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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2016-CA-001507-MR

STEPHON MILLER

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT  
HONORABLE JEAN CHENAULT LOGUE, JUDGE  
ACTION NO. 16-CR-00092

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, D. LAMBERT AND J. LAMBERT, JUDGES.

ACREE, JUDGE: Stephon Miller appeals from the September 21, 2016 judgment and sentence on a conditional plea of guilty of the Madison Circuit Court. Miller pleaded guilty to trafficking in a controlled substance in the first degree, with penalty enhancement based on his conviction as a persistent felony offender in the second degree. He was sentenced to five years' imprisonment. Miller appeals the Madison Circuit Court's denial of his motion to suppress certain evidence

discovered during the execution of an arrest warrant for Rodney Martin at his apartment in Richmond, Kentucky. Law enforcement officers found a bag of cocaine Miller admitted belonged to him. The trial court held the cocaine was discovered during a lawful protective sweep incident to an in-home arrest, an exception to the Fourth Amendment. We affirm.

On January 13, 2016, four United States Deputy Marshals were executing an arrest warrant for Rodney Martin. He had violated the terms of his supervised release in a federal case. When the deputies arrived at Martin's apartment, they noticed an unfamiliar vehicle in the driveway. Deputy Tyrone Bartley approached the vehicle and asked the female inside what she was doing at the residence. The woman replied that she was waiting for a man named "Hot."

Deputy Jacob Frick proceeded to the back of the residence. He alerted the other officers that someone was attempting to flee the residence through a window in the back.

Deputy Bartley then approached the front of the residence and was met by Martin. Deputy Bartley asked Martin if he had tried to flee out the back of the residence. Martin denied doing so. Deputy Bartley placed Martin in restraints in the front room of the residence. Martin's wife and a small child were also present in the room with Deputy Bartley and Martin.

Deputy Bartley asked Martin the identity of a man named "Hot." Martin claimed to be known as "Hot," but denied knowing the female waiting in the vehicle outside. Deputy Bartley asked Martin and his wife if anyone else was

in the residence; both told the deputy there was no one else. However, they each denied attempting to escape through the back window. When Deputy Bartley questioned them again whether there was anyone else in the residence, both remained silent. Deputy Bartley then determined that in the interest of officer safety, a protective sweep of the residence should be conducted.

As Deputy Bartley was speaking with Martin and his wife, Deputy Frick noticed an individual in one of the bedrooms in the back of the residence and asked the individual to come out. The individual proceeded to the front room. It was Stephon Miller. Deputy Frick asked Miller his name and if he was on probation or parole. Miller replied that he was on parole and provided Deputy Frick with his parole officer's name. Deputy Frick was familiar with Miller's parole officer whose entire caseload was comprised of parolee and probationers who were required to be in inpatient facilities. Martin's apartment was not an inpatient facility, so Deputy Frick took Miller into custody on suspicion of a parole violation. Deputy Frick also noticed that Miller was sweating excessively.

Not knowing whether others may still be hiding in the apartment, the protective sweep continued. Deputy Roger Daniel assisted, conducting a sweep of the bedroom where Miller had been. His attention was drawn to a piece of furniture that had been pulled away from the wall. Without touching the furniture, Deputy Daniel and Deputy Frick looked behind it and saw what appeared to be a bag of narcotics. They did not touch the bag but called to the scene Detective Matt Boyle of the Richmond Police Department.

When Detective Boyle arrived, he viewed the room and made the same observations as the Deputies. Detective Boyle *Mirandized* Miller. Miller admitted he attempted to climb out the back window and, when he could not do so, he threw the bag behind the furniture. Without saying what was in the bag, Miller asked the officers if he could have some before he left. His request was denied. The bag later proved to contain cocaine.

Miller was transported to the Detention Center, and he was charged with trafficking in a controlled substance in the first degree and being a persistent felony offender in the first degree.

Miller filed a motion to suppress the cocaine found in the bedroom as well as any statements he made at the scene. A hearing was conducted on June 15, 2016. Three of the deputies testified at the hearing. The trial court made oral findings that the purpose for sweeping the residence, including the bedroom, was for officer safety. Further, under the totality of the circumstances, which included a vehicle waiting for someone in the driveway, an individual attempting to climb out the back window of the residence, the unconfirmed identity of a man known as “Hot,” the false statements of Martin and his wife that they were alone in the apartment, established a sufficient basis for conducting a protective sweep to ensure officer safety.

Miller’s counsel insinuated at the suppression hearing that the officers were being untruthful about the location of the furniture and the narcotics in the bedroom. The trial court found no basis for questioning the credibility of the

federal officers as they had no interest in processing a state case against Miller.

Miller's motion to suppress was denied.

Following the denial of his suppression motion, Miller entered a plea of guilty for trafficking in a controlled substance in the first degree, enhanced to a Class C felony by being a persistent felony offender in the second degree. He was sentenced to five years. This appeal followed.

Our standard of review of the trial court's denial of a suppression motion is twofold. First, the trial court's findings of fact are conclusive if they are supported by substantial evidence; and second, the trial court's legal conclusions are reviewed *de novo*. *Commonwealth v. Marr*, 250 S.W.3d 624, 626 (Ky. 2008); Kentucky Rules of Criminal Procedure (RCr) 9.78.

Miller's argument on appeal is that the officers exceeded the bounds of the protective sweep. Miller contends that once he was in custody, the reason for the sweep no longer existed and it was improper for the officers to continue. For the following reasons, we disagree with Miller.

