NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellant v. ROY E. REYES Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2713 EDA 2011

Appeal from the Order Dated September 12, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0003146-2011

BEFORE: MUNDY, J., OTT, J., and PLATT, J.*

MEMORANDUM BY OTT, J.: Filed: April 29, 2013

The Commonwealth appeals from the order dated September 12, 2011 entered in the Court of Common Pleas of Philadelphia County, suppressing physical evidence obtained by the police following the warrantless search of 522 East Ontario Street, Philadelphia. The Commonwealth claims the suppression court erred as a matter of law in determining the police did not possess exigent circumstances to enter the residence. After a thorough review of the submissions by the parties, the certified record, and relevant law, we reverse and remand for further proceedings.

When the Commonwealth appeals from a suppression order:

> we follow a clearly defined standard of review and consider only the evidence from the defendant's

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* Retired Senior Judge assigned to the Superior Court.

> witnesses together with the evidence of the prosecution that, when read in the context of the entire record, remains uncontradicted. The suppression court's findings of fact bind an appellate court if the record supports those findings. The suppression court's conclusions of law, however, are not binding on an appellate court, whose duty is to determine if the suppression court properly applied the law to the facts.

Commonwealth v. Dunnavant, --- A.3d ---, 2013 PA Super 38 at *3 (2/27/13) (quoting ***Commonwealth v. Miller***, 56 A.3d 1276, 1276 (Pa. Super. 2012)).

Here, the suppression court made the following findings.

On January 29th, 2011, at around 1:55 A.M., Philadelphia Police Officers Kelly Robbins and Sean McKnight were on patrol when two radio flashes directed them to the 500 block of East Ontario Street.[1] The officers knew the block, as they had made arrests on that block for narcotics violations. The officers arrived within seconds of the second flash.

The officers noticed that the lights were still on at 522 East Ontario Street. As they got out of their car, they could hear "yelling and screaming" inside the house. The officers did not hear anyone say anything about a gun. Further, there was no indication anyone was in danger. The officers heard multiple voices, "all yelling and screaming on top of each other." There was no activity on the street, and there was no evidence on the street that any shots had been fired.

> [1] The content of the flashes was not allowed into the record. While the Commonwealth witnesses did describe the contents of the flashes, there was no documentation on them, which prevented any cross examination. Thus, the contents of the flashes are not considered in this opinion. However, even if the contents were included, the outcome of this opinion would not be affected.

> Based on the radio flashes, and the noise inside the house, the officers entered the house by kicking the door in, breaking the handle lock, and breaking the door off the hinges. The officers did this without first knocking and announcing that they were officers. The officers yelled "Police" and proceeded to search the occupants of the living room. As they entered the officers had their guns out, and yelled "Hands in the air." Neither of the officers at any point asked the residents what they were doing.
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> When the officers entered the living room in the front of the house, they found five Hispanic males and one Hispanic female gathered around the television. The residents of the house were playing Madden Football on their X-box. Other officers from the 24th District came into the house as well, yelling "Show your hands," to the people in the house. The officers did not see any signs of violence, did not see any blood, or any bullet holes, or anything to indicate any illegal activity.
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> Officer McKnight noticed the defendant, Roy Reyes, sitting on the couch, with a video game controller in his hands. The officer told him to put the controller down, and lift up his hand. As Mr. Reyes lifted his hands, Officer McKnight noticed the black grip of a handgun in his waistband.

Pa.R.A.P. 1925(a) Opinion, 3/23/12, at 2-3 (internal citations omitted).

We are required to accept the findings of fact so long as they are supported by the record. There is a minor discrepancy between the facts as relayed by the suppression court and the certified record. The notes of testimony indicate upon entering the house, the people were not gathered around the television. The female was not in the living room, but was on the stairs leading to the second floor. One of the males was standing near the kitchen. As the police entered, he put his hands in his jacket pockets and quickly went into the kitchen. Officer Robbins followed this man while

Officer McKnight went into the living room. ***See*** N.T. Suppression Hearing, 9/12/11, at 10.[1]

The suppression court did not consider the substance of the first two radio calls. This represents an error of law. The testimony produced at the suppression hearing demonstrated there were three radio calls. The first call informed the officers that there was a report of a man with a gun on the 500 block of East Ontario Street. The second call informed the officers there had been a report of gunfire inside 522 East Ontario Street. The third call provided flash information regarding the appearance of the man with the gun. The defense did not object to the substance of the first two radio calls. The defense did object to introduction of the flash information that indicated Reyes matched the description of the person. The suppression court sustained the objection to the third call because Officer Robbins' written statement to the detectives, in which she related the substance of the flash information, had been misplaced and was not in the police file. ***See*** N.T. at 17-18.

Aside from the fact that the first two calls were not objected to, there are no grounds to exclude the substance of those radio calls. Because the

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[1] This is the same page the Suppression Court cited in its opinion. All citations to the notes of testimony are from this hearing.

calls were offered to explain the subsequent actions of the police officers, and not for the truth of the statements, they are not improper hearsay.

> [I]t is well established that certain out-of-court statements offered to explain the course of police conduct are admissible because they are offered not for the truth of the matters asserted but rather to show the information upon which police acted.

Commonwealth v. Chmiel, 889 A.2d 501, 532 (Pa. 2005). ***See also*** Pa.R.E. 802. Therefore, in addition to the facts recited by the suppression court, we must also consider the police officers were responding to information of a person with a gun and that there had been gunfire in the residence of 522 East Ontario Street.

