[J-43-99]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	64 W.D. Appeal Dkt. 1998
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court at No. 1096PGH1997 on April 30,
	:	1998, affirming the Order of the Court of
v.	:	Common Pleas of Westmoreland County,
	:	Criminal Division, at Nos. 3870C & 3871C
	:	of 1995 of March 27, 1997
RANDOLPH W. WRIGHT,	:	
	:	
	:	
Appellant	:	ARGUED: March 9, 1999

OPINION

MR. JUSTICE SAYLOR **DECIDED: DECEMBER 23, 1999**

This case presents the issue of whether Section 2711(b) of the Crimes Code, which requires the seizure of weapons in certain cases involving domestic violence, authorized the warrantless search of Appellant's home.

On September 21, 1995, at approximately 11:00 p.m., Appellant, Randolph W. Wright, Sr. ("Wright"), returned to the mobile home he shared with his wife and their nine-year-old son. After entering his son's room, where he found his wife and son asleep in bed, Wright produced a nine-millimeter handgun, fired a shot over the bed, and forcibly removed his wife to the living room. There, Wright argued with his wife, placed the gun against his chin, and told her to pull the trigger. Wright then shot his wife in the head, causing a "glazing injury" to her parietal scalp and fracturing her skull. Upon seeing the injury to his

mother, Wright's son telephoned the local emergency response number and reported the shooting.

At 11:55 p.m., two troopers from the Pennsylvania State Police received a radio dispatch for a shooting at the Wright residence. When the troopers arrived, they observed a spent nine-millimeter casing near a screen door on the side of the mobile home. The troopers announced themselves several times, were ultimately advised to "come in," and in response, ordered Wright out of the residence, placed him on the ground, and handcuffed him. Medical personnel were summoned, Wright's son was removed to a neighbor's house, and the scene was secured.

At approximately 1:04 a.m., on September 22, Wright was advised of his constitutional rights and questioned regarding the nature and location of the weapon used in the shooting. Wright responded that he had used a nine-millimeter Makarov, which was inside the mobile home. The police maintained the security of the scene until a third trooper arrived at 1:40 a.m. At that time, having obtained neither a search warrant nor the consent of Wright or his wife, troopers searched the residence. During the search, they discovered the Makarov and a .380-caliber pistol beneath the mattress of the bed in the master bedroom. The nine-millimeter handgun was loaded, with the hammer in a cocked position. Wright was charged with criminal attempt-homicide, 18 Pa.C.S. §901; aggravated assault (two counts), 18 Pa.C.S. §2702; and reckless endangerment (two counts), 18 Pa.C.S. §2705.

Prior to trial, Wright filed a motion to suppress the firearms seized from his residence, claiming that the police should have obtained a search warrant. The suppression court denied the motion, finding that Section 2711(b) of the Crimes Code, 18 Pa.C.S. §2711(b), requires the seizure of all weapons used by the defendant in the commission of the offense. Wright proceeded to a jury trial, arguing that he had not fired his gun into the wall over his son's bed, and that the injury to his wife was accidental,

having occurred during the course of a struggle.[1] Wright was convicted of all charges, except the offense of aggravated assault related to his son, and was subsequently sentenced to an aggregate prison term of five-and-one-half to eleven years and eleven months.

On appeal, a divided panel of the Superior Court affirmed in a memorandum decision. In the lead opinion, Judge Joyce reasoned that the search was justified pursuant to Section 2711(b), which requires the police to seize any weapons used in the commission of certain enumerated offenses involving domestic violence, and that the power to seize such weapons necessarily confers the right to search. Judge Joyce also concluded that the search was proper, because of exigent circumstances that required the troopers to remove the weapons from the residence to ensure the safety of the individuals who resided there. In a concurring opinion, Judge Olszewski maintained that a construction of Section 2711(b) that permits warrantless searches in domestic cases involving a weapon violates the Fourth Amendment's protection against unreasonable searches and seizures. Nevertheless, Judge Olszewski agreed that the return of Wright's son to the residence in the future constituted an exigent circumstance justifying the warrantless search. Judge Kelly also concurred, stating his view that the warrantless search was permissible as incident to a lawful arrest. This Court allowed appeal to consider the propriety of the search and seizure.