A warrantless search of an individual's private residence, absent exigent circumstances, is prohibited by the Fourth Amendment to the United States Constitution. *Carter v. Commonwealth*, 449 S.W.3d 771, 774 (Ky. App. 2014) (citing *Commonwealth v. McManus*, 107 S.W.3d 175 (Ky. 2003)). However, in *Maryland v. Buie*, the United States Supreme Court expanded the scope of permissible warrantless searches to include a properly limited protective sweep in conjunction with an in-home arrest. 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d

276 (1990). The Kentucky Supreme Court officially adopted the holding of *Buie* in *Guzman v. Commonwealth*, 375 S.W.3d 805, 808 (Ky. 2012). In *Guzman*, the Court defined a permissible protective sweep to include all or part of an individual's home when officers possess an objectively reasonable belief that the residence may be harboring a dangerous person. *Id.*

*Buie* permits “two types of protective sweeps incident to an arrest that are reasonable and lawful under the Fourth Amendment.” *Kerr v. Commonwealth*, 400 S.W.3d 250, 266 (Ky. 2013). The first type allows officers “as a precautionary matter and without probable cause or reasonable suspicion, [to] look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” *Id.* (quoting *Buie*, 494 U.S. at 334, 110 S.Ct. 1093). The second type “allows officers to undertake a broader search of places not adjacent to the place of arrest if 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.* (quoting *Buie*, 494 U.S. at 334, 110 S.Ct. 1093); *see also Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968) (“[i]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”). This is the well-known reasonable suspicion standard. *See Terry*, 392 U.S. at 1, 88 S.Ct. 1868. The second type of protective sweep is at issue in this case.

Our Supreme Court addressed the second type of sweep for the first time in *Brumley v. Commonwealth*, 413 S.W.3d 280 (Ky. 2013). In *Brumley*, the Court found that officers had violated the Fourth Amendment because the sweep conducted did not comply with the *Buie* requirements. Specifically, knowledge of firearms in the residence as well as noise emanating from the residence did not provide officers with the requisite reasonable suspicion to conduct a protective sweep of the residence for an individual posing a danger to officers on the scene. *Id.* at 288.

“Reasonable suspicion must be determined under the totality of the circumstances, considering all of the information available to law enforcement officials at the time.” *Brumley v. Commonwealth*, 413 S.W.3d 280, 285 (Ky. 2013) (internal quotations and citations omitted). The circumstances facing the officers were: (1) a female waiting in an unfamiliar car in the driveway waiting for someone inside named “Hot”; (2) the unconfirmed identity of “Hot”; (3) an individual attempting to flee from a back window of the apartment where the arrest warrant was being executed; (4) Martin and his wife lying to the officers about who was in the apartment; (5) Martin and his wife stating they did not attempt to flee out the back of the apartment; and (6) Miller did not admit he, rather than some additional unidentified person, tried to exit the back window until after the protective sweep.

The trial court found that ordering the protective sweep was reasonable even after Miller was in custody because based upon these

circumstances the officers had not yet confirmed that all the individuals actually in the apartment were accounted for. We agree. The officers could not trust Martin to tell them the truth about how many people were in his apartment. Miller never admitted he was the individual attempting to flee out the back of the residence until after Detective Boyle arrived and questioned him. The circumstances presented a situation in which it was reasonable for the officers to conduct the sweep of the residence even after Miller was in custody. Simply because no other individual was found does not make the sweep excessive in scope.

Miller further contends that the second type of *Buie* sweep is limited only to cursory viewing of those areas which a person might attempt to conceal himself from officers. Accordingly, so goes his argument, it was improper for the officers to look behind the furniture because it was not large enough for a person to conceal themselves behind it.

As it relates to the piece of furniture in the bedroom, the testimony was that the furniture was catty-corner, but pulled away from the wall, approximately 8 to 10 inches by one estimation. The testimony was consistent among the officers that no one had touched or moved the furniture. Deputy Daniel testified that he shone his flashlight in the area behind the furniture to make sure no one was secreted behind it, and he saw a bag of narcotics in plain view on the floor. Officer Frick described the room and the furniture in it. He stated that because the furniture was pulled away from the wall you could see the bag of



narcotics behind it. None of the marshals moved or touched the furniture or moved or touched the narcotics in the bedroom.

The trial court found the officers' testimony to be credible that the area behind the furniture was cursorily swept for other potential individuals inside the residence, and the controlled substance was plainly visible on the floor. The trial court was entitled to rely on the officers' testimony as credible. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (“[J]udging credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court.”). Moreover, cursorily searching behind the piece of furniture pulled away from the wall in the bedroom which Miller appeared from was not outside the scope of the protective sweep in this case.

The justification for a protective sweep is the safety threat posed to officers by unseen individuals in the residence. *Brumley*, 413 S.W.3d at 285 (citing *Buie*, 494 U.S. at 336, 110 S.Ct. 1093). We agree with the trial court that the protective sweep conducted in connection with the execution of an arrest warrant was appropriate and reasonable under the circumstances presented here. The officers did not exceed the scope of the protective sweep in verifying that no one was hiding behind the furniture in the bedroom, which led to the discovery of the controlled substance plainly in view on the floor behind it.

Accordingly, we affirm the Madison Circuit Court's denial of Miller's motion to suppress the cocaine recovered from the scene and statements made by Miller relating thereto.

ALL CONCUR.

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