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Commonwealth of Kentucky
Kentucky Supreme Court
No. 10-SC-415-DG

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CRYSTAL LYNN GUZMAN

APPELLANT

v.

Appeal from Fayette Circuit Court
Hon. Pamela R. Goodwine, Judge
Indictment No. 08-CR-1495

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

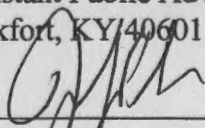
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CERTIFICATE OF SERVICE

I certify that a copy of the Brief for Commonwealth has been served February 8, 2012, via United States mail to Hon. Pamela R. Goodwine, Judge, Fayette Circuit Court, 382 Robert F. Stephens Courthouse, 120 N. Limestone Street, Lexington, KY 40507; via electronic mail to Hon. Ray Larson, Commonwealth's Attorney, Suite 300, 116 N. Upper Street, Lexington, Kentucky 40507; and via United States mail to Erin Hoffman Yang, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601.



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INTRODUCTION

Crystal Lynn Guzman, hereinafter “Appellant,” entered a conditional guilty plea to possession of a controlled substance in the first degree and possession of drug paraphernalia, and received a one-year prison sentence which was probated for a period of three years. She reserved the right to appeal the trial court’s denial of a motion to suppress evidence discovered during a search of her apartment. The Kentucky Court of Appeals affirmed the Appellant’s convictions. This Court granted discretionary review.

Note Concerning Citations

The record on appeal consists of one volume of transcript of record and one CD. The volume of transcript of record will be cited as “TR” with the page number. The video record will be cited as “VR” with the date and time index. Citations to the Appellant’s brief will be noted as “Appellant’s Brief” with the page number.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary. The issues raised are adequately addressed by the parties' briefs.

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COUNTERSTATEMENT OF THE CASE

On November 24, 2008, the Appellant was indicted by a Fayette County grand jury for possession of a controlled substance in the first degree, first offense; and possession of drug paraphernalia, first offense. TR 17-18. The charges arose following a search of an apartment the Appellant was living in on September 10, 2008. TR 10.

The Appellant was arraigned and pleaded not guilty. TR 22. Thereafter, she filed a motion to suppress evidence found during the search, claiming that the evidence was the product of an illegal search and seizure. TR 27. Specifically, the Appellant claimed that the search unreasonably exceeded the scope of any permission she had given police officers to enter the apartment. Id.

A suppression hearing was held on February 19, 2009. TR 36. Officer Chy'Anne Krugler of the Lexington Division of Police was the only witness. VR 2/19/09, 3:45:00-4:21:50. She testified to the following details surrounding the incident:

Lexington police received a narcotics and prostitution complaint shortly after 1:00 a.m. on September 10, 2008. VR 2/19/09, 3:45:24-3:45:43, 3:57:40. The complaint was made by a tenant in an apartment building in the Meadowthorpe neighborhood of Lexington named Ms. Wallace. Id. at 3:45:48-3:46:12, 3:47:15. Officer Krugler and Officer McAllister were dispatched to investigate. Id. at 3:45:45.

The officers arrived at the scene and met with Ms. Wallace in her apartment. VR 2/19/09, 3:46:15, 3:57:50-3:58:00. She explained that the person who rented one of the upstairs apartments, Mr. Goth, was in jail.¹ Id. at 3:46:20-3:46:40. She

¹ Officer Krugler testified that there were four apartments in the building. Ms. Wallace's was the lower left apartment when entering the building,

further explained that Mr. Goth's girlfriend, the Appellant, had a lot of men "in and out" and that there had been drug activity and prostitution going on in the apartment. Id. Ms. Wallace informed the officers that earlier she had seen "them" going into the apartment with a black male. Id. at 3:46:40. She told "them" that if they were doing anything illegal she was going to call the police. Id. at 3:46:50. The black male said "some ugly things" to her and told her to mind her own business, so she called the police. Id. at 3:46:53-3:47:00.

Officer Krugler initially testified that Ms. Wallace stated that she had seen the Appellant, a black male, and another male going into the apartment. VR 2/19/09, 3:47:00. However, Officer Krugler later testified that Ms. Wallace only stated that "they" went into the apartment with a black male. Id. at 3:58:00, 4:17:15. Officer Krugler indicated that she did not ask Ms. Wallace who "they" were and did not assume how many people "they" referred to at the time. Id. at 3:58:20, 4:17:15.