Based upon the findings it cited in its opinion, the suppression court determined the Commonwealth had not proved the existence of any exigent circumstance, thereby obviating the need for a search warrant. The suppression court stated in its Pa.R.A.P 1925(a) opinion:

> As a general rule, only a limited number of circumstances will excuse the police from compliance with the warrant and probable cause requirements of the Fourth Amendment. One such circumstance occurs when police reasonably believe that someone within a residence is in need of immediate assistance.

Commonwealth v. Miller, 724 A.2d 895, 900 (Pa. 1999).

Pa.R.A.P. 1925(a) Opinion, 3/23/12, at 7.

This is the correct standard to determine whether the "emergency aid doctrine" applies. A suppression court must determine whether the police

"reasonably believed" that someone within the location they are searching has been injured and is in need of immediate aid or that immediate action is needed to prevent such injury from occurring.

However, after reciting the proper standard of review, the suppression court then applied the six-pronged test to determine whether exigent circumstances existed.[2] ***See Commonwealth v. Govens***, 632 A.2d 1316, 1324-25 (Pa. Super. 1993). This was an error of law.

There are multiple cases indicating that the only consideration for the emergency aid doctrine is the reasonable belief test. ***See Commonwealth v. Galvin***, 985 A.2d 783, 795-96 (Pa. 2009); ***Commonwealth v. Miller***, 724 A.2d 895, 900 (Pa. 1999); ***Commonwealth v. Norris***, 446 A.2d 246, 248 (Pa. 1982). Additionally, the United States Supreme Court has announced the same standard. ***See Michigan v. Fisher***, 130 S.Ct. 546 (2009); ***Brigham City, Utah v. Stuart***, 126 S.Ct. 1943 (2006).

> [L]aw enforcement officers "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." This "emergency aid exception" does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises. It requires only "an objectively reasonable

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[2] The six prongs are: (1) a grave offense must be involved; (2) the suspect must be reasonably believed to be armed; (3) there must be a clear showing of probable cause, including trustworthy information, that the suspect committed the crime; (4) a strong reason to believe the suspect is in the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) entry, though not consented, is made peaceably.

> basis for believing" that "a person within [the house] is in need of immediate aid."

Michigan v. Fisher, 130 S.Ct. at 548 (internal citations omitted).

Therefore, the suppression court erred in examining whether there was a clear showing of probable cause, or that a grave offense was involved, or that entry was peaceable, all of which the suppression court found lacking. Rather, the suppression court was only bound to determine whether, based on the information known at the time, the police possessed a reasonable belief that someone in the residence was injured and needed help or was in immediate danger of being seriously injured.[3]

The suppression court also noted that the police officers did nothing to corroborate the information they received over the radio. We do not believe

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[3] At the suppression hearing, the suppression court discounted the screaming and yelling as an indication that someone inside might be in danger. "If they were playing a game and they were all screaming and yelling, okay, it could have been something for fun, not necessarily something for someone who's in danger." N.T. at 50. To the extent this represents a retroactive analysis, it is improper.

> It was error … to replace that objective inquiry into appearances with its hindsight determination that there was no emergency. It does not meet the needs of law enforcement or the demands of public safety to require officers to walks away for a situation like the one they encountered here. Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But "[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties.

Michigan v. Fisher, 130 S.Ct. at 549.

that such corroboration is a requirement under the emergency aid doctrine. Although we are not bound by Federal Appellate Court case law, we are persuaded by the reasoning found in ***U.S. v. Russell***:

> [O]ur case law clearly requires that the police must only have "reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life." Russell's analysis, however, would incorporate a fourth requirement into the emergency doctrine: that the police obtain independent verification or other information relating to the emergency before entering the house. We decline to read an additional limitation into the emergency exception's settled case law. Further, such a requirement would dramatically slow emergency response time, and would therefore be at odds with the purpose of the emergency doctrine-"allow[ing] police to respond" to emergency situations. The only requirement-which the police easily met-is that they have "reasonable grounds to believe that there is an emergency at hand."

U.S. v. Russell, 436 F.3d 1086, 1091 (9th Cir. 2006) (citations and footnotes omitted).

Therefore, the only question to be answered is whether the police possessed a reasonable belief that emergency aid was required. The facts show the police were notified of a possible gunman on the 500 block of East Ontario Street. That information was quickly amended to indicate there had been gunfire within 522 East Ontario Street. The police arrived within seconds of the radio call. The only house with lights on in the general vicinity was 522 East Ontario Street. As the officers exited their car, they immediately heard yelling and screaming coming from within the residence. They could not make out what was being said because people were yelling

over each other and the yelling was in a mixture of Spanish and English. It was approximately 2:00 a.m. and the neighborhood was a high crime area. Officer Robbins' uncontradicted testimony was, "That neighborhood is a high narcotics, also high VUFA[4] pinches and stolen cars." N.T. 7. Officer Robbins further testified, after approaching the door,

> At that point we heard a female screaming inside the house. And based on the radio call information, the time of night, the location, and the screaming, we felt at that moment that we had to enter and take action. We felt that somebody's life might be in danger.

N.T. at 9-10.

As a matter of law, given the facts as determined by the suppression court as well as the uncontradicted testimony of Commonwealth witnesses, Officers Robbins and McKnight possessed a reasonable belief that emergency aid was needed within 522 East Ontario Street. Therefore, the suppression court erred in suppressing the evidence obtained from the warrantless entry into 522 East Ontario Street.

Order reversed. This matter is remanded for further proceedings.

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[4] Violation of the Uniform Firearms Act.