continues to shield the curtilage where an outsider has no valid reason to go." *Quintana,* 276 S.W. 3d at 759. The Court qualified this rule with at least two exceptions. "Unless an officer has probable cause to obtain a warrant or *exigent circumstances arise,* the intrusion can go no further than the approach to the obvious public entrance of the house." *Id.* (Emphasis added). Exigent circumstances include situations in which people are in immediate danger,

evidence faces immediate destruction, or a suspect's imminent escape. In the case before us, the person ran into the garage and closed the door. There were no other exits though which this person could flee in an attempt to get away. While the flight may have given rise to reasonable suspicion warranting a *Terry* search, the exigent circumstance of imminent escape did not arise in this situation as there was no possibility of the person getting away. Absent consent, a warrant, or exigent circumstances, the police were not permitted to enter the garage in order to detain the suspect.

The Commonwealth string cites numerous cases in which other circuits have held that police, in effectuating a *Terry* stop, may pursue a fleeing person inside protected curtilage and even inside the home. However, in each of the cases the Commonwealth cites, the *Terry* stop commenced in a public place. After attempting to briefly detain the suspects, each fled into his home or the curtilage of his home, creating exigent circumstances requiring warrantless intrusion into the protected area. In none of the cases that the Commonwealth cites did a *Terry* stop commence inside a residence; police had the suspicion necessary to conduct the stop before the suspect began to flee. Here, the Commonwealth argues that officers, having reasonable, articulable suspicion that criminal activity is afoot, may lawfully enter a private residence without a warrant in order to *initiate* a *Terry* stop. We disagree.

Assuming that the officers then had reasonable suspicion, they were not authorized to enter Appellant's home or the protected curtilage of her home

based upon that suspicion to initiate a *Terry* stop. Absent a warrant or consent, exigent circumstances based upon probable cause must exist before the government may invade the privacy of someone's home.

For the foregoing reasons, the decision of the Graves Circuit Court denying Appellant's motion to suppress is reversed and this matter remanded for further proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Julia Pearson
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Ken W. Riggs
Frankfort, Kentucky