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COMMONWEALTH OF KENTUCKY
KENTUCKYSUPREME COURT
FILE NO. 2010-CA-000415-DG
(2009-CA-001117-MR)

CRYSTAL LYNN GUZMAN — APPELLANT

v. — APPEAL FROM FAYETTE CIRCUIT COURT
HON. PAMELA R. GOODWINE, JUDGE
INDICTMENT NO. 08-CR-1495

COMMONWEALTH OF KENTUCKY — APPELLEE

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BRIEF FOR APPELLANT, CRYSTAL LYNN GUZMAN

Submitted by:

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The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Pamela R. Goodwine, 382 Robert F. Stephens Courthouse, 120 N. Limestone Street, Lexington, Kentucky 40507; the Hon. Ray Larson, Commonwealth's Attorney, Suite 300, 116 N. Upper Street, Lexington, Kentucky 40507; the Hon. Herbert T. West, Assistant Public Defender, 111 Church Street, Lexington, Kentucky 40507 and served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on October 26, 2011. The record on appeal was not removed from the Office of the Clerk of the Kentucky Supreme Court for the purpose of this Brief.

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ERIN HOFFMAN YANG

Introduction

Crystal Lynn Guzman was convicted of Possession of a Controlled Substance, First Degree, First Offense and Possession of Drug Paraphernalia, First Offense. She received one year probated for three years pursuant to a conditional guilty plea. The Court of Appeals affirmed her conviction, erroneously finding that the "protective sweep" of Guzman's residence was justified. Ms. Guzman comes to this Court following its granting of discretionary review. Because the police illegally engaged in a "protective sweep" of Ms. Guzman's residence, reversal is necessary.

Statement Regarding Oral Argument

Ms. Guzman requests oral argument in this matter.

Statement Regarding Cites to the Record

The record on appeal consists of one CD of trial proceedings and one volume of trial transcripts. Cites to the video record shall be as follows:

VR, date stamp, time stamp

Trial transcripts shall be cited TR, page no.

Statement of Points and Authorities

Introduction i

Statement Regarding Oral Argument i

Statement Regarding Cites to the Record i

Statement of Points and Authorities ii

Statement of the Case 1

Maryland v. Buie, 494 U.S. 324 (1990) ..... passim

Argument 6

I. There Was No Reasonable, Articulable Suspicion that Other Individuals Were In the Apartment. The Evidence Seized Must Be Suppressed 6

Standard of Review 6

Ornelas v. United States, 516 U.S. 690(1996) 6

United States v. Roark, 36 F.3d 14 (6th Cir. 1994) 6

Clark v. Commonwealth, 868 S.W.2d 101 (Ky. App. 1993) 6

The Court of Appeals' Erroneous Holding 6

Law 7

State v. Davila, 99 A.2d 1116 (N.J. 2010) 7

Analysis 8

United States v. Archibald, 589 F.3d 289 (6th Cir. 2009) 8, 9, 10

People v. Celis, 93 P.3d 1027 (Cal. 2004) 8, 13

Quintana v. Commonwealth, 276 S.W.3d 753 (Ky. 2008) 9

U.S. Const. Amend. IV 9, 14

Krause v. Commonwealth, 206 S.W.3d 922 (2006) 10

Sibron v. New York, 392 U.S. 40 (1968) 11

Epps v. Commonwealth, 295 S.W.3d 807 (Ky. 2009) 11

United States v. Hatcher, 680 F.2d 438 (6th Cir. 1982) 11, 12, 13

United States v. Gardner, 627 F.2d 906 (9th Cir. 1980) 12

United States v. Coates, 495 F.2d 160 (D.C.Cir.1974) 12

Conclusion 14

Ky. Const. § 10 14

Statement of the Case

On September 10, 2008, Lexington Police Officer Chy'Anne Krugler responded to a call alleging that Appellant, Crystal Lynn Guzman, was dealing in drugs and engaging in prostitution. VR 2/19/09 at 3:45:11. Apparently, the apartment was rented to Crystal's boyfriend, Jeffrey Goff, who was incarcerated. The call was received around 1:10 a.m. Despite the hour, Krugler and her partner, Brian McAllister, went to an apartment complex to speak to the caller, Crystal's neighbor, Ms. Wallace.[1]