As the officers were talking to Ms. Wallace she informed them that the black male was coming downstairs. VR 2/19/09, 3:47:40, 3:58:56. The officers went outside and talked to him after he exited the building. Id. at 3:47:52. The man was Paul Demerit. Id. at 3:48:05. He stated that he had been in the apartment with a friend and that they were "just hanging out." Id. at 3:48:14. Mr. Demerit appeared to be intoxicated on narcotics. Id. at 3:48:24. He gave permission for the officers to search him and his vehicle, and nothing was found. Id. at 3:48:28. However, the officers discovered that Mr. Demerit was on probation for trafficking in narcotics. Id. at 3:48:36.

and Mr. Goth's was the upper right apartment. VR 2/19/09, 3:47:20.

After speaking with Mr. Demerit the officers returned inside and went upstairs to make contact with the Appellant. VR 2/19/09, 3:49:10. The officers knocked on the apartment door several times. Id. at 3:49:20. Officer Krugler knocked loudly and persistently. Id. at 4:01:30. While waiting she could hear moving around inside and heard noises and scuffling. Id. at 3:49:30, 3:50:25. She heard people walking around the apartment. Id. at 4:01:50.

No one came to the door for several minutes but eventually Teddy Hendren answered the door. VR 2/19/09, 3:49:23. He stated that he did not live at the apartment and was there visiting a friend. Id. at 3:49:35. Officer Krugler could see the Appellant lying on a mattress on the floor that was directly in front of the door, approximately four to five feet away. Id. at 3:49:40, 4:03:30. Officer Krugler asked why it took so long to answer the door and Mr. Hendren said that they had been having sexual intercourse. Id. at 3:49:48.

The Appellant gave the officers permission to come inside. VR 2/19/09, 3:50:00, 3:50:30. When the officers entered it was very dark and Officer Krugler asked if there was a light. Id. at 3:50:05, 3:50:40. The Appellant quickly got dressed under the covers and turned on a small lamp beside the mattress. Id. at 3:50:12. Once the light was on Officer Krugler noticed a wide doorway that had a "big blanket tacked up over it." Id. at 3:51:00. The blanket covered a doorway to the rest of the apartment. Id. at 4:04:40. When she saw the doorway she asked the Appellant if there was anyone else in the apartment "out of concern with the circumstances of them running around." Id. at 3:51:15. The Appellant said there was not, but Officer Krugler performed a quick

protective sweep of the apartment to make sure there was no one who could harm the officers. Id. at 3:51:20.

The protective sweep involved Officer Krugler briefly going into each room to check and see if anyone was hiding. VR 2/19/09, 3:52:16. She described the sweep as “walk in, look around, make sure there's no hiding spot, walk out.” Id. at 4:06:38. She went into two bedrooms, the bathroom, and lastly the kitchen. Id. at 3:52:33. When she entered the kitchen she immediately saw a large kitchen spoon on top of dishes in the sink. Id. at 3:51:38. The spoon was “burnt all over the bottom” which indicated narcotic use to Officer Krugler. Id. at 3:51:53. She picked the spoon up and there was white residue all over it. Id. at 3:51:57. She then returned to the living room. Id. at 3:52:40.

The Appellant and Mr. Hendren denied having any knowledge of the spoon. VR 2/19/09, 3:52:55. Officer Krugler told the Appellant that she had found paraphernalia and asked for permission to search the apartment for narcotics. Id. at 3:53:25. When the Appellant asked what would happen if she refused, Officer Krugler indicated that she would leave to get a search warrant and Officer McAllister would stay at the apartment. Id. at 3:54:00. The Appellant subsequently granted permission to search. Id. at 3:54:15. During the search the officers found cocaine and various items of drug paraphernalia which led to the Appellant's and Mr. Hendren's arrest. Id. at 3:54:18-3:55:58, 4:11:15-4:11:45, 4:19:08.