Section 2711 provides, in relevant part, as follows:

> **(a) General rule. --** A police officer shall have the same right of arrest without a warrant as in a felony whenever he has probable cause to believe the defendant has violated section 2504 (relating to involuntary manslaughter), 2701 (relating to simple assault), 2702(a)(3), (4) and (5) (relating to aggravated assault) or 2705 (relating to recklessly endangering another

[1] Wright's wife and son testified to this effect on behalf of the defense at trial.

> person) against his spouse or other person with whom he resides or has formerly resided although the offense did not take place in the presence of the police officer. A police officer may not arrest a person pursuant to this section without first observing recent physical injury to the victim or other corroborative evidence.
>
> **(b) Seizure of weapons. –** The arresting police officer shall seize all weapons used by the defendant in the commission of the alleged events.

18 Pa.C.S. §2711(a), (b). By requiring the police to seize weapons in certain cases involving domestic violence, Section 2711(b) makes mandatory what was previously permissive. In so doing, the statute serves to afford protection to victims of domestic violence by lessening the opportunity for future harm.

Nevertheless, an unavoidable tension exists between the government's interest in protecting victims of abuse and the reasonable expectation of privacy associated with one's place of dwelling, which derives from the Fourth Amendment to the United States Constitution.[2] See generally Johnson v. United States, 333 U.S. 10, 14, 68 S. Ct. 367, 369 (1948)(stating that "[t]he right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance"); see also Dorman v. United States, 435 F.2d 385, 389 (D.C. App. 1970)("[f]reedom from intrusion into the home or dwelling is the archetype

---

[2] The Fourth Amendment states that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

of the privacy protection secured by the Fourth Amendment"), cited with approval in Payton v. New York, 445 U.S. 573, 587, 100 S. Ct. 1371, 1380 (1980). In furtherance of such privacy interests, searches conducted without prior approval by a judicial officer "are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967); see also Commonwealth v. Williams, 547 Pa. 577, 584-85, 692 A.2d 1031, 1034-35 (1997).

A plain reading of subsection (b) suggests only that an arresting officer is obligated to confiscate the weapons used in a domestic abuse situation; the terms of the statute do not purport to address the means that may be used in order to discover or locate such weapons. Moreover, to construe Section 2711(b) as authorizing warrantless searches whenever a weapon is implicated in a domestic violence case would, as noted by Judge Olszewski, create a new and categorical exception to the Fourth Amendment's warrant requirement. Because we are obliged to construe the enactments of the General Assembly in harmony with constitutional requirements, see 1 Pa.C.S. §1922(3); Commonwealth v. McCoy, 405 Pa. 23, 30, 172 A.2d 795, 798 (1961), the more tenable reading of Section 2711 is that the provision requires the police to seize a weapon when the intrusion is otherwise permissible. We hold, therefore, that the seizure of a weapon pursuant to Section 2711(b) is subject to the limits of existing Fourth Amendment jurisprudence.

Apart from Section 2711(b), the Commonwealth contends that the search was justified pursuant to the exigent circumstances exception to the warrant requirement. See generally Mincey v. Arizona, 437 U.S. 385, 392-93, 98 S. Ct. 2408, 2413 (1978). Alternatively, the search would be justified if conducted incident to Wright's lawful arrest. See Chimel v. California, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2040 (1969).

It is widely recognized that situations involving the potential for imminent physical harm in the domestic context implicate exigencies that may justify limited police intrusion

