

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAM CORNETT,

Defendant-Appellant.

UNPUBLISHED

August 6, 1996

No. 169766

LC No. 91-002956

Before: Murphy, P.J., and Reilly , and C.W. Simon, Jr.*, JJ

PER CURIAM.

Defendant appeals as of right his bench trial conviction of possession with intent to deliver more than fifty but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii) for which he was sentenced to five to twenty years of imprisonment. We affirm.

An undercover officer arranged to buy two ounces of cocaine from Lawrence Balsus. On four occasions, the officer and Balsus drove to a two-family flat, the lower flat of which was defendant's residence. Each time, Balsus reported that "his man" was not available. After the fourth attempt, while the officer and Balsus were in front of Balsus' residence on a nearby street, a Cadillac drove past. Balsus said, "There he is." One of two men in the car made a motion to either the officer or Balsus. The officer and Balsus drove to defendant's residence, and Balsus got out of the car and walked towards the house. At that time, a green Ford Grenada parked nearly bumper to bumper with the undercover vehicle. The driver, later identified as Charles Bowen, got out, leaving the driver's door open and walked toward the front of the house. He went in after Balsus entered the house. Balsus returned to the undercover car and handed the officer a clear plastic baggie containing a white powder substance. The officer asked about the second ounce, but Balsus said he needed money first. After the officer weighed the bag, and gave a signal, the arrest team moved in and arrested Balsus.

As Balsus was being removed from the car, Bowen came out of the house. The screen door was shut, but the "main door" was open. Detective Lieutenant Clark testified that as he and Detective

* Circuit judge, sitting on the Court of Appeals by assignment.

Sergeant Mitchell “made the secured” of Bowen at the door on the porch, Clark could see people in the house. Mitchell testified that he did not see any other activity going on around the house and didn’t hear any noise, but that officers on the side said that there were individuals looking outside the windows. Detective Lieutenant Robert Dossetto called a protective sweep of the house and testified that the sole reason for ordering the officers to enter the house was officer safety.

According to the officers’ testimony, after entering the house, defendant was seen leaving a bedroom, pulling the door behind him and attempting to close it. Clark opened the door and looked in to make sure that there was not another person in the room. He saw some “long guns” and what appeared to be narcotics in plain view. Dossetto read defendant his rights, explained why they entered the house and the permission to search form. Defendant indicated that he understood the form and signed it.

Defendant was charged with possession with intent to deliver fifty to 225 grams of cocaine. He moved to suppress the evidence on the basis that it was discovered after an unlawful entry for a search without a warrant. After an evidentiary hearing, the court denied the motion. Defendant waived a jury trial, and was convicted by the court as charged.

On appeal, defendant contends that the protective sweep of the residence was improper, not supported by probable cause or any exception to the warrant requirement. We disagree.

We review a trial court’s ruling with regard to a motion to suppress evidence for clear legal error. *People v Smielewski*, 214 Mich App 55, 62; 524 NW2d 293 (1995). However, a trial court’s application of a constitutional standard is not entitled to the same deference as its factual findings. *Id.*

The trial court considered whether under the facts of this case, the officers were justified in entering the premises to conduct a protective sweep. See *Maryland v Buie*, 494 US 325; 110 S Ct 1093; 108 L Ed 2d 276 (1990), which was adopted by this Court in *People v Shaw*, 188 Mich App 520, 524; 470 NW2d 90 (1991). In both *Shaw* and *Buie*, the protective sweep inside the dwelling occurred after an arrest took place in the dwelling. No published case of this Court or the Michigan Supreme Court has discussed whether officers making an arrest outside a dwelling may enter the dwelling for the purposes of conducting a protective sweep.¹

However, the Supreme Court’s decisions discussing the exigent circumstances exception to the warrant requirement support the trial court’s denial of defendant’s motion to suppress.

Pursuant to the exigent circumstances exception, we hold that the police may enter a dwelling without a warrant if the officers possess probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime. The police must further establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the

escape of a suspect. If the police discover evidence of a crime following entry without a warrant, that evidence may be admissible. *In re Forfeiture of \$176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993).

As discussed below, we conclude that this standard was satisfied. In addition to the requisite showing of probable cause, the circumstances indicated that immediate action was necessary to prevent the removal or destruction of evidence.

The officers had probable cause to believe that delivery of cocaine had occurred on the premises and that the premises contained evidence or perpetrators of the crime. Balsus went into the house to buy two ounces of cocaine for the undercover officer, and returned to the car with one ounce. The officers had probable cause to believe that the other ounce and Balsus' supplier² were on the premises.

We agree with the trial court that the officers reasonably believed that immediate action was necessary for the preservation of evidence.

In the context of a removal or destruction of evidence case, the most objective and compelling justification would be an actual observation of removal or destruction of evidence or such an attempt. Absent such compelling facts, the police must present facts indicating more than the mere possibility that there is a risk of the immediate destruction or removal of evidence. . . . [I]n those cases where the police can show an objectively reasonable basis to believe the risk of destruction or removal of evidence is imminent—that immediate action is necessary before they can obtain a warrant—they may enter a residence for the limited purpose of securing the premises pending issuance of a search warrant. *People v Blasius*, 435 Mich 573, 594; 459 NW2d 906 (1990).

In this case, the officers had information that they could make narcotic transactions at defendant's address. As stated above, they had probable cause to believe that the person who supplied Balsus with the cocaine remained inside. Detective Lieutenant Clark testified that as they contacted Bowen on the porch, he could see other people in the house. He also heard officers stating that there were people at the window. According to Clark, "There was movement to indicate that they were no longer at the window and somewhere in the house as comments were made to me."

This evidence indicates that there was more than a mere possibility that evidence would be removed or destroyed. Given the likelihood that the supplier and at least another ounce of cocaine remained on the premises and that the occupants observed the police arresting Balsus and securing Bowen, the police had an objectively reasonable basis to believe that the risk of destruction or removal of evidence by Balsus' supplier was imminent.

Because the facts support application of the exigent circumstances exception to the warrant requirement, defendant's motion to suppress was properly denied regardless of whether the circumstances also justified a protective sweep.

Defendant next contends that his consent to search was void because it was not freely and voluntarily given. The trial court concluded that the narcotics were in plain view at the time the officers entered and were discovered before defendant signed the consent form. These findings are not clearly erroneous. We agree with the court's conclusion based on those findings that the consent form is not relevant to the admissibility of the narcotics.

Affirmed.

/s/ William B. Murphy
/s/ Maureen Pulte Reilly
/s/ Charles W. Simon, Jr.

¹ Federal courts have held that a protective sweep may be conducted in certain circumstances. See 3 LaFave, Search and Seizure (2d ed), § 6.4(c), pp 333-335.

² The officers' testimony does not indicate that the individuals who were in the Cadillac went inside the house. However, under the circumstances, Balsus' ability to complete the transaction on this occasion when he was previously unable to do so because "his man" was not available, indicates that the supplier was on the premises. Because the driver of the Grenada, who left the house before the officers entered, was thought to be engaged in counter-surveillance, the officers could reasonably conclude that Balsus' supplier was still inside.