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19-P-8

Appeals Court

COMMONWEALTH vs. ARN JONES.

No. 19-P-8.

Essex. December 5, 2019. - July 24, 2020.

Present: Rubin, Lemire, & Hand, JJ.

Controlled Substances. Constitutional Law, Search and seizure. Search and Seizure, Emergency, Protective sweep. Practice, Criminal, Motion to suppress.

Complaint received and sworn to in the Salem Division of the District Court Department on October 2, 2015.

A pretrial motion to suppress evidence was heard by Matthew J. Machera, J., and the case was tried before him.

Patrick M. Groulx for the defendant.
Catherine Langevin Semel, Assistant District Attorney, for the Commonwealth.

RUBIN, J. The defendant was convicted of possession with intent to distribute a class B substance, G. L. c. 94C, § 32A (a), possession with intent to distribute a class D substance, G. L. c. 94C, § 32C (a), and a school or park zone violation, G. L. c. 94C, § 32J. The defendant argues that a

motion to suppress the fruit of a protective sweep of a second-floor apartment in a building in Salem should have been allowed because the protective sweep was improper. We affirm.

1. Background. Two Salem police officers testified to the following facts at the hearing on the motion to suppress, and their testimony was adopted by the judge as part of his findings.

The police were dispatched to a building in Salem after a 911 call from one Chris Gray, who indicated that he was calling from a closet in the second-floor apartment that he shared with his girlfriend. He believed that his girlfriend was being held inside their apartment against her will, and he did not know if she was all right.

Upon arrival, the police set up a perimeter around the apartment building so that officers were stationed behind the building. Gray came out the back door, was stopped by officers stationed there, and identified himself; he told the police there were four men with weapons inside the second-floor apartment. He told the officers he believed his girlfriend was passed out in the bedroom, was possibly being held against her will, and was in some kind of distress. He told them he did not know what her condition was or if she was able to leave of her own free will.

Three officers knocked on the front door of the second-floor apartment and several times announced, "Salem Police." With no response, and with authorization from the sergeant in command to force open the door, the officers did so. On appeal, the defendant has raised no issue with respect to the initial entry of the apartment.

The police entered into the kitchen, where one man was present. The sergeant announced that officers had a dog with them that would be entering the apartment. Two other men then entered the kitchen from a separate room. These three men were immediately handcuffed and pat frisked for weapons for the officers' safety. No weapons were found on any of them. Again, the defendant raises no issue with respect to these seizures or searches.

Gray's girlfriend came out of the bedroom after the three men had been handcuffed and pat frisked. Officers testified during the motion hearing that she was "a little out of it" and that "she kind of didn't know what was going on." She appeared to be unharmed and said she was "okay."

At some point, a fourth man, later identified as the defendant, appeared at a glass window in the back door of the building. He peered out and was observed by Officer Gary Lebrun, who was stationed at the back door. Officer Lebrun instructed him through the locked door to open it and come out,

but the defendant instead ducked down and the officer lost sight of him.

Officer Lebrun radioed other officers that there was a person in the hallways of the building. Officers left the apartment, came down the stairway searching for this person, and let Officer Lebrun in the back door of the building. They went down to the basement. After making sure there was no one in the basement, the officers worked their way up the stairwell, checking apartment doors on the way up. They were all locked.

When Officer Lebrun was heading up the stairwell to the fourth floor, he saw the defendant sitting in the stairwell. He instructed the defendant to come down, and the defendant complied. The officer handcuffed the defendant and brought him back to the apartment where the three other men were handcuffed and Gray's girlfriend was present.

We may assume without deciding that, as the defendant contends, the protective sweep at issue occurred only then, after the defendant was in custody. According to the testimony credited at the hearing on the motion, the police "checked all the rooms" in the apartment in order to "make sure nobody else was hiding." During that protective sweep, in addition to some paperwork with the defendant's name on it, the police saw some narcotics on a futon and some other paraphernalia in plain view "on the nightstand, on the floor." Items discovered during the

protective sweep formed the basis for a subsequently obtained search warrant. There is no issue raised by the defendant about the search warrant, apart from whether it was the fruit of the allegedly improper protective sweep.

2. Discussion. The motion judge correctly concluded that the protective sweep was permissible under the "emergency aid" doctrine, a "narrow exception" to the warrant and probable cause requirements. Commonwealth v. Duncan, 467 Mass. 746, 749-750, 754, cert. denied, 574 U.S. 891 (2014). The exception applies when officers enter a dwelling to provide emergency assistance. Id. at 749-750. As mentioned, the defendant does not contend that the police had an insufficient basis for their initial belief that there was an ongoing emergency and, thus, for their initial entry; although we therefore need not and do not decide the question, we note that in this case they had a report by a physically present, identified, nonanonymous witness who gave what he said was his address and who described in detail his basis of knowledge. See Commonwealth v. Atchue, 393 Mass. 343, 347 (1984), quoting United States v. Wilson, 479 F.2d 936, 940 (7th Cir. 1973) ("A serious charge . . . when volunteered by an identified party . . . carries with it indicia of reliability of the informant"). "[T]he conduct of the police following the entry must be reasonable under the circumstances," Duncan, supra at 750, quoting Commonwealth v. Peters, 453 Mass. 818, 823

(2009), and the officers' authority is "'strictly circumscribed' by the circumstances of the emergency that justified entry."

Commonwealth v. Arias, 481 Mass. 604, 612 (2019).

In this case, the police had information that there might be armed men holding a woman in an apartment against her will. In the circumstances presented here, so long as the officers had "an objectively reasonable basis to believe" that the emergency continued because there might be an armed individual hidden somewhere in the apartment, a protective sweep of the apartment, limited to what was necessary to see if there was a person hiding, was permissible. Arias, 481 Mass. at 612.

The defendant's contention is that, at the time of the search, an emergency warranting the protective sweep no longer existed. See Arias, 481 Mass. at 612 ("if, after entry, officers no longer have an objectively reasonable basis to believe that an emergency exists, it is unreasonable to continue searching"). Gray had told the officers that there were four armed men in the apartment, possibly holding his girlfriend, whose condition he did not know, against her will. But, the defendant argues, by the time of the protective sweep, four men had been detained, none had weapons on him, and Gray's girlfriend had been found in the apartment, appeared fine, and had told officers she was "okay."

The defendant's contention that any emergency had ended by the time of the sweep is incorrect. Even assuming without deciding that because Gray asserted that there were four men with weapons in the apartment it would have been impermissible to check for an additional person after four men were located in the apartment, that is not in fact what happened here. Police located only three men in the apartment. The fourth man, the defendant, was never seen in the apartment, but only in a back hall and on the stairway. Perhaps he had been in the apartment, but it is possible he had been outside it in the stairwell, hallways, or basement the entire time. The police therefore had a reasonable basis, even after the defendant's apprehension, for a continued reasonable belief that there might be an armed individual hiding somewhere in the apartment.

The defendant's case is not assisted by the statement from Gray's girlfriend that she was "okay." Even leaving aside the fact that she appeared "out of it," a person threatened with harm by a hidden man with a weapon obviously might be instructed to say something false to the police in order to get them to leave the apartment. Given the information provided by Gray, it was therefore reasonable for the police to complete a protective sweep of the premises, despite the statement by Gray's girlfriend, to insure that there was no threat to her from a

hidden man. Indeed, it appears to have been the prudent course of action. The Constitution does not prohibit it.

Judgments affirmed.