At the conclusion of the hearing the trial court set forth its findings and conclusions on the record. VR 2/19/09, 4:29:30-4:32:35. The court found that the

officers initially had reasonable suspicion to conduct an investigation based on the complaint. Id. at 4:31:50. After receiving the complaint the officers talked to the witness and she indicated what the complaint was. Id. at 4:29:40-4:30:06. The witness directed the officers' attention to Mr. Demerit when he came downstairs and she told the officers that Mr. Demerit went in with "them" or "they." Id. at 4:30:07. The officers did not find anything on Mr. Demerit but corroborated the complaint since he was a convicted felon for trafficking and the complaint involved narcotics. Id. at 4:30:14. Officer Krugler then followed through with an investigation. Id. at 4:32:00. It was clear that the officers were police when they were invited in the apartment. Id. at 4:30:28, 4:32:12. Once inside the apartment, the blanket covering the opening to a room raised suspicion and permitted the officer to conduct a quick protective sweep. Id. at 4:30:40-4:31:00. While conducting the sweep the paraphernalia was found in plain view. Id. at 4:31:00. The Appellant then consented to the search of the apartment after the paraphernalia was found. Id. at 4:31:12-4:31:28. Based on these findings and conclusions the trial court denied the motion to suppress. Id. at 4:32:22; TR 36.

Thereafter, the Appellant entered a conditional guilty plea in which she reserved the right to appeal the trial court's ruling. TR 40-44, 69. On May 22, 2009, the trial court sentenced the Appellant to one year for possession of a controlled substance in the first degree and twelve months for possession of drug paraphernalia, but probated the sentence for a period of three years. TR 66-68; VR 5/22/09, 9:20:00.

The Appellant appealed to the Kentucky Court of Appeals. On appeal, the Appellant argued that Officer Krugler's protective sweep was not justified and that the

evidence discovered during the subsequent search of the apartment must be suppressed as fruit of the poisonous tree.

On May 21, 2010, the Court of Appeals rendered a not-to-be-published, unanimous Opinion affirming. Guzman v. Commonwealth, 2009-CA-001117. Applying the standard set forth in the United States Supreme Court case of Maryland v. Buie, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), the Court of Appeals found that Officer Krugler's protective sweep of the apartment was proper based on the totality of the circumstances. Slip Opinion pg. 7-9. The Appellant subsequently filed a motion for discretionary review which this Court granted.

ARGUMENT

SUPPRESSION WAS NOT WARRANTED AS OFFICER KRUGLER'S PROTECTIVE SWEEP WAS JUSTIFIED BY THE TOTALITY OF THE CIRCUMSTANCES.

The Appellant argues that the Court of Appeals erred in upholding Officer Krugler's protective sweep of the apartment. Appellant's Brief at 6, 8, 14. Specifically, the Appellant claims that there was insufficient evidence to establish a reasonable, articulable suspicion that there was a third party in the apartment who posed a danger to the officers. *Id.* at 9, 14. However, as will be shown, the totality of the circumstances provided Officer Krugler with a reasonable belief, based on specific and articulable facts, that there may be someone in the apartment who posed a danger. Accordingly, the Court of Appeals correctly found that the protective sweep was proper.

A. Standard of Review on a Suppression Ruling

Appellate review of a trial court's ruling on a motion to suppress involves a two-step analysis. Anderson v. Commonwealth, 352 S.W.3d 577, 583 (Ky. 2011) (citing Commonwealth v. Whitmore, 92 S.W.3d 76 (Ky. 2002)). First, an appellate court must determine whether the trial court's findings of fact are supported by substantial evidence. *Id.* (citing Kentucky Rule of Criminal Procedure 9.78). If the facts are supported by substantial evidence they are conclusive. *Id.* "Substantial evidence" refers to evidence of substance and relevant consequence which has the fitness to induce conviction in the minds of reasonable men. Owens-Corning Fiberglass Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998) (citations omitted). In reviewing the facts, an appellate

court should review only for clear error and “give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.” Whitmore, 92 S.W.3d at 79 (quoting Ornelas v. United States, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996)).

If the findings of fact are supported by substantial evidence, the appellate court must then conduct a de novo review of the trial court’s application of the law to those facts to determine whether its decision is correct as a matter of law. Anderson, 352 S.W.3d at 583. The Appellant bears the burden of showing that the trial court’s ruling was clearly erroneous. Harper v. Commonwealth, 694 S.W.2d 665, 668 (Ky. 1985), overruled on other grounds by Barnett v. Commonwealth, 317 S.W.3d 49 (Ky. 2010). In the absence of any showing to the contrary, the reviewing court must assume that the trial court ruled correctly. Id.

B. Applicable Law - the *Maryland v. Buie* Standard for a Protective Sweep

“It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.” Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639 (1980). Such searches are unconstitutional “unless it can be shown that they come within one of the exceptions” to the warrant requirement. Cook v. Commonwealth, 826 S.W.2d 329, 331 (Ky. 1992).

The “protective sweep” is a recognized exception to the warrant requirement. “A “protective sweep” is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of officers or others.” Maryland v. Buie, 494

U.S. 325, 327, 110 S.Ct. 1093, 1094, 108 L.Ed.2d 276 (1990). The sweep is “narrowly confined to a cursory visual inspection of those places in which a person might be hiding.” Id.

The protective sweep or “safety check” exception was previously recognized by the Kentucky Court of Appeals in Commonwealth v. Elliott, 714 S.W.2d 494 (Ky. App. 1986). In Elliott, the Court of Appeals held that in order for the exception to apply there must be a “serious and demonstrable potentiality for danger” and that the “burden is on the government to prove that officers had probable cause to believe a serious threat of danger existed.” Id. at 496 (citations omitted).

However, in Buie, the United States Supreme Court ruled that this standard was unnecessarily strict under the Fourth Amendment. 494 U.S. at 337, 110 S.Ct. at 1099. The Court went on to hold that “[t]he 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.” Id., 110 S.Ct. at 1099-1100.

While Buie refers to a protective sweep occurring “incident to an arrest,” 494 U.S. at 327, 110 S.Ct. at 1094, the fact that the protective sweep occurred prior to the arrest in this case has never been raised as a basis to find the sweep invalid. Moreover, many courts have upheld protective sweeps conducted prior to an arrest. See United States v. Gould, 364 F.3d 578, 584 (5th Cir. 2004), abrogated on other grounds by Kentucky v. King, 131 S.Ct. 1849 (2011) (recognizing that “arrest is not always, or per

se, an indispensable element of an in-home protective sweep. . . .”]; United States v. Taylor, 248 F.3d 506, 514 (6th Cir. 2001) (upholding a protective sweep conducted prior to an arrest in a consent entry case); State v. Davila, 999 A.2d 1116, 1127-1129 (N.J. 2010) (recognizing that the majority of the federal circuits have extended the holding of Buie beyond the incident to arrest context, and concluding that a protective sweep following a consent entry into a residence can be proper in certain circumstances).

These courts have found the same concerns for officer safety to be present even before a suspect is arrested. See Gould, 364 F.3d at 584 (“[I]n the in-home context it appears clear that even without an arrest other circumstances can give rise to equally reasonable suspicion of equally serious risk of danger of officers being ambushed by a hidden person. . . .”); Taylor, 248 F.3d at 513 (“[T]he principle enunciated in Buie with regard to officers making an arrest - that the police may conduct a limited protective sweep to ensure the safety of those officers - applies with equal force to an officer left behind to secure the premises while a warrant to search those premises is obtained.”). Therefore, in light of these authorities, this Court should recognize the Buie reasonable suspicion standard and apply it to determine the propriety of Officer Krugler’s protective sweep.²

“In determining whether a reasonable, articulable suspicion exists, the reviewing court must examine the totality of the circumstances to see whether the officer

² It should be noted that the Appellant now acknowledges that the Buie standard applies in this matter, despite asserting in her motion for discretionary review that it was not relevant to this case. Appellant’s Brief at 7.

had a particularized and objective basis for the suspicion.” Commonwealth v. Marr, 250 S.W.3d 624, 627 (Ky. 2008). A court “should not view the factors relied upon by the police officers to create reasonable suspicion in isolation but must consider all of the officers observations and give due regard to inferences and deductions drawn by them from their experience and training.” Baltimore v. Commonwealth, 119 S.W.3d 532, 539 (Ky. App. 2003).

C. The Court of Appeals Correctly Held that the Protective Sweep Was Proper.

In upholding Officer Krugler’s protective sweep the Court of Appeals held as follows:

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 to 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.

Slip Opinion pg. 8-9.

As the Court of Appeals correctly recognized, there were specific and articulable facts which supported a reasonable belief that there may be an unaccounted person (or persons) in the apartment. As noted, Ms. Wallace told Officer Krugler that “they” had gone into the apartment with a black male and did not specify how many people “they” referred to. VR 2/19/09, 3:58:00, 4:17:15. She also told Officer Krugler that the Appellant had a lot of men “in and out” of the apartment. Id. at 3:46:30. Additionally, Officer Krugler testified that while waiting at the apartment door for several minutes she heard moving around, scuffling and noises, and also heard *people* walking around the apartment. Id. at 3:49:30, 3:50:25, 4:01:50.

It was also reasonable for Officer Krugler to believe that an unaccounted for person in the apartment may pose a danger to the officers under the circumstances. The officers were on the scene to investigate a complaint of narcotics activity and prostitution. VR 2/19/09, 3:45:24-3:45:50. It was well after 1:00 a.m. in the morning. Id. at 3:57:40, 4:00:45. Officer Krugler had knowledge that the man who rented the apartment in question was in jail and that there had been previous complaints regarding the same apartment. Id. at 3:46:20, 3:59:25. Additionally, a man had just emerged from the apartment who was visibly intoxicated on narcotics and was a convicted drug trafficker. Id. at 3:48:24.

Based upon these facts, Officer Krugler could reasonably infer that others in the apartment may be engaging in illegal narcotics activity and/or illegal sexual

activity. She could also reasonably infer based on the delay in opening the door, the scuffling noises and walking around that she heard, and the unusual blanket covering the doorway to the rest of the apartment that someone inside may be attempting to avoid being discovered or apprehended by the police. It was certainly reasonable for Officer Krugler to believe that such a person could pose a threat to the officers' safety.

In considering whether the protective sweep was justified it must be emphasized that reasonable suspicion "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." Williams v. Commonwealth, 147 S.W.3d 1, 5 (Ky. 2004) (quoting Illinois v. Wardlow, 528 U.S. 119, 123, 120 S.Ct. 673, 675-676, 145 L.Ed.2d 570 (2000)). Officer Krugler need not be able to show with certainty that the apartment harbored a person who posed a danger. Rather under Buie, there need only be "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id. at 494 U.S. at 334, 110 S.Ct. at 1098. The totality of the facts discussed above, along with rational inferences from those facts, satisfy this standard.

The Appellant raises a number of arguments in claiming that there was no reasonable, articulable suspicion to justify the sweep, but none of them render the Court of Appeals's Opinion erroneous.

First, the Appellant is incorrect in claiming that Officer Krugler had no reason to believe that anyone other than the Appellant and Mr. Hendren was in the apartment. Appellant's Brief at 8, 10-11, 14. As explained, Officer Krugler did initially

testify that Ms. Wallace referred to the Appellant, a black male, and another man going into the apartment. VR 2/19/09, 3:47:00. However, she later testified on multiple occasions that Ms. Wallace had not identified three people specifically but stated that “they” went in the apartment with the black male. Id. at 3:58:00, 4:17:15. Regarding this matter, the trial court did not find that Ms. Wallace told the officers that three people went into the apartment, but instead found that she told the officers that “them” or “they” went into the apartment with Mr. Demerit. Id. at 4:30:10.

In addition, even if Ms. Wallace did identify three people it would not make Officer Krugler’s suspicion of another person in the apartment unreasonable. As noted above, Ms. Wallace had also informed Officer Krugler that the Appellant had a lot of men “in and out” and there was no indication that Ms. Wallace was constantly watching the apartment that evening. VR 2/19/09, 3:46:30. The Court of Appeals recognized this fact as further substantiating the reasonableness of Officer Krugler’s decision to conduct the protective sweep. Slip Opinion pg. 9, n.8.

Next, despite the Appellant’s claim, the scuffling noises, walking around, and delay in opening the door *do* support Officer Krugler’s suspicion of there being an unaccounted for person who posed a danger to the officers. Appellant's Brief at 9-10, 14. The Appellant relies heavily on United States v. Archibald, 589 F.3d 289 (6th Cir. 2009) to support her claim, but Archibald is distinguishable from this matter.

In Archibald, the Sixth Circuit Court of Appeals held that a protective sweep of the defendant’s apartment after he was detained on his front porch did not satisfy the Buie standard. Id. at 301-302. Among other grounds, the court rejected an

argument that the protective sweep was justified based on the defendant's delay in responding to an officer's knocking on the door, as well as shuffling sounds the officer heard coming from inside the residence. Id. at 300. In rejecting the argument the court pointed to the fact that the officer's comments to other officers on the scene such as "I can hear *him*" and "I can hear *someone* moving around inside," indicated a belief that there was only one person in the residence. Id. (emphasis in original).