Ms. Wallace said she saw Crystal headed for her apartment with a white man and a black man that night. Id. at 3:47:00. Wallace told them that if they were doing something illegal, she would call the police. Id. at 3:46:30. Wallace told Krugler that the black man said "some ugly things" and told her to mind her own business. Id.

As the officers were interviewing Ms. Wallace, she told him that the black man had left Crystal's apartment and was headed down the stairs. Id. at 3:47:35. Krugler and McAllister decided to talk to the man, Paul Demerit. Id. Demerit said he was just hanging out with a friend at Crystal's apartment. Id. at 3:48:06. Krugler testified that Demerit appeared to be intoxicated on "some kind of narcotics." Demerit gave permission to search his person and his vehicle. Id. However, the police did not find any contraband or active warrants. Id. The background check did reveal that he was on probation for trafficking. Id.

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[1] Ms. Wallace is not identified in the record by her first name.

Although it was well past one a.m. at this point, the officers proceeded to Crystal's apartment for a "knock and talk." Id. at 3:49:08; 4:00:16. Krugler testified that it took several minutes for Mr. Hendren, apparently the white male Harris saw with Demerit and Crystal, to open the door. Id. at 3:49:15. Hendren told them that he did not live there and was visiting his friend. Id.

Crystal was lying on a mattress on the floor by the front door. Id. at 3:49:42. She gave the officers consent to come in. Id. The officers asked why it took so long for her to come to the door, since they could hear people moving around in the apartment. Id. Krugler said she heard "noises and scuffling" before Hendren answered the door. Id. at 3:50:20. Hendren told them that they had been having sex. Id. at 3:49:42.

Krugler asked Crystal to turn on a light. Id. Crystal replied that she couldn't get to a lamp because she was not wearing any pants. Id. She pulled her pants on beneath the covers and turned on a lamp. Id. at 3:50:11. When Crystal turned the light on, Krugler saw a doorway she described as a little bigger than a regular door, with a blanket tacked over it. Id. at 3:51:00. Crystal said there was no one else in the apartment.

Nevertheless, Krugler proceeded to do a "protective sweep" of the apartment. Id. Krugler claimed "concern with the circumstances of the running around" and "went to each room to make sure that there was nobody that could harm us." Id.

Though Krugler claimed she was checking for an unknown person during the search, her check included looking into the sink, where she noticed a lot of dishes. Id. at 3:51:30. She examined the dishes long enough to find a spoon that was burnt on the bottom on top of the other dishes. Id. Krugler picked it up and saw white residue all over the spoon. Id. at 3:52:00.

Krugler confronted Hendren and Crystal about the spoon; both denied any knowledge of it. Id. at 3:53:00. Crystal told Krugler that Hendren and Demerit had been in the kitchen earlier. Id. When Krugler asked for permission to search, Crystal said the apartment was not hers. Id. at 3:53:26. Krugler told her that since her boyfriend was in jail, she had control over the apartment and could give permission to search. Id.

However, Crystal was hesitant, asking Krugler what would happen if she refused consent. Id. at 3:54:00. Krugler replied that if Crystal did not consent, she would leave McAllister at the apartment while she obtained a warrant. Id. At that point, Crystal agreed to the search. Id. Cocaine residue and various items of drug paraphernalia were found in the apartment. Id. at 3:54:20.

On cross-examination, Krugler implied that even in the wee hours of the morning, it was unusual behavior for Guzman not to answer the door right away. Id. at 4:00:50. According to Krugler, "[i]f somebody knocked on my door I'd wake up pretty much immediately. Especially if I was right inside my door." Id. at 4:01:14.

