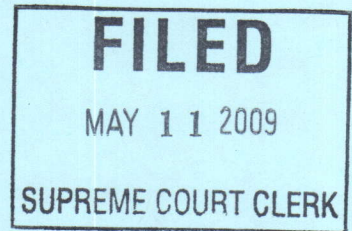


Commonwealth of Kentucky
Supreme Court
File No. 2008-SC-274



HOLLIS KING

APPELLANT

v.

Appeal from Fayette Circuit Court
Hon. James D. Ishmael, Jr., Judge
Indictment No. 2005-CR-01500-2

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

Submitted by:

JACK CONWAY

Attorney General of Kentucky

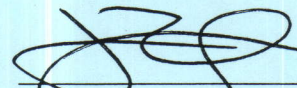
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CERTIFICATE OF SERVICE

I certify that the foregoing Brief for the Commonwealth was mailed first class, U. S. Mail, postage pre-paid this 11th day May, 2009, to: Hon. James D. Ishmael, Jr., Judge, Fayette Circuit Court, 551 Robert F. Stephens Courthouse, 120 N. Limestone St., Lexington, Ky. 40507; via state delivered messenger mail to: Hon. Lisa Bridges Clare, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601, Counsel for Appellant. Sent via electronic Mail to: Hon. Ray Larson, Commonwealth's Attorney, 116 N. Upper St., Lexington, Ky. 40507.



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INTRODUCTION

Appellant, Hollis King, entered a conditional guilty plea to first-degree trafficking in a controlled substance, possession of marijuana, and second-degree persistent felony offender charges in the Fayette Circuit Court, and was sentenced to a ten-year term of imprisonment. Appellant appealed his conditional guilty plea to the Kentucky Court of Appeals and it was affirmed. He has now been granted discretionary review by this Court.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe oral argument would be helpful to the Court in this case because the issues are thoroughly addressed in the parties' briefs.

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COUNTERSTATEMENT OF THE CASE

On October 13, 2005, the Lexington Division of Police conducted a “buy-bust” operation with a confidential informant in the Centre Parkway area of Lexington. (VR No. 1, 3/23/06, 10:14:14). After the confidential informant made contact with a subject and completed a drug transaction, Officer Steven Cobb was directed to move in and apprehend said subject. (Id., 10:17:26). Said subject entered the breezeway of a nearby apartment building and then went inside the back right apartment (Apartment No. 79). (Id., 10:19:35). Officer Cobb, along with two other officers, entered the breezeway to locate this individual and make an arrest. (Id., 10:20:47). However, Officer Cobb was unaware of which apartment the suspected drug trafficker had entered at the time. (Id., 10:55:50).

As Officer Cobb and his fellow officers approached the middle of the breezeway, they were confronted with a strong odor of burnt marijuana. (Id., 10:21:12). The back left apartment (Apartment No. 78) appeared to be the source of this smell. (Id., 10:21:19). One of the other officers with Officer Cobb banged on the door of said apartment and announced the presence of law enforcement. (Id., 10:21:27). After this, Officer Cobb and the other officers could hear movement inside. (Id., 10:22:40). At this point, the officers were afraid that possible evidence could be destroyed. (Id., 10:23:10). Officer Cobb then kicked the door to the apartment open, and he and the other officers proceeded to conduct a protective sweep of the residence. (Id., 10:23:48). There were three individuals in the apartment – Appellant, Jamela Washington, and Clarence Johnson – all of whom were smoking marijuana. (Id., 10:24:15). Several items of drug evidence

were found in the apartment, including 4.6 ounces of powder cocaine and 25 grams of marijuana. (Id., 10:25:50). All of the aforesaid individuals were taken into custody and transported to jail. (Id., 10:29:30).

The suspect from the undercover “buy-bust” operation was subsequently located in the back right apartment (Apartment No. 79) and was taken into custody. (Id., 10:49:06). The charge against said suspect was later dismissed. (Id., 10:49:18).

