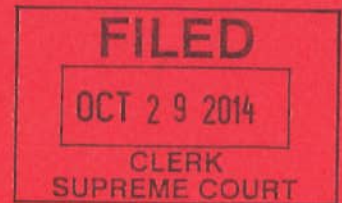


COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2014-SC-48



RICKY BARRETT JR.

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HON. MARTIN J. SHEEHAN, JUDGE
INDICTMENT NO. 12-CR-00300

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLANT, RICKY BARRETT JR.

Submitted by:

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CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Martin J. Sheehan, Judge, 600 Justice Center, 230 Madison Avenue, Covington, Kentucky 41011; the Hon. Rob Sanders, Commonwealth's Attorney, 605 County Building, 303 Court Street, Covington, Kentucky 41011; the Hon. Elizabeth Selby, Department of Public Advocacy, 333 Scott Street, Suite 400, Covington, Kentucky 41011; and to be served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on October 29, 2014. The record on appeal has been returned to the Kentucky Supreme Court.



ROY A. DURHAM

INTRODUCTION

Ricky Barrett, Jr. appeals from a Kentucky Court of Appeals opinion which affirmed Barrett's conditional guilty plea from the Kenton Circuit Court to the charge of First Degree Possession of a Controlled Substance, First Offense. Mr. Barrett was sentenced to a term of eighteen (18) months pursuant to the plea agreement and comes to this Court on a grant of Discretionary Review.

STATEMENT CONCERNING ORAL ARGUMENT

Mr. Barrett welcomes oral argument if this Court believes it would assist in rendering a fair and just opinion in this case.

STATEMENT REGARDING CITATIONS TO TRIAL RECORDS

The record on appeal in this case included one (1) volume of record, 1 video tape and 1 compact disc. For purposes of this brief, citations to the record are made using the following formats; "TR, p. _" for citations to the transcript of record and "VR: date; time" for citations to the compact disc. The video tape will not be cited.

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STATEMENT OF THE CASE

Covington Police officers were dispatched to 2721 Rosina Ave. due to a call received in reference to Ricky Barrett being at the residence. (VR: 06/25/12; 03:21:15). That information was based upon an anonymous tipster who refused to talk and merely called 911 or dispatch with the information. (Id. at 03:40:30). The officers confirmed there were several active warrants out for Mr. Barrett. (Id. at 03:21:45; 03:34:45).

Officer Justin Edwards arrived and did a sweep of the outside of the house prior to making contact at the front door to check the exit points. (Id. at 03:35:15). Officer Edwards heard people inside the house and returned to the front of the house. (Id.). Officer Isaacs arrived and went to the back of the residence to secure the back while Officer Edwards knocked on the front door. (Id. at 03:22:10). Officer Edwards continued to hear people inside but once he knocked on the door, the sound of people talking ceased. (Id. at 03:35:45).

Officer Christian arrived and went to the back to maintain the security of the rear and Officer Isaacs went to the front to assist Officer Edwards. (Id. at 03:22:30; 03:36:10). Once Officer Isaacs was in the front, Officer Edwards began to knock on the door harder and then used his flashlight to knock which caused the door to open. (Id. at 03:36:10). Officer Isaacs testified that once the door opened, Officer Isaacs and Officer Edwards both said they were going inside the residence. (Id. at 03:23:00). Officer Isaacs testified that they went in to make sure there was not a crime being committed. Isaacs stated that it is a standard practice with the Covington Police Department to enter a home if there is an open door in the residence. (Id. at 03:23:27).

The officers announced they were coming in and advised “Covington Police.” (Id. at 03:23:00). Once inside, Officer Edwards stationed himself at the steps while Officer Isaacs began to search the downstairs area. (Id. at 03:37:05). They heard a female saying she was upstairs and Officer Edwards advised her to come down. (Id. at 03:23:30; 03:37:25). The female stated that she was unclothed, however, Officer Edwards demanded her to come down anyway. (Id. at 03:37:33). The female came down clothed with a towel on her head. (Id. at 03:37:40; 03:43:45).

The female identified herself as Deborah Barrett. She stated she was the homeowner and showed the officers her I.D. (Id. at 03:37:45; 03:28:00). Deborah Barrett was placed in handcuffs. (Id. at 03:28:00). Officer Edwards then proceeded to ask if Ricky Barrett was in the residence. (Id.). Deborah advised that her step-son, Ricky Barrett, was hiding in a closet at the top of the steps. (Id. at 03:24:15; 03:28:30). Officer Isaacs and Officer Christian immediately went upstairs. (Id. at 03:24:20). Officer Christian stationed himself outside the closet door while Officer Isaacs went to the right to clear the rest of the residence before they opened the closet door. (Id. at 03:24:27).

While searching the rest of the house, Officer Isaacs observed some syringes and paraphernalia in a bedroom. (Id. at 03:24:40; 03:25:20). Once Ricky Barrett was placed into custody, Officer Isaacs went back and secured syringes and a cap that contained a suspected filter for heroin use and a burnt spoon with residue. (Id. at 03:25:10; 03:31:30). Deborah advised the officers that the bedroom was in fact Ricky’s. (Id.).

Ricky Barrett was indicted by a Kenton County Grand Jury for First Degree Possession of a Controlled Substance. (TR p. 14). Defense filed a motion to suppress on

June 14, 2012. (TR p. 30 – 31). A Suppression Hearing was held on June 25, 2012. (VR; 06/25/12).

Barrett argued that the entry into the home was unlawful as the officers did not have a search warrant, probable cause or exigent circumstances. (VR; 06/25/12 at 03:48:00). Barrett argued that the officers were not allowed in the house because of a mere possibility. (Id. at 03:49:10). What the officers had was an anonymous tip. (Id. at 03:50:30). Since there was neither probable cause nor exigent circumstances, Barrett argued that any evidence seized is fruit of the poisonous tree and needed to be suppressed. (Id. at 03:49:50).

Additionally, Barrett argued that even if the court found the entry reasonable, the evidence should still be suppressed pursuant to Guzman v. Commonwealth 375 S.W.3d 805 (Ky. 2012), in that they went outside the scope of a protective sweep. (VR; 06/25/12; 03:52:00). Barrett stated that the testimony was that Officer Christian stood at the closet door the entire time because they knew that is where Ricky Barrett was located. (Id. at 03:52:20).

The Commonwealth argued that the police had reasonable suspicion and probable cause to believe that Ricky Barrett was in the house. (Id. at 03:53:15). This was based upon the fact that they were sent there by an anonymous complaint that Ricky Barrett, who had active warrants, was in that residence and once at the residence, they heard people inside. (Id. at 03:53:25). Additionally, dispatch notified them that there was a prior police contact with Ricky Barrett at that residence. (Id. at 03:53:35). The Commonwealth opined that was probable cause to believe there was someone in there hiding, not wanting to be captured. (Id. at 03:53:50).

The Trial Court stated that even if they did not have enough to go into the house initially, it all changed when the occupant came down and said Ricky was hiding in the closet. (Id. at 03:55:20). The Trial Court held that “even if there was taint from crossing that threshold initially, it was removed once they were given a definitive information that he’s hiding in the upstairs closet. And the sweeps, I mean those weren’t anything, they just walked through a couple of rooms, they clearly can do that.” (Id. at 03:58:20). The Trial Court overruled the Motion to Suppress. (Id. at 03:58:49; TR p. 32).

Ricky Barrett entered into a conditional guilty plea allowing him to appeal the court’s overruling of the motion to suppress without the benefit of a negotiated sentencing recommendation. (VR: 07/16/12; 11:59:10; TR p. 52 - 53). The Trial Court accepted Ricky Barrett’s plea to the charges of First Degree Possession of a Controlled Substance. (Id. at 12:05:14). The Trial Court sentenced Ricky Barrett to eighteen (18) months. (VR: 08/13/12; 10:38:30; TR p 54 – 56).

On appeal, Movant argued that the trial court erred when it failed to suppress evidence as the Officer’s entry into the house was an unlawful entry AND the Officer’s search of the residence was impermissible pursuant to Guzman v. Commonwealth, 375 S.W.3d 805 (Ky. 2012). In affirming the judgment, the Court of Appeals found that the officers believed Barrett was the owner of the residence at the time they arrived, although it was later established Barrett’s father, Ricky Barrett Sr., owned the residence and therefore the “factual findings are supported by substantial evidence and establish a reasonable belief by the officers that Barrett was in the residence when they entered.” Additionally, the Court of Appeals found that “Officer Christian positioned himself

outside the closet while Officer Isaacs performed a protective sweep of the upstairs rooms.” (Opinion p 2). The Court also found that “Before opening the door, Officer Isaacs conducted a protective sweep of the room adjoining the hallway for safety purposes.” (Opinion p.5). The Court, based on Kerr v. Commonwealth, 400 S.W.3d 250, 267 (Ky. 2013)(citing Maryland v. Buie, 494 U.S. 325 (1990)), concluded, “Because the officers were in the process of making a valid arrest, we conclude they were permitted to conduct a protective sweep of the room adjoining where Barrett was found.” (Opinion p. 5).

This Court granted Appellant’s Motion for Discretionary Review on August 13, 2014. Any additional facts may be mentioned in the argument section below, as necessary.

ARGUMENT.

THE TRIAL COURT ERRED WHEN IT DENIED RICKY BARRETT’S MOTION TO SUPPRESS THE EVIDENCE AS FRUIT OF THE POISONOUS TREE IN VIOLATION OF THE FOURTH AMENDMENT.

Preservation.

This issue is preserved by Mr. Barrett’s conditional guilty plea, reserving the right to appeal the trial court’s denial of his motion to suppress. (VR: 07/16/12; 11:59:10; TR P. 52 – 53).

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).

Law.

Both the Federal and Kentucky Constitutions prohibit unreasonable searches and seizures. U.S. Const., 4th Amdt.; Ky. Const., §10. The 4th Amendment was incorporated into the 14th Amendment making it applicable to the states in Mapp v. Ohio, 367 U.S. 643 (1961). The Commonwealth's search and seizure provision is similar to the federal provision. LaFollette v. Commonwealth, 915 S.W.2d 747 (Ky. 1996) (overruled on other grounds). Most warrantless arrests, searches and seizures are presumed to be illegal. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Steagald v. U.S., 451 U.S. 204 (1981). "Our survey of the case law that has identified and shaped fundamental Fourth Amendment principles leads us to the following rule: In the absence of a warrant authorizing the officers' entry into Defendant's home, the Government must overcome the presumption that this entry was unreasonable." United States v. Rohrig, 98 F.3d 1506, 1514-1515 (6th Cir. 1995).

The Kentucky Supreme Court has stated, "The Fourth Amendment of the United States Constitution and Section Ten of the Kentucky Constitution provide safeguards against an unwarranted and unreasonable search and seizure by the state." Commonwealth v. Hatcher, 199 S.W.3d 124, 126 (Ky. 2006). It further stated that "warrantless searches are per se unreasonable unless subjected to a specifically, well delineated exception." citing Katz v. United States, 389 U.S. 347, 357 (1967).

To justify a warrantless entry based on exigent circumstances, there must also be probable cause to enter the residence. United States v. Johnson, 9 F.3d 506, 509 (6th Cir.1993) (citing United States v. Sangineto–Miranda, 859 F.2d 1501, 1511 n. 6 (6th Cir.1988)). Probable cause is defined as "reasonable grounds for belief, supported by less

than prima facie proof but more than mere suspicion.” United States v. Bennett, 905 F.2d 931, 934 (6th Cir.1990).

Warrantless searches inside someone's home are presumptively unreasonable unless the occupants consent or exigent circumstances exist to justify the intrusion. Payton v. New York, 445 U.S. 573, 586, 590(1980). A “protective sweep” exception exists only when there is a “serious and demonstrable potentiality for danger.” Commonwealth v. Elliott, 714 S.W.2d 494, 496 (Ky. App. 1986); U.S. v. Morgan, 743 S.W.2d 1158, 1163 (6th Cir. 1984). The Commonwealth must prove that officers had probable cause to believe a serious threat of danger existed. Id.; see also U.S. v. Kolodziej, 706 F.2d 590, 597 (5th Cir. 1983). Officers must have articulable facts that reasonably warrant the intrusion. Id.

The Officer’s entry into the house was an unlawful entry.

[W]hile an arrest warrant and a search warrant both serve to subject the probable-cause determination of the police to judicial review, the interests protected by the two warrants differ. An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect an individual from an unreasonable seizure. A search warrant, in contrast is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police.

Steagald v. United States, 451 U.S. 204, 212 – 213 (1981).

In U.S. v. Hardin, 539 F.3d 404 (6th Cir. 2008), the Sixth Circuit discussed “Whether Probable Cause or Reason to Believe is the Correct Standard Governing When Officers May Enter a Residence to Execute an Arrest Warrant.” Supra at p. 410. The Court held that “even assuming that a lesser reasonable-belief standard applies, the officers in this case did not have sufficient evidence to form a reasonable belief that

Hardin was present in the apartment.” Supra at p. 416. The Court then addressed whether “Information Provided by the CI Establish Reason to Believe and/or Probable Cause that Hardin was Inside Apartment” Supra at 420. The Court went on to hold, “As a result, the officers may well have reasonably suspected that Hardin was generally living at this residence, but they had essentially *no* evidence to indicate that Hardin was *then* inside the apartment. Because Payton requires at a minimum that the officers have ‘a reasonable belief that the subject of the arrest warrant is within the residence *at that time*,’ Pruitt, 458 F.3d at 483 (emphasis added), the officers' entry violated the Fourth Amendment.” Supra at 423 – 424.

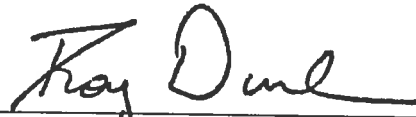
Just as in Hardin, the anonymous complaint did not provide a reasonable belief that Mr. Barrett was within the residence at the time the officers entered the residence. In addition, the Commonwealth argued that people could be in there burglarizing the house.

The 6th Circuit held in U.S. v. McClain, 444 F.3d 556, 563 (6th Cir. 2005), “In our view, a neighbor's phone call indicating that the owners had moved out of the house at 123 Imperial Point several weeks earlier and that there was a light on in the house that had not been on before, even coupled with the officers' discovery of a slightly ajar front door, does not present the type of objective facts necessary to establish probable cause that a burglary was in progress at the house.” In the case at bar, the door came ajar only after the officer began knocking on the door with a flashlight. Clearly, if the facts in McClain do not rise to support the officers entering the premises, the mere fact that the door came ajar after knocking it with a flashlight also does not provide exigent circumstances for the officers to enter the residence.

Conclusion.

The officers violated Ