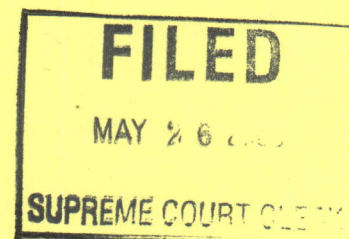


COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2008-SC-274



HOLLIS DESHAUN KING

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HON. JAMES D. ISHMAEL, JUDGE
INDICTMENT NO. 05-CR-1500

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR APPELLANT, HOLLIS DESHAUN KING

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The undersigned does certify that copies of this Reply Brief were mailed, first class postage prepaid, to the Hon. James D. Ishmael, 503 Robert F. Stephens Courthouse, 120 N. Limestone ST., Lexington, Kentucky 40507; the Hon. Andrea Mattingly Williams, 116 N. Upper St., Suite 300, Lexington, Kentucky 40507; the Hon. Matthew W. Boyd, 101 W. Short ST., Suite 300, Lexington, Kentucky 40507; and by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on May 26, 2009.

JAMESA J. DRAKE

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ARGUMENT

The police had probable cause to believe that the occupants of an apartment were committing a crime, *i.e.* possession of marijuana. The police also had probable cause to believe that a man who was somewhere near that apartment committed an entirely different crime, *i.e.* delivery of cocaine. Those two facts together did not authorize the police to enter the apartment without a warrant. The Court of Appeals erred by concluding otherwise.

The Court of Appeals concluded that the odor of burning marijuana and sounds consistent with the destruction of evidence **plus** the pursuit of a felony crack cocaine dealer authorized the police to enter the apartment without a warrant.¹ Slip op. at 8, 11. Twice, the majority opinion remarked that the police lacked authority to enter the apartment without a warrant based **solely** on the odor of burnt marijuana and the sound of people moving inside. Slip op. at 8, 9. Judge Buckingham, in dissent, reached the same conclusion. *Id.* at 12. In that regard, the Court of Appeals was correct. The odor of marijuana emanating from a private residence does not, *ipso facto*, authorize a warrantless entry into a private residence.

As a preliminary matter and to properly frame the issue, because a motorist's privacy interest in his or her automobile is diminished and because an automobile's mobility gives rise to an exigent circumstance *per se*,² the First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have all held that the smell of burnt marijuana alone justifies a warrantless search of a **vehicle**. See *United States v. Staula*, 80 F.3d 596, 602 (1st Cir.

¹ As explained *infra*, the notion that the police entered the apartment in pursuit of the cocaine dealer is not supported by the record or the trial court's findings of fact.

² *Maryland v. Dyson*, 527 U.S. 465, 467, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999) ("the automobile exception does not have a separate exigency requirement: If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more.") (internal citation omitted).

1996); *United States v. Ramos*, 443 F.3d 175, 184 (3d Cir. 2006); *United States v. Scheetz*, 293 F.3d 175, 184 (4th Cir. 2002); *United States v. Kelley*, 961 F.2d 524, 527 (5th Cir. 1992); *United States v. Garza*, 10 F.3d 1241, 1246 (6th Cir. 1993), *United States v. Mosby*, 541 F.3d 764, 768 (7th Cir. 2008); *United States v. Peltier*, 217 F.3d 608, 610 (8th Cir. 2000); *United States v. Morin*, 949 F.2d 297, 300 (10th Cir. 1991); *United States v. Lueck*, 678 F.2d 895, 903 (11th Cir. 1982) (so stating).

However, the Fourth Amendment affords greater protection to a home than a vehicle,³ and the smell of burning marijuana does **not**, without more, authorize a warrantless entry into a private **residence**.

In *Taylor v. United States*, 286 U.S.1, 52 S.Ct. 466, 76 L.Ed. 951 (1932), prohibition agents smelled an “odor of whisky coming from within” a residential garage, broke open the garage door, and found cases of whisky. *Id.* at 5. The officers acted unlawfully: “Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees (Const. Amend. 4) against unreasonable search.” *Id.* at 6.

In *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948), the police “recognized at once a strong odor of burning opium which to them was distinctive and unmistakable” emanating from a hotel room. The police knocked on the door and heard “shuffling or noise.” After the defendant opened the door, the police entered and searched the room. *Id.* at 12. The Supreme Court held that the search was unlawful.

³ See e.g. *Minnesota v. Carter*, 525 U.S. 83, 99, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (Kennedy, J., concurring) (“it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people”); *Kirk v. Louisiana*, 536 U.S. 635, 638, 122 S.Ct. 2458, 153 L.Ed.2d 599 (2002) (“police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home”).

The police had probable cause: “If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify the issuance of a search warrant.” *Id.* at 13. But, absent some exigent circumstance, probable cause alone was insufficient to justify the search.

The smell of burning opium, without more, did not give rise to exigent circumstances: “The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time will disappear. But they are not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant. If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required.”⁴ *Id.* at 15.

Johnson remains good law. See e.g. *United States v. Carter*, 315 F.3d 651, 658 (6th Cir. 2003) (had the police relied **only** on the odor of marijuana as a basis for entering the residence, “the matter would have been governed by *Johnson* and any evidence gained from the search would have been suppressed.”)

In *Posey v. Commonwealth*, 185 S.W.3d 170 (Ky. 2006), this Court made a passing reference, in a string cite, to two cases, and the parenthetical description of the holdings of

⁴ The *Johnson* Court remarked, when commenting on the lack of an exigent circumstance, that “[n]o suspect was fleeing or likely to take flight.” *Id.* at 15. Defendant takes that to mean that no suspect was fleeing or likely to take flight **from the place to be searched**. In the instant case, the suspected cocaine dealer was fleeing **from the police**, not from the apartment in question.

those cases convey the impression that a warrantless search of a residence based solely on the odor of marijuana is constitutionally valid.⁵ Neither case stands for that proposition.

The first case, *United States v. Grissett*, 925 F.2d 776 (4th Cir. 1991), has since distinguished by *United States v. Mowatt*, 513 F.3d 395, 402 (4th Cir. 2008). In *Grissett*, the police smelled marijuana **after** the suspect opened the door. In *Mowatt*, the police smelled marijuana **before** the suspect opened the door. The *Mowatt* Court explained: “*Grissett* is distinguishable...for an obvious reason: The officers in the present case were aware of the marijuana in the apartment before they decided to alert [the defendant] of their presence. Unlike in *Grissett*, and as in *Johnson*, the officers here had the option of leaving the probable cause determination to a magistrate. They needed only to seek a warrant before confronting the apartment’s occupants. By not doing so, they set up the wholly foreseeable risk that the occupants, upon being notified of the officers’ presence, would seek to destroy the evidence of their crimes.” The second case, *Cherry v. Commonwealth*, 605 S.E.2d 297 (Va. App. 2004), is similar to *Grissett*. In *Cherry*, the police smelled marijuana **after** the suspect opened the door. *Id.* at 300.

To be clear, defendant is **not** asking this Court to adopt a bright-line rule. In some instances, the odor of a controlled substance by itself **may** be sufficient to justify a warrantless entry onto private property. *See e.g. Bishop v. Commonwealth*, 237 S.W.3d 567,

⁵ *Posey* provides: “[W]e find no merit in Appellant’s contention that the imminent destruction of misdemeanor crime evidence is not sufficient to constitute exigent circumstances under the Fourth Amendment. *See ... United States v. Grissett* (exigent circumstances existed to justify warrantless entry into motel room where police smelled burning marijuana while standing outside);...*Cherry v. Commonwealth* (police officer’s warrantless entry into residence based on exigent circumstances after smelling burnt marijuana was reasonable, even though marijuana possession was only a misdemeanor offense)...” *Id.* at 174 (internal citations omitted).

569 (Ky. App. 2007) (odors consistent with an “active methamphetamine lab,” where were emanating from the trunk⁶ of a vehicle parked near an elementary school justified a warrantless search of the trunk because “methamphetamine production, an inherently dangerous act, was occurring in a public place.”)

Turning to the facts of the instant case: (1) unlike “an active methamphetamine lab,” smoking marijuana within one’s home is not so inherently dangerous that it justifies a warrantless entry into a private residence; (2) the police may **not** enter a private residence to prevent the destruction of “evidence” where the only “evidence” is smoke, *see Johnson*, 333 U.S. at 15 (exigent circumstances did not justify a warrantless entry into a motel room where the suspected criminal activity was opium smoking; “fumes...are not capable at any time of being reduced to possession for presentation to court”); *compare United States v. Carter*, 315 F.3d 651, 655 n. 3 (police smelled burnt marijuana and observed a “blunt” in plain view; exigent circumstances justified entry into the apartment because the “blunt” may have been “but a toilet flush away from destruction”); (3) as in *Mowatt*, the police observed the odor of marijuana **before** announcing their presence and, as in *Mowatt*, the officers had the option of leaving the probable cause determination to a magistrate; thus, like *Mowatt*, by failing to seek a warrant and instead announcing a police presence, the police created the foreseeable risk that the occupants might destroy evidence, and entered the residence unlawfully.

The fact that the police heard “people moving around inside” after they banged on the door, identified themselves, and “demand[ed] that the door be opened” is of no consequence. TR. 74 (trial court’s factual findings). The notion that “people moving around” **might**

⁶ The trunk of a car is afforded more Fourth Amendment protection than the passenger compartment. *See New York v. Belton*, 453 U.S. 454, 460 n. 4, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) (even a search incident to arrest does not itself permit a search of the trunk).

destroy evidence and the notion that some evidence other than smoke **might** be inside is nothing more than rank speculation. *Id.* at 76.

In sum, the Court of Appeals correctly concluded that “the trial court’s analysis that officers are legally permitted to approach a residence after smelling marijuana, knock on the door, and make a warrantless entry into the residence after hearing movement within the residence is incorrect. To the contrary, such conduct constitutes the impermissible creation of an exigent circumstance by police and, therefore, invalidates any search predicated on this ground.” Slip op. at 9. It is at this juncture, however, that, respectfully, the Court of Appeals reasoning veers off course.

THE COURT OF APPEALS MISSTATES THE FACTS, AND THEN RELIES ON THAT MISTATEMENT TO DECIDE THE CASE.

The trial court and the Court of Appeals disagree on why Officer Cobb entered the apartment. Why he entered the apartment – as opposed to whether he was justified in doing so – is a question of fact. The trial court’s factual findings are supported by evidence in the record and control. *See* Ky. Const. § 115 (“Appeals shall be on the record and not by trial de novo.”) The trial court’s specifically found:

When asked directly to articulate the reasons which he thought justified the forced entry into [the apartment]... Officer Cobb testified that he and the other officers thought that there was a crime occurring inside [the apartment] based on the strong odor of burnt marijuana being detected from under the door and, from the noise heard through the door, that its occupants were engaging in destruction of evidence. ... Officer Cobb and the other officers thought that drugs were being destroyed inside [the apartment] which justified knocking down the door to that unit.

TR. 76.

What is noticeably absent from the trial court’s findings – but which plays the dispositive role in the Court of Appeals decision – is the fact that the cocaine dealer was on

the lam somewhere near the apartment. According to the trial court, Officer Cobb found himself in the breezeway of the apartment because he was chasing the cocaine dealer, but, once there, he focused his attention on the apartment because he smelled marijuana emanating from under the door and he believed that “its occupants” were destroying evidence. The trial court makes no mention of whether Officer Cobb believed that the cocaine dealer was in any way associated with the apartment.

According to the Court of Appeals, however, Officer Cobb knocked down the door because he believed that **the cocaine dealer** was inside the apartment, destroying evidence:

Although they had not observed which door the [suspected cocaine dealer] had entered, based on the source of the marijuana odor, they believed that the left door [*i.e.* the apartment in question] had recently been opened and shut. Thus, the officers believed that the fleeing suspect had entered the left apartment. After knocking on the door and announcing themselves as police, Cobb heard movement inside the apartment and feared that felony evidence might be destroyed if immediate action was not taken.

* * * * *

[B]ecause the police were pursuing a suspected felony crack cocaine dealer...to a particular apartment building door and believing that the suspect was about to destroy evidence of a serious crime, we conclude that the warrantless entry into [the apartment] was valid.”

Slip op. at 3, 11. The distinction is not trivial. As explained *supra*, the Court of Appeals relies on the pseudo-fact that “the police...believ[ed] that the suspect was about to destroy evidence of a serious crime” to decide the case.

Simply put, the Court of Appeals opinion is based on facts not found by the trial court and, as discussed *infra*, the facts as found by the trial court do not justify a warrantless entry into the apartment. For that reason alone, this Court should reverse the decisions of both courts. In an abundance of caution, defendant discusses the Court of Appeals reasoning.

**THE COMBINATION OF THE “HOT PURSUIT” AND “GOOD FAITH”
EXCEPTIONS TO THE WARRANT REQUIREMENT DID NOT AUTHORIZE A
WARRANTLESS ENTRY INTO THE APARTMENT.**

It appears that this Court has not determined when and under what circumstances the “hot pursuit” exception to the warrant requirement justifies a warrantless entry into a private residence. In *Styles v. Commonwealth*, 507 S.W.2d 487 (Ky. 1974), this Court instructed that: “When officers are in hot pursuit of a suspect they have reasonable grounds to believe has committed a felony and who flourishes a weapon, exigent circumstances exist which require the officers to act... If we were to hold that a momentary loss of sight by the pursuing officers terminated the existence of exigent circumstances, we would formulate a completely unreasonable and unworkable restriction upon police conduct.” *Id.* at 488. This Court has not addressed the issue further since *Styles*.

The United States Supreme Court has not addressed the issue either, and, in the absence of guidance from that Court, many – if not most – lower courts follow the so-called “*Dorman* approach.” See *United States v. Dorman*, 435 F.2d 385 (D.C. Cir. 1970). For a full exposition of the *Dorman* approach, and citation to the courts that follow it, see 3 W. LaFave, *Search and Seizure*, § 6.1(f), p. 309-329.

In *Dorman*, the D.C. Court of Appeals identified “a number of considerations that are material” to the question of whether exigent circumstances justify the “hot pursuit” of a fleeing suspect. *Dorman*, 435 F.2d at 394. One such consideration is whether there is “strong reason to believe that the suspect is in the premises being entered.” *Id.* at 393; See LaFave, § 6.1(f), p. 312 n. 202 (collecting cases where the outcome turned on this criterion).

In the instant case, defendant assumes *arguendo* that the police had an objectively reasonable belief that the cocaine dealer took refuge inside one of the apartments because

“they heard an apartment door shut.” TR. 76 (trial court’s findings). But, the police did **not** have an objective reasonable belief that the cocaine dealer took refuge inside the apartment in question. The only factor that distinguished the apartment in question from all the other apartments was that it smelled of burnt marijuana. The smell of **burning marijuana** emanating from an apartment does **not** give rise to an inference that a fugitive, wanted by the police for **selling cocaine**, has sought refuge from the police inside.

Implicitly recognizing as much, the Court of Appeals concludes that the “good faith” exception to the warrant requirement excuses the officers’ mistake. That reasoning engenders a dangerous slippery slope. Professor LaFave warns that “an across-the-board good faith exception would mean in practice that appellate courts defer to trial courts and trial courts defer to the police. Reviewing courts could not be expected to set matters straight, for the elusive good faith exception would add a factor of discretion to the operation of the exclusionary rule impossible for the appellate courts effectively to control. Moreover, and perhaps of ultimate importance...is the risk in tampering with the exclusionary rule is that police officers may feel they have been unleashed...” LaFave, § 3.1(g). For that reason, few courts have applied the good-faith exception to warrantless searches. *See e.g. United States v. Whiting*, 781 F.2d 692, 698 (9th Cir. 1986) (the good faith exception “is clearly limited to warrants invalidated for lack of probable cause”).

More to the point, the officers’ mistake in the instant case was a mistake of law. Officer Cobb had no idea which apartment the cocaine dealer entered. He entered the apartment in question because he mistakenly believed that the facts gave rise to probable cause to suspect “that drugs were being destroyed inside [the apartment] which justified knocking down the door to that unit.” TR. 76 (trial court’s factual findings).

Officer Cobb's mistaken belief that he had probable cause and sufficient justification to enter without a warrant was a mistaken belief about the law. The good faith exception to the warrant requirement applies to mistakes of fact, not mistakes of law. See *United States v. Brazel*, 102 F.3d 1120, 1149 (11th Cir. 1997) (collecting cases). The good faith exception to the warrant requirement is inapt here. And, as explained *infra*, Officer Cobb did **not** have legal cause to "knock down the door." The Court of Appeals erred by concluding that Officer Cobb and his fellow officers were legally authorized to enter the apartment without a warrant.

CONCLUSION

Defendant respectfully requests that this Court reverse the decision of the Court of Appeals.

Respectfully submitted,



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