Krugler continued to allege that she could hear people walking around the apartment, but conceded that she did not hear anything that specifically indicated a threat. Id. at 4:01:29. There were never any indications that anyone in the apartment possessed weapons or that a violent crime had occurred. Id. In addition, she admitted that Crystal did not consent to a "sweep" of the apartment or give any indication she would check all the rooms if she let the officers in. Id. at 4:04:00.

Instead, Krugler argued that a "protective sweep" was necessary once she saw the blanket over the doorway. Id. at 4:04:29. She claimed that her only reason for the sweep was to look for another person. Id. at 4:06:42. Yet, she also conceded she had no indication that anyone else besides Hendren and Guzman were inside the apartment. Id. at 4:05:10. She also testified that she assumed Demerit was the black male Crystal was seen with earlier that morning. Id. at 4:17:17.

Defense counsel moved to suppress the evidence, noting that the protective sweep was illegal and any contraband discovered in the later search was a result of the sweep and fruit of the poisonous tree. Id. at 4:26:30. Counsel noted that Krugler had exceeded the scope of consent because "people don't just come in your door and start wandering around." Id. at 4:26:30. Counsel argued that the police had no reason to believe there was another person in the apartment based on the information they were given. Id. at 4:24:30.

The trial court overruled the motion to suppress, finding that the blanket over the doorway was "not normal" and therefore "raised suspicion." Id. at

4:30:30. The trial court found that there were not exigent circumstances, but the officers were allowed to do a protective sweep. Id. at 4:31:00; 4:32:00. The trial court also expressed a belief that the sweep was a sort of plain view, stating that the discovery of the spoon was no different from an officer seeing a crack pipe upon entering the apartment. Id. at 4:32:00.

The Court of Appeals affirmed, citing *Maryland v. Buie*, 494 U.S. 324, 327 (1990), for the proposition that "the Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." Opinion Affirming at p. 8.

The panel found the sweep justified. It cited the officers investigating "a complaint of dangerous criminal activities in the early morning at an apartment about which they had previously received previous reports," "scuffling noises" heard in the apartment, the delay in answering the door, the officers' interaction with Demerit, and the blanket tacked over the door as factors giving reasonable suspicion that another individual might be in the apartment. Id. at p 8-9.

Thereafter, Ms. Guzman asked this Court to accept her case on discretionary review. Because the trial court and Court of Appeals below erroneously found that the sweep was justified by the officer's fear that Guzman was harboring a dangerous individual, despite their admission that there was no reason to belief a third person was on the premise, the evidence must be suppressed.

Argument

I. There Was No Reasonable, Articulable Suspicion that Other Individuals Were In the Apartment. The Evidence Seized Must Be Suppressed.

Standard of Review

A lower court's ruling on a motion to suppress is reviewed *de novo*. *Ornelas v. United States*, 516 U.S. 690, 699(1996). See also *United States v. Roark*, 36 F.3d 14 (6th Cir. 1994), *Clark v. Commonwealth*, 868 S.W.2d 101 (Ky. App. 1993).

The Court of Appeals' Erroneous Holding

The Court of Appeals affirmed the trial court, finding in pertinent part:

> Below, Officer Krugler testified that she was concerned by the noises and scuffling that she had heard prior to the time the door was opened and decided to conduct a protective sweep based upon her concern over the combination of the scuffling noises, the delay in opening the door, the observance of an individual, seemingly intoxicated and with a criminal record leaving the apartment, and the large blanket tacked up over the doorway.
>
> These factors, must also be viewed in conjunction with the fact that the officers were on the scene to investigate a complaint of dangerous criminal activities in the early morning at an apartment about which they had previously received reports. Additionally, these allegations were corroborated by their interaction with Demerit, who appeared to be intoxicated on narcotics after leaving the apartment and who was on probation for drug trafficking. Considering the totality of the circumstances, we are in agreement with the court below that those factors served as a basis for the officers to have a reasonable, articulable suspicion that there could be other individuals in the apartment who might prove dangerous. Accordingly, we believe that the protective sweep was justified.

Opinion Affirming at p. 8-9.

Law.

In *Maryland v. Buie*, the United States Supreme Court held that the Fourth Amendment permits a properly limited "protective sweep" conducted incident to an in-home arrest on a warrant in order to protect the safety of police officers or others. 494 U.S. 325 (1990). The Court emphasized that a " 'protective sweep' is a quick and limited search of premises,...narrowly confined to a cursory visual inspection of those places in which a person might be hiding." 494 U.S. at 327. The test for the propriety of such a protective sweep is whether "the searching officer 'possesse[d] a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed]' the officer in believing,' [citations omitted] that the area swept harbored an individual posing a danger to the officer or others." *Id.*

The rationale of *Buie* has been extended to allow a protective sweep of a residence to occur absent an arrest in the proper circumstances. *State v. Davila*, 99 A.2d 1116, 1129 (N.J. 2010). "That said, at a minimum, the presence of probable cause to arrest is a weighty factor in the calculation of whether officers are in danger when effecting an arrest in the home." *Id.* Indeed, courts are hesitant to affirm protective sweeps conducted based on consent to enter private property. *Id.* at 1130. When a protective sweep is performed in a non-arrest setting, the legitimacy of the police presence must be probed. *Id.* at 1132. And, a

careful examination must be undertaken of the basis for the asserted reasonable articulable suspicion of dangerous persons on the premises. *Id.*

Analysis

The Court of Appeals erred in finding that the officers had reasonable, articulable suspicion to sweep Guzman's apartment. While Officer Krugler's sole justification for the sweep was to look for another person, Krugler conceded **she had no reason to believe that anyone else besides Hendren and Guzman were inside the apartment.** VR 2/19/09 at4:05:10; 4:06:42. She admitted on the stand that she assumed Demerit was the black male Crystal was seen with earlier that morning. Id. at 4:17:17.

"Clearly, *Buie* requires more than ignorance or a constant assumption that more than one person is present in a residence." *United States v. Archibald*, 589 F.3d 289, 300 (6th Cir. 2009). The burden of finding reasonable articulable facts to justify a sweep is not reduced because the officers were unable to view the entire residence or because they felt vulnerable based on their location. *Id.* at 299-300. Neither "scuffling noises" or a bare assumption that another person may be present justified their actions in this case.

For example, in *People v. Celis*, the police had been surveilling the home of a suspected drug dealer for two days. 93 P.3d 1027, 1035 (Cal. 2004). During that time, they noted the presence of his wife and "possibly a male juvenile" at the home. *Id.* The police detained the defendant in his backyard, believing he was en route to a drug exchange. *Id.* The officers also detained Ordaz, a man in the area;

assumedly to receive the drugs. *Id.* The police then conducted a protective sweep of the home. The officers "had not been keeping track of who was in the house"; thus, when they entered the house to conduct a protective sweep, they did so without "any information as to whether anyone was inside the house." *Id.* Also, there is no indication that when stopped by the officers, either defendant or Ordaz was armed. *Id.* As such . "[t]he facts known to the officers before they performed the protective sweep fell short of what *Buie* requires, that is, 'articulable facts' considered together with the rational inferences drawn from those facts, that would warrant a reasonably prudent officer to entertain a reasonable suspicion that the area to be swept harbors a person posing a danger to officer safety. *Id.*

Likewise, in this case, the government failed to provide sufficient facts to support a reasonable belief that a third party was present and posed a danger to the police. See *Archibald,* 589 F.3d at 299. Neither Guzman's delay in answering the door nor alleged "shuffling noises" presented a basis for the sweep. First, this Court has made clear that Guzman had no duty to answer the door. "[A]ny interaction between the police and the resident of a house in the course of a knock and talk must be consensual." *Quintana v. Commonwealth,* 276 S.W.3d 753, 759 (Ky. 2008). The Fourth Amendment allows a resident time to collect herself before opening the door, just as it allows her to refuse to answer the door.

Second, the police knocked on Guzman's door sometime after one a.m. Most people would not be dressed and expecting visitors in the wee hours of the morning. In *Krause v. Commonwealth,* this Court noted that four a.m. was an

"alarming hour" at which to be confronted by police. 206 S.W.3d 922, 926 (2006)(time of knock and talk one of many factors demonstrating coerced consent).

In *Archibald,* supra, the state argued that shuffling noises and a delay in answering the door justified a protective sweep. The 6th Circuit disagreed, finding that cases upholding a protective sweep based on noises emanating from a residence required additional facts or stronger evidence. *Archibald,* 589 F.3d at 300. Uncertainty as to who is in a residence cannot suffice to justify a protective sweep:

> Allowing the police to conduct protective sweeps whenever they do not know whether anyone else is inside a home creates an incentive for the police to stay ignorant as to whether or not anyone else is inside a house in order to conduct a protective sweep. Finally, and perhaps most importantly, allowing the police to justify a protective sweep on the ground that they had no information at all is directly contrary to the Supreme Court's explicit command in *Buie* that the police have an articulable basis on which to support their reasonable suspicion of danger from inside the home. 'No information' cannot be an articulable basis for a sweep that requires information to justify it in the first place.

Id.

In this case, the police were not completely ignorant-all the information they possessed indicated Guzman and Hendren were the only people inside the apartment. The witness, Ms. Wallace, told Krugler that Crystal was with one black man and one white man. Wallace identified the black man, Demerit, as he left the apartment. A white male answered the door when the officers went to the apartment. Crystal Guzman was also in the apartment. Officer Krugler testified that she assumed Demerit was the black male Crystal was seen with earlier that

morning. VR 2/19/09 at 4:17:17. Thus, all three individuals known to the police were accounted for before they began the sweep.

Moreover, the officers' interaction with Demerit did not give rise to reasonable suspicion that Guzman harbored a dangerous individual in her apartment. While the officers may have believed Demerit was impaired, he consented to a search of his person and his car; no contraband was found. Simple association with a drug user is insufficient to establish reasonable suspicion. *Sibron v. New York,* 392 U.S. 40, 62 (1968). According to the United States Supreme Court, "[t]he inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." *Id.*; see also *Epps v. Commonwealth,* 295 S.W.3d 807, 809 (Ky. 2009). And again, in the context of protective sweeps, officers must be able to point to reasonable, articulable suspicion that the premises in which they are present is "harboring a person posing a danger to those on the arrest scene." *Buie, supra,* 494 U.S. at 336. The Court of Appeals failed to convey how the officers' interaction with Demerit would lend itself to a reasonable belief that a dangerous person was inside the apartment.

The Court of Appeals' finding that Guzman was suspected of "dangerous criminal activities"-prostitution and drug use-was a factor supporting the sweep fails to justify their holding. Ironically, the panel relied on dicta from the Sixth Circuit, but failed to apply the actual holding of the case to its analysis. *United States v. Hatcher,* 680 F.2d 438, 444 (6th Cir. 1982). (In its opinion affirming,

the court cited *Hatcher* for the proposition that courts should be cautious "in limiting the ability of police officers to protect themselves as they carry out missions which routinely incorporate danger." However, the Guzman court ignored the fact that in *Hatcher*, the trial court **suppressed** evidence from a protective sweep justified on similar grounds. 680 F2d at 444. In order to necessitate a protective sweep "there must be at the time of the search some basis for a reasonable belief by the officers that there may be other persons on the premises who could pose a danger to the agents." *Id.*, citing *United States v. Gardner*, 627 F.2d 906, 909 (9th Cir. 1980). *United States v. Coates*, 495 F.2d 160, 165 (D.C.Cir.1974).

In *Hatcher*, *supra*, there was no evidence the defendant was a dangerous individual and no indication that any other persons were in the house at the time of Hatcher's arrest. 680 F2d at 444. Thus, the trial court erred in justifying the sweep on the basis that "the subject of drugs is a dangerous one, dangerous for all of those persons involved in it, especially those who are on the law enforcement side." *Id.* In Ms. Guzman's case, the Court of Appeals cited Demerit's perceived intoxication and the fact that Guzman was accused of drug activity to justify the sweep of her apartment. However, "[t]hat reasoning may be too easily applied to any number of categories of criminal arrests, and would permit wholesale abrogation of the Fourth Amendment reasonableness requirement whenever an arrest is made in such subject areas." *Id.* As such, the warrantless search of Hatcher's basement was not justified on the basis of a need for protection of the

arresting agents. Likewise, the warrantless search of the apartment in which Guzman was found was not justified on the basis of officer protection.

In addition, in *Hatcher* and *Celis, supra*, the police swept the defendant's residence after a valid arrest for drug trafficking. Thus, unlike the officers in this case, the police had **probable cause** to believe the defendant was dealing drugs. Still, this was not enough to justify a warrantless sweep of his home for unknown fugitives since there was no evidence the men were dangerous and there was no clear indication that any other persons were in the house at the time of their arrest. See *Hatcher*, 680 F.2d at 444; *Celis*, 93 P.3d at 1035. In Ms. Guzman's case, there was no evidence of a threat to officer safety beyond unconfirmed allegations of drug use and prostitution.

Finally, the Sixth Circuit squarely rejected the notion that items found in "plain view" during a protective sweep are admissible. In *Hatcher, supra*, the police found cocaine in "plain view" on a desk in the basement during the protective sweep. 680 F.2d at 443. Like the trial court in Guzman's case, the trial court in *Hatcher* held the drugs were in "plain view" in the course of the sweep. *Id.*

The Sixth Circuit rejected use of the "plain view" doctrine for protective sweeps. *Id.* In order to necessitate a protective sweep, an officer must have some basis for a reasonable belief that there may be other persons on the premises who could pose a danger to the agents. *Id.* There is no plain view exception when an officer is in a part of a residence absent a reasonable belief there may be danger.

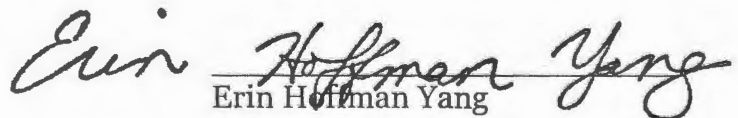
In this case, there were no weapons in plain view, no smells of burning drugs, no sudden appearances. There was only Krugler's baseless allegation that another person may have been in the apartment. The three people identified by Ms. Harris were accounted for. Krugler gave no rational basis for believing anyone else was in the apartment, save for blanket used as a makeshift door.

Whether a blanket over a doorway is "not normal" is not the issue. It is not unusual to hear people moving about an apartment when startled by the police in the wee hours of the morning. Nor is it unusual for two adults engaging in consensual sex, caught off guard by a knock on the door, to take a few minutes to compose themselves. The Commonwealth could not show the demonstrable danger required to justify a protective sweep. The Court of Appeals erred.

Conclusion

The Fourth Amendment and Section 10 of the Kentucky Constitution require that officers have a reasonable and articulable suspicion of danger before barging into a residence in the early morning hours. To allow an officer to justify a sweep based on fear or a harbored fugitive, after she testified there was no reason to believe another person was in the residence makes a mockery of these Constitutional protections. Accordingly, Ms. Guzman asks this Court to reverse the Court of Appeals and suppress the evidence gleaned from the illegal protective sweep of her residence.

Respectfully Submitted,



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