In addition, the officer's testimony that the sounds may have been caused by possibly two individuals was only supported by his statement that "We *always* assume there could be - not necessarily are, but could be others." Id. (emphasis in original). The court held that "Buie requires more than ignorance or a constant assumption that more than one person is present in a residence." Id. The court further held that "[n]o information" cannot be an articulable basis for a sweep that requires information to justify it in the first place." Id.

Here, however, Officer Krugler had information to justify her suspicion. As noted, prior to knocking on the door she had been told by Ms. Wallace that "they" had gone into the apartment with a black male, and she had been told that the Appellant had a lot of men "in and out" of the apartment. VR 2/19/09, 3:46:30, 3:58:00, 4:17:15. Thus, Officer Krugler was acting on more than simply "no information" or a "constant assumption" that there may be an unaccounted for person or persons in a residence. The moving around, scuffling noises, and the sound of *people* walking in the apartment that she heard may be properly considered as part of the totality of the circumstances. See Taylor, supra, 248 F.3d at 514 (considering the fact that officers heard scuffling noises

from inside indicating that there might be more than one person in an apartment as part of the circumstances justifying a protective sweep).

As to the Appellant's further arguments, it was certainly proper for the Court of Appeals to consider the officers' interaction with Mr. Demerit *as a part* of its reasonable suspicion determination. The officers' interaction with Mr. Demerit partially corroborated the complaint from Ms. Wallace and reasonably suggested that others in the apartment may be engaging in illegal activity as well. The information gained from this interaction should not be considered in isolation, but as part of all of the circumstances which gave rise to a reasonable suspicion that the apartment harbored a person who posed a danger. See Baltimore, *supra*, 119 S.W.3d at 539.

Likewise, the Appellant's claim that there was no danger since there were no weapons in plain view, no smells of burning drugs, and no sudden appearances does not warrant reversal. Appellant's Brief at 14. Again, the totality of the circumstances that were actually presented to the officers must be considered. Marr, *supra*, 250 S.W.3d at 627. The absence of these particular factors is not controlling.

In conclusion, Officer Krugler was a six-year veteran officer who was conducting an investigation during the early morning hours. VR 2/19/09, 3:45:00. She testified that she had no intention of performing the protective sweep when she entered the apartment, but believed it was necessary after observing the blanket "tacked up" over the doorway to the rest of the apartment and "out of concern with the circumstances of them running around." Id. at 3:51:00-3:51:30, 4:04:28, 4:04:40. Her protective sweep was properly limited under Buie in both scope and duration - "walk in, look around,

make sure there's no hiding spot, walk out" - and the record contains no indication that it was simply used as a ruse to perform a warrantless search. Id. at 4:06:38.

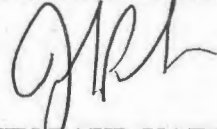
In its Opinion the Court of Appeals recognized the importance of law enforcement officials having the ability to safely and effectively perform their duties. Slip Opinion pg. 8 (citing Davis v. Commonwealth, 120 S.W.3d 185, 190 (Ky. App. 2003)). To that end, “[c]ourts should be cautious “in limiting the ability of police officers to protect themselves as they carry out missions which routinely incorporate danger.”” United States v. Hatcher, 680 F.2d 438, 444 (6th Cir. 1982) (quoting United States v. Coates, 495 F.2d 160, 165 (D.C. Cir. 1974)). Here, Officer Krugler’s concern was more than a vague or baseless suspicion given the serious nature of the complaint, the statements of the witness, the officers’ corroboration of the complaint through their interaction with Mr. Demerit, the uncertainty as to how many people were in the apartment, the delay in answering the door, the scuffling and walking around that was heard while the officers waited outside, and the suspicious blanket covering the doorway to the rest of the apartment. These circumstances, when considered together, give rise to a reasonable, articulable suspicion that someone may have been in the apartment who posed a danger to the officers. Buie, supra, 494 U.S. at 337, 110 S.Ct. at 1099-1100. Thus, the Court of Appeals correctly held that Officer Krugler was justified in conducting the quick protective sweep to ensure the officers’ safety.

CONCLUSION

For all the foregoing reasons the Opinion of the Kentucky Court of Appeals should be affirmed.

Respectfully Submitted

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