into a dwelling in order to remove an item of potential danger. Indeed, some courts have gone so far as to suggest that a report of domestic violence is sufficient, in and of itself, to warrant such an entry. See, e.g., State v. Greene, 784 P.2d 257, 259 (Ariz. 1989); Commonwealth v. Rexach, 478 N.E.2d 744, 746 (Mass. App. Ct. 1985)(recognizing the volatility inherent in domestic disturbances and thus permitting responding police to "use all reasonable means to prevent further abuse"). Other courts have remained more circumspect. See, e.g., State v. Gilbert, 942 P.2d 660, 664-66 (Kan. Ct. App. 1997)(holding that objective manifestations of domestic violence can constitute exigent circumstances justifying the warrantless search of a residence by police, provided that the search is in direct relation to ensuring the welfare and protection of individuals who may be injured); State v. Younger, 702 A.2d 477, 481 (N.J. Super. 1997)(noting that "the permissible scope in each case will be dependent on the circumstances, including the extent and nature of the officer's probable cause to believe that there is a dangerous weapon on the premises and the degree of exigency of the situation"); State v. Raines, 778 P.2d 538, 542 (Wash. Ct. App. 1989)(emphasizing the need to allow officers flexibility at the scene of a domestic disturbance). See generally Welsh v. Wisconsin, 466 U.S. 740, 753, 104 S. Ct. 2091, 2099 (1984)(noting that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense" suspected by the police).

This is not, however, a case in which the delay occasioned by obtaining a warrant would have subjected a victim of domestic abuse to further risk of physical harm -- at the time the search was conducted, the potential for imminent violence had been eliminated. Wright was in police custody, his wife was receiving treatment at a hospital, his son was being taken in by his grandparents, and the police had secured the premises. The mere possibility that Wright's family would have returned to the house at some point in the future did not give rise to an exigency that rendered it impracticable for the police to obtain a

warrant.[3] Moreover, there was no indication that the safety of others was threatened, evidence might be lost or destroyed, or police lacked the ability to maintain security at the premises pending the issuance of a search warrant.

While the ultimate removal of the weapons was reasonable and prudent, and in fact mandated by Section 2711, it is clear that the authorities had ample time to obtain a warrant or, as a practical matter, the consent of Mrs. Wright. Accordingly, the exigent circumstances exception to the warrant requirement of the Fourth Amendment is inapplicable. See Mincey, 437 U.S. at 393, 98 S. Ct. at 2413 (stating that "a warrantless search must be strictly circumscribed by the exigencies that justify its initiation").

Nor can the intrusion be justified as incident to Wright's arrest. A warrantless search incident to an arrest is valid "only if it is substantially contemporaneous with the arrest and confined to the immediate vicinity of the arrest." Shipley v. California, 395 U.S. 818, 819, 89 S. Ct. 2053, 2054 (1969). Here, the search was not substantially contemporaneous with the arrest, as Wright had been in custody for over an hour prior to the search; nor was the search conducted in the immediate vicinity of the arrest, as Wright was arrested outside his residence. See Vale v. Louisiana, 399 U.S. 30, 33-34, 90 S. Ct. 1969, 1971 (1970)(holding that a search of the defendant's home was not incident to an arrest when the defendant was arrested outside the residence); see also Commonwealth v. White, 543 Pa. 45, 57, 669 A.2d 896, 902 (1995).[4]

---

[3] In his dissenting opinion, Mr. Justice Castille posits that the continued police presence at the crime scene is of no relevance, since, in his view, the officers lacked the authority to restrain the Wrights' son from reentry. We need not address this stated concern in the present case, however, because there is no evidence of imminent reentry by the boy to support the finding of an exigency.

[4] In his dissenting opinion, Mr. Justice Castille maintains that the firearm was never truly at issue at Wright's trial but merely served as a Commonwealth exhibit; thus, any error in its admission into evidence was harmless. The defense theory of the case, however, was that the shooting was accidental, having occurred during a struggle for the gun, and such
(continued…)

For these reasons, the firearms should have been suppressed as the fruit of an illegal search. Accordingly, the order of the Superior Court is reversed, and the case is remanded for a new trial.

Mr. Justice Castille files a concurring and dissenting opinion in which Madame Justice Newman joins.

Mr. Justice Nigro files a concurring and dissenting opinion.

(…continued)
theory was supported at trial by the victim, who testified for the defense. To rebut this evidence, the Commonwealth felt it necessary to offer the testimony of an expert witness, based upon his examination of the weapon, to the effect that substantial pressure needed to be applied to the trigger in order to fire the weapon, and that it could not have been accidentally discharged. Thus, the firearm was more than an unembellished trial exhibit, and the Commonwealth did not raise the issue of harmless error in its submissions to this Court. Under these circumstances, we find that harmless error has not been demonstrated beyond a reasonable doubt.