On November 21, 2005, the Fayette County Grand Jury returned a true bill in Indictment No. 05-CR-1500 charging Appellant with first-degree trafficking in a controlled substance, trafficking in marijuana (eight ounces to five pounds), and being a second-degree persistent felony offender (“PFO”). (Transcript of Record (“TR”), 6-7). Appellant was subsequently arraigned on the foregoing charges, at which time he entered a plea of not guilty. (TR, 20; VR No. 1, 12/16/05, 14:26:45).

On January 16, 2006, Appellant filed a motion to suppress the evidence seized by the police in this matter. (TR, 21-22). On March 23, 2006, the Fayette Circuit Court conducted a suppression hearing thereon; Officer Cobb was the only witness to testify at this proceeding. (VR No. 1, 3/23/06). The circuit court entered a written opinion and order denying the suppression motion on June 2, 2006. (TR, 72-80). Appellant then moved the circuit court to reconsider this decision. (TR, 81-85). This request was denied by the circuit court as well. (TR, 88).

After his suppression motion was denied, Appellant elected to change his plea and enter into a plea agreement with the Commonwealth. On July 21, 2006, the Fayette Circuit Court accepted Appellant’s guilty plea to first-degree trafficking in a

controlled substance, possession of marijuana (amended from trafficking in marijuana), and being a second-degree PFO. (TR, 97-98; VR No. 1, 7/21/06, 13:44:00). The guilty plea was conditioned on Appellant reserving his right to appeal from the circuit court's decision regarding his motion to suppress. (TR, 95, VR No. 1, 7/21/06, 13:39:30).

Appellant was finally sentenced on August 25, 2006. (VR No. 1, 8/25/06). The written final judgment was entered on August 29, 2006. (TR, 112-114). In accordance with the plea agreement, the circuit court imposed a sentence of five years as to the trafficking in a controlled substance charge, enhanced to ten years by the PFO charge, and twelve months as to the marijuana possession charge. (Id.).

Appellant appealed his conviction and sentence to the Kentucky Court of Appeals. The Court of Appeals affirmed Appellant's conviction stating:

Therefore, because the police were pursuing a suspected felony crack cocaine dealer following a "buy-bust" operation 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 King's apartment was valid. For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

(Slip Op. at 12).

Appellant moved for and was granted discretionary review by this Court.

ARGUMENT

I.

EXIGENT CIRCUMSTANCES EXISTED TO ALLOW A WARRANTLESS ENTRY INTO APPELLANT'S HOME.

Appellant argues that the Court of Appeals and the Commonwealth have attempted to create a smokescreen to cover-up errors committed by a rookie police officer. (Aplt. Br. at 1). However, Appellant himself, utilizes four pages out of eleven pages of his argument ignoring the real issue before this Court, exigent circumstances, and addressing the sanctity of the home and the requirements to obtain a warrant. (Id. at 9-12). The Commonwealth contends that the only issue before this Court is whether or not exigent circumstances existed to allow officers a warrantless entry to Appellant's home. Appellant argues that the Court of Appeals and Circuit Court erred in determining that the officers in this case were in "hot pursuit" of a felony drug dealer. This conclusion is without merit, as exigent circumstances, not created by the officers themselves, did exist to justify the warrantless entry at issue in this matter.

In Taylor v. Commonwealth, 577 S.W.2d 46 (Ky. App. 1979), this Court recognized that a warrantless search is permissible "where evidence may be destroyed." Id. at 48. As explained by the Supreme Court of the United States in Roaden v. Kentucky, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973), "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation." Id. at 505, 93 S. Ct. at 2802; Cormney v. Commonwealth, 943 S.W.2d 629,

633 (Ky. App. 1996). “Exigent circumstances justify a warrantless entry into a home only where there is also probable cause to enter the residence.” United States v. Sangineto-Miranda, 859 F.2d 1501, 1511 n. 6 (6th Cir. 1988).

Under the circumstances peculiar to this case, it is manifest that exigent circumstances were present to justify the warrantless entry. Here, law enforcement officers were directed to arrest a suspected drug trafficker who was just involved in an undercover “buy-bust” operation. The suspect was observed entering a breezeway of a nearby apartment building. The officers dispatched to arrest the suspect were unaware of what apartment the suspect entered before they entered the breezeway. The officers were confronted with the sound of a closing door and the odor of burnt marijuana, which appeared to be emanating from Apartment No. 78. The officers then properly announced their presence. When no one answered the door, but persons could be heard moving inside, the police rightly entered the residence without a warrant due to the exigent circumstance that evidence of a felony offense could possibly be destroyed. Both the Circuit Court and the Court of Appeals properly recognized the foregoing and correctly determined to deny Appellant’s motion to suppress.

Additionally, the Commonwealth notes that Appellant suggests that the police created the exigency in this case by announcing their presence. However, as discussed heretofore, the exigent circumstance here was the police officers’ fear that evidence could possibly be destroyed. Considering the police were attempting to apprehend and arrest a suspect who had just completed a drug transaction with a confidential informant, it is beyond question that such a fear was well-founded. The

police certainly did not create any exigency here, and Appellant's apparent suggestion to the contrary is devoid of merit.

The Court of Appeals in the Appellant's co-defendant's case addressed these issues and found:

While we conclude that an odor of burnt marijuana emanating from a residence standing alone does not justify the warrantless entry of that residence, Cobb's entry into Washington's residence under the facts of this case was justified as an exigent circumstance. From Cobb's testimony, he was in hot pursuit of a felony suspect; he had a good-faith belief that the suspect had entered the apartment; he believed that drugs and buy money would be found inside the apartment; no one answered the door; he heard people moving around inside the apartment; and, ultimately, he believed that felony evidence might be destroyed if immediate action was not taken. Because these officers were in a situation where they reasonably believed that evidence of a serious crime might be destroyed, they properly disregarded the warrant requirement to prevent the possible destruction of evidence. U.S. v. Banks, 540 U.S. 31, 36-38, 124 S.Ct. 521, 157 L.Ed.2d 343 (2003).

These facts created a reasonable basis to support Cobb's belief that he had to act to prevent the possible destruction of this evidence; thus, his entry was justified as an exception to the prohibition against warrantless searches and seizures. Posey v. Commonwealth, 185 S.W.3d at 173. Accordingly, the trial court's application of the law to the facts as established was correct as a matter of law.

Washington v. Commonwealth, 231 S.W.3d 762 (Ky. App. 2007).

The Court of Appeals in this case stated:

However, under the circumstances of this case, we conclude that the police did not engage in deliberate and intentional conduct to evade the warrant requirement. While it was possible that the suspect may have never been aware of the officers' presence, it cannot be concluded as a

matter of law that it was unreasonable for the police to have believed that the suspect knew of their presence and that they had to take immediate action to prevent the destruction of evidence. U.S. v. Knights, 534 U.S. 112, 118-119, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) (reasonableness is the touchstone of Fourth Amendment analysis).

Moreover, while King places great significance in the fact that he was not the original suspect nor was he aware of the presence of police, the warrantless entry and search of his apartment was still valid. First, while we recognize that the police mistakenly believed that the suspect had entered the left, rear apartment when in fact he had entered the right apartment, their mistaken belief did not invalidate the constitutionality of the warrantless entry.

Under the “good-faith” exception, when police reasonably (though erroneously) believe that they are pursuing a suspect, the legality of their warrantless entry into a residence is not invalidated solely because their belief that the suspect had entered the residence was erroneous. Perkins v. Commonwealth, 237 S.W.3d 215, 219 (Ky.App.2007).

Second, in Devenpeck v. Alford, 543 U.S. 146, 152-155, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004), the Court discussed the mind state of police in relation to analyzing the existence of probable cause. The Court stated that whether probable cause exists “depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of ... [his action].” *Id.* at 152.

This standard for analyzing the validity of a police officer's belief that he had probable cause to take a particular action is equally applicable to determining whether a police officer's belief as to the existence of an exigent circumstance is constitutionally valid. To conclude otherwise would render the constitutionality of a warrantless entry into a defendant's home on the infallibility of police (i.e., the validity of a search would hinge on whether or not the pursuing officer correctly identifies which apartment the fleeing suspect entered). This is an undesirable outcome.

The correct standard, when applied to the facts of this case, is whether or not the officers reached a reasonable conclusion (to enter the left apartment) based on the facts known to them at the time of the forced entry. *Id.* Although hindsight informs us that the officers chose the wrong door, this does not invalidate the constitutionality of the search because the officers' actions were reasonable under the circumstances at the time of their entry.

(Slip Op. at 10-11)

Appellant's argument that the officer involved here was somehow rash and inexperienced after four 4 years on the police force is without merit. Also Appellant's argument that Officer Cobb should have knocked and waited for Mr. Johnson, a co-defendant, and the Appellant to finish "happily smoking his marijuana" is absurd. (Aplt. Br. at 13). As discussed above, Officer Cobb did not brashly kick down the Appellant's door without reason. Rather, Officer Cobb, knocked and announced his presence as a police officer, and only after hearing movement from within the Appellant's home, and having a reasonable good faith belief that he had chased a drug dealer into the apartment, did Officer Cobb reach the conclusion that the drug dealer was destroying evidence of his drug activities, and entered the residence without a warrant. Exigent circumstances existed to allow a warrantless entry. It does not matter whether or not Appellant was the person who Officer Cobb was after in hot pursuit, because Officer Cobb had a good faith belief that he was indeed that person. *See Perkins v. Commonwealth*, 237 S.W.3d 215, 219 (Ky.App.2007). Appellant's argument that no movement had occurred within the Appellant's apartment, regardless of Officer Cobb's testimony, and that somehow Appellant and his co-defendants did not hear Officer Cobb knock and announce himself,

is also unfounded and without merit. (Aplt. Br. at 13). Officer Cobb was in hot pursuit of a drug dealer, smelled a strong odor of marijuana, believed that he had cornered the man in his home, and knocked and announced himself. After he heard suspicious movements and did not receive an answer to his announcement, Officer Cobb, finally, with a reasonable good faith belief that evidence was being destroyed by a drug dealer, entered the apartment without a warrant. Officer Cobb smelled marijuana, which under the instance circumstances created probable cause to search Appellant's apartment. See U.S. v. Elkins, 300 F.3d 638 (C.A.6 Tenn. 2002). In Elkins the 6th Circuit Court of Appeals stated:

This court has held that an officer's detection of the smell of marijuana in an automobile can by itself establish probable cause for a search. United States v. Garza, 10 F.3d 1241, 1246 (6th Cir.1993). The same may be true when marijuana is smelled within a home. See United States v. Tobin, 923 F.2d 1506, 1512 & n. 4 (11th Cir.1991); 2 LaFave, Search and Seizure § 3.6(b), at pp. 290-92; see also United States v. Gonzalez, No. 94-6503, 1995 WL 626286, at *3 (6th Cir. Oct. 24, 1995) (unpublished opinion) (per curiam) (holding that smell of marijuana alone created probable cause for roadside search of a motor home). Our probable cause inquiry is somewhat easier: as noted above, the smell of marijuana here does not stand alone in the warrant affidavit, but is accompanied by an anonymous tip that the Elkinses were growing marijuana in their home, a tip that the smell of marijuana strongly corroborated. A sufficiently corroborated tip of drug activity can support a warrant to search a home. United States v. Leake, 998 F.2d 1359, 1363 (6th Cir.1993). This court held in United States v. Smith, 783 F.2d 648 (6th Cir.1986), that a reliable informant's unadorned tip that an individual was producing marijuana at his house, coupled with the police's observation of a marijuana plant outside the house, supported a warrant to search the interior. Id. at 651-52.

(Elkins at 659).

In the case at bar, any reasonable officer would have believed, “Where there’s smoke, there’s fire,” (or in this case drug dealers) and reached the conclusion that the person that they had been pursuing for selling drugs was in the residence with the strong smell of marijuana emanating from it. Officer Cobb acted in good faith and in a reasonable manner. Exigent circumstances and probable cause existed to allow warrantless entry into Appellant’s residence.

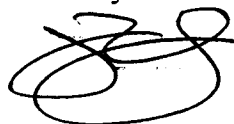
The Kentucky Court of Appeals applied a well-settled standard of review and reached the correct conclusion in each of the complained of instances.

CONCLUSION

For the above stated reasons, the judgment of the Kentucky Court of Appeals and the Fayette Circuit Court must be affirmed.

Respectfully submitted,

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