[J-40A-2017 and J-40B-2017] [Opinion: Wecht, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 37 EAP 2016
	:	
Appellee	:	Appeal from the Judgment of Superior Court entered on April 19, 2016 at 1480 EDA 2015 (reargument denied June 16, 2016) reversing and remanding the Order entered on April 17, 2015 in the Court of Common Pleas, Philadelphia County, Criminal Division at CP-51-CR-0001465-2012.
v.	:	
ANGEL ROMERO,	:	
Appellant	:	
	:	ARGUED: September 13, 2017
COMMONWEALTH OF PENNSYLVANIA,	:	No. 38 EAP 2016
	:	
Appellee	:	Appeal from the Judgment of Superior Court entered on April 19, 2016 at 1479 EDA 2015 (reargument denied June 16, 2016) reversing and remanding the Order entered on April 17, 2015 in the Court of Common Pleas, Philadelphia County, Criminal Division at CP-51-CR-0001464-2012.
v.	:	
WENDY CASTRO,	:	
Appellant	:	
	:	ARGUED: September 13, 2017

CONCURRING OPINION

JUSTICE MUNDY **DECIDED: April 26, 2018**

I join Part II(A) of the Opinion regarding the resolution of the factual consent issue in full and agree the Superior Court misapplied its standard and scope of review. *See* Op. at 13-14. I further agree with a significant portion of the lead opinion's reasoning as well as its mandate to remand to the trial court to give the Commonwealth the opportunity to introduce the arrest warrant to ascertain whether it provided a basis for the search of

Appellants' home. I write separately to explain how my analysis differs from the lead opinion's.

As the lead opinion observes, this case presents a purported conflict between two cases from the Supreme Court of the United States, *Payton v. New York*, 445 U.S. 573 (1980), and *Steagald v. United States*, 451 U.S. 204 (1981). In my view, the required inquiry is better served by analyzing these cases in reverse order, as I believe doing so reveals that there is not as much tension between the two cases as is being suggested.

The lead opinion observes that in *Steagald*, the Court held a search warrant is required to search the home of a third-party for an arrestee, absent consent, exigent circumstances, hot pursuit, or some other well-established exception.[1] It is conceded here that Appellants were not the named arrestee in Agent Finnegan's warrant, there was a search conducted of Appellants' home without a search warrant, and the Commonwealth does not argue that any traditional exception to the warrant requirement applies. I fully agree with the lead opinion that "*Steagald* reflects a binding, majority holding from the United States Supreme Court, which directly addresses the third-party interest jeopardized by home entries of this sort." OAJC at 51. Therefore, I would synthesize the two cases as follows: because law enforcement conducted a warrantless search of Appellants' home, S*teagald* requires that Appellants' suppression motion be granted, unless the Commonwealth can *overcome Steagald* by showing that *Payton* applies. This gives full effect to both of the Supreme Court's cases.

[1] Although *Steagald*'s rule that the search of a home requires a search warrant or an exception is a constitutional truism, I observe that Appellants have consistently raised this point throughout this litigation. *See* N.T., 2/20/15, at 7 (defense counsel stating "my argument would be that [a] search must be conducted pursuant to a search warrant" and relying on *Steagald*); Petition for Allowance of Appeal, 309 EAL 2016, at 9-10; Petition for Allowance of Appeal, 310 EAL 2016, at 10-12; Romero's Brief at 23; Castro's Brief at 23.

I now turn to how the Commonwealth can satisfy *Payton* to overcome *Steagald*. I agree with the Tenth Circuit that the best synthesis of *Payton*'s requirements is that for an arrest warrant itself to permit an entry into a home, "officers must have a reasonable belief the arrestee (1) lived in the residence, and (2) is within the residence at the time of entry." *United States v. Gay*, 240 F.3d 1222, 1226 (10th Cir. 2001) (citation omitted).[2] I further agree that "reasonable belief" must mean probable cause. *See* OAJC at 39-43. In addition to the lead opinion's analysis, I note that this Court, for other search and seizure purposes, has held that "reasonable grounds" in our own statutes means probable cause. *Commonwealth v. Kohl*, 615 A.2d 308, 313 (Pa. 1992) (addressing now-repealed 75 Pa.C.S. § 1547(a)(2)).

My principal point of disagreement with the lead opinion is over its treatment of *Payton* as an intermediate category between pure dicta and a binding rule. *See* OAJC at 51. In this regard, I share Justice Dougherty's views that "the [Supreme] Court has since relied repeatedly on [*Payton*'s] language to resolve the execution of arrest and search warrants." Concurring and Dissenting Op. at 2. In addition to the cases cited by Justice Dougherty, I note that *Steagald* itself used the language in *Payton* as part of the basis for its rule. *See Steagald*, 451 U.S. at 221 (citing *Payton*, 445 U.S. at 602-03) (stating, in discussing the government's concerns about obtaining a search warrant, "the situations

[2] As the lead opinion notes, *Payton* states that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton*, 445 U.S. at 603. However, I agree with the Court of Appeals that "[t]here is no substantial reason to believe that the standard of knowledge should be different or greater when it comes to the other prong of the *Payton* test, whether the suspect resides at the house." *Valdez v. McPheters*, 172 F.3d 1220, 1225 (10th Cir. 1999). By contrast, the Superior Court's rule in this case dispensed with the need for any information on the "within" prong. *Commonwealth v. Romero*, 138 A.3d 21, 25 (Pa. Super. 2016) (citing *Commonwealth v. Muniz*, 5 A.3d 345 (Pa. Super. 2010)) (stating, "[w]here authorities have a reasonable belief that the subject of an arrest warrant lives within a given premises, they can enter the home and arrest the suspect without a search warrant."), *appeal granted*, 161 A.3d 798 (Pa. 2016).

in which a search warrant will be necessary are few. As noted in *Payton*[,] an arrest warrant alone will suffice to enter a suspect's own residence to effect his arrest."). I therefore agree, consistent with the views of the Third Circuit, that the language in *Payton* has "evolved into a tenet of Fourth Amendment jurisprudence[.]" *United States v. Vasquez-Algarin*, 821 F.3d 467, 472 (3d Cir. 2016). Therefore, I view *Payton* as its own constitutional rule that requires: (1) a valid arrest warrant; (2) probable cause that the home in question is the arrestee's residence; and (3) probable cause that the arrestee will be found at that home in the moment the search is effectuated.

Turning back to this case, I observe that what is crucial in any Fourth Amendment analysis is what is known to law enforcement *ex ante* under the totality of the circumstances. We do not analyze these issues through the lens of what police did or did not discover from the search *ex post*. Stated another way, the Fourth Amendment does not reward law enforcement for being right nor does it penalize officers for being wrong. *Commonwealth v. Carter*, 105 A.3d 765, 769 n.4 (Pa. Super. 2014) (en banc), *appeal denied*, 117 A.3d 295 (Pa. 2015).

As the lead opinion notes, the Commonwealth did not produce the arrest warrant for Moreno at the suppression hearing. The only evidence in the record is Agent Finnegan's testimony. On the residence prong of *Payton*, my review of the suppression hearing transcript reveals that Agent Finnegan's testimony was at times contradictory. At one time, he testified that he believed Moreno's family lived there, which suggests Agent Finnegan knew that this home belonged to someone else and Moreno could just be staying there. N.T., 2/20/15, at 12, 23-24. At another point, Agent Finnegan testified he believed this house to be Moreno's actual residence. *Id.* at 14. When the trial court questioned him directly, Agent Finnegan stated both beliefs in the same sentence. *See id.* at 38 (telling the trial court he had "[t]he belief that . . . this was [Moreno's] legal

residence *and* the belief that he very well may have been staying there.") (emphasis added).

However, even assuming that Agent Finnegan's information gave rise to probable cause that Moreno's "residence" was 4745 North Second Street, that is not enough under *Payton*. As noted above, *Payton* requires probable cause to believe that 4745 North Second Street was Moreno's residence *and* that Moreno would be physically present there when the officers effectuated their entry. *Gay*, 240 F.3d at 1226. From my review of the transcript, the Commonwealth did not produce any evidence that Moreno would be physically present when the officer entered Appellants' home.[3] Therefore, the Commonwealth did not ultimately meet its burden.

This testimony highlights what the lead opinion titles the "uncertain residence problem." OAJC at 36. Although I agree with the lead opinion's recitation of *Payton*'s framework, I observe that it places a high burden on law enforcement officers in executing valid arrest warrants. As the lead opinion notes, instead of providing any guideposts for how *Payton* should be applied, the Court simply "took the question of residence for granted, and did not consider the possibility of error in that determination." *Id.* at 35 n.10.

In addition to the possibility of error in determining the location of an arrestee's residence, I observe that the *Payton* Court did not contemplate that its rule would have to be applied to fugitives. The two consolidated cases in *Payton* involved individuals who had a knowable fixed residence, one being a house, and the other being an apartment. *Payton*, 445 U.S. at 576-78. The pitfalls of applying *Payton* to the "uncertain residence

[3] This may have been because Agent Finnegan did not believe he needed to gather any such facts as to Moreno's presence. *See* N.T., 2/20/15, at 22 (describing his understanding of the process as "[a] body warrant can be served on an address that we believe to be the legal address for the offender. When we are searching that address, we can look anywhere a reasonable person would believe that a [sic] individual could be hidden or hiding.").

problem" are magnified when law enforcement and courts are tasked with applying it to a class of persons that by definition has no set residence in the first place, such as Moreno in this case. I believe the Supreme Court of the United States should give courts and law enforcement more detailed guidance in this area.

This leaves the arrest warrant itself. I agree with the lead opinion that "[i]t remains possible that the contents of that warrant reflected the magistrate's determination of probable cause to search [Appellants'] home, in which case the challenged entry was lawful." OAJC at 61. Consistent with the lead opinion's view, to always require two physical pieces of paper would indeed elevate form over substance. *Id.* at 57-58 n.20. Therefore, I have no objection to allowing the Commonwealth to enter the arrest warrant into evidence and to subject it to a traditional "four corners" analysis.

Based on the foregoing, I conclude that the trial court correctly applied *Steagald* to this case, and that the Commonwealth did not carry its separate burden to overcome that conclusion under *Payton*. I further agree with the lead opinion's resolution to permit the Commonwealth an opportunity to introduce the arrest warrant for Moreno on remand. Accordingly, I respectfully concur in the result.