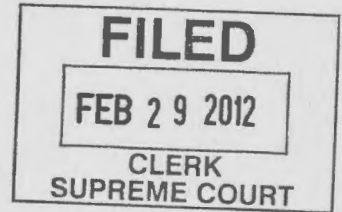


COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2010-SC-000415-DG
(2009-CA-001117-MR)



CRYSTAL LYNN GUZMAN

APPELLANT

v.

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

COMMONWEALTH OF KENTUCKY

APPELLEE

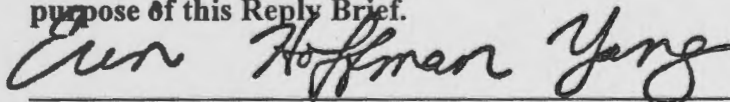
REPLY BRIEF FOR APPELLANT, CRYSTAL LYNN GUZMAN

Submitted by:

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The undersigned does certify that copies of this Reply 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 February 29, 2012. The record on appeal was not removed from the Office of the Clerk of the Kentucky Supreme Court for the purpose of this Reply Brief.



ERIN HOFFMAN YANG

Purpose of Reply Brief

The purpose of this reply brief is to respond to arguments set forth in Appellee's brief.

Statement Regarding Oral Argument

Ms. Guzman requests oral argument.

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

The Commonwealth argues the sweep was proper because Wallace said that “they” had gone into the apartment with a black male, and Officer Krugler heard “people” walking around the apartment. This argument fails legally and factually.

A protective sweep is warranted only if “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.” *Maryland v. Buie*, 494 U.S. 325, 327 (1990). Despite the Commonwealth’s references to “people” and “they,” Krugler conceded **she had no reason to believe that anyone else besides Hendren and Guzman were inside the apartment.** VR 2/19/09 at 4:05:10; 4:06:42. Thus, it is disingenuous for the Commonwealth to claim it was “reasonable for Officer Krugler to believe that an unaccounted person in the apartment [might have posed] a danger to the officers under the circumstances.” Appellee’s Brief at p. 12. In fact, Krugler had no basis to believe Guzman was harboring any individual, much less a dangerous individual. “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 Commonwealth also argues that the officer's interaction with Demerit somehow justified the protective sweep of the apartment, stating he "appeared to be intoxicated on narcotics" and was on probation for trafficking. However, Demerit consented to a search of his person and his vehicle. No narcotics or contraband was found and there were no warrants for him. The Commonwealth fails to show how the encounter with Demerit gave rise to suspicion that a dangerous individual was being harbored at Guzman's apartment.

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The Commonwealth argues that a delay in opening the door somehow justified a sweep, ignoring that the police knocked on Guzman's door sometime after one a.m. Contrary to Krugler's assertions, 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).

The Commonwealth fails to cite precedent for allowing a protective sweep under any similar circumstances. For example, in *U.S. v. Gould*, 364 F.3d 578 (5th Cir. 2004)(abrogated on other grounds by *Kentucky v King*, 131 S.Ct. 1849 (2011), a protective sweep conducted absent an arrest was upheld based on very disparate facts. In *Gould*, the officers conducting a protective sweep were told a man they *knew* to be prone to violence was planning to kill two local judges. *Id.* at 590. They went to a mobile home where they believed Gould would be staying, and were told by an occupant that he was in bed. *Id.* "*Gould was not in his bed asleep, as Cabral had just represented, nor was Gould otherwise visible, so the*

danger and imminence of ambush then dramatically increased, justifying the few seconds 'sweep' looking under the bed and opening the two bedroom closet doors." Id. at 589 [emphasis added].

Likewise, in *United States v. Taylor*, 248 F.3d 506, 514 (6th Cir. 2001), a protective sweep was upheld based on distinguishable facts. The police wanted to question Taylor, who was suspected of dealing drugs, selling illegal weapons, and being involved in the Michigan militia; Taylor was also a suspect in one or more murders. *Id.* at 510.

Taylor's brother let the officers in and said the suspect was at the gym. *Id.* The officers immediately found marijuana in plain view, and conducted a protective sweep to ensure officer safety while they awaited a search warrant. *Id.* The Sixth Circuit found that the officer's immediate² discovery of contraband, coupled with the reports of Taylor's involvement with drugs and weapons justified a protective sweep for officer safety and to prevent destruction of evidence while awaiting a warrant. *Id.* at 513-14.

In *Taylor*, and *Gould*, *supra*, police conducted a protective sweep seeking (a) a specific person (b) they had reason to believe was on the premises and (c) they had reason to believe could be armed and or dangerous. None of these factors are present in Ms. Guzman's case. While an arrest is not required for a protective sweep, courts are hesitant to affirm protective sweeps conducted based on consent to enter private property. *State v. Davila*, 99 A.2d 1116, 1130 (N.J. 2010).

The Commonwealth urges this Court to “give due regard to inferences and deductions drawn by [officers] from their experience and training.” Appellee’s Brief , p. 11, citing *Baltimore v. Commonwealth*, 119 S.W.3d 532, 539 (Ky. App. 2003). Yet *Baltimore* involved an investigative stop, rather than an intrusion into the home, which has traditionally been afforded greater protection. See *Payton v. New York*, 445 U.S. 573, 586 (1980). (“It is a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.”)

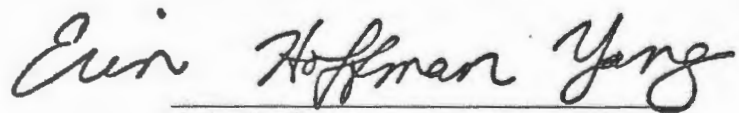
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Accordingly, when a protective sweep is performed in a non-arrest setting, the legitimacy of the police presence must be probed. *Davila*, 99 A.2d at 1132. And, a careful examination must be undertaken of the basis for the asserted reasonable articulable suspicion of dangerous persons on the premises. *Id.* There was no basis for asserted reasonable suspicion.

Conclusion

This Court should reverse the Court of Appeals and suppress the ill-gotten evidence against Ms. Guzman.

Respectfully submitted,



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Attorney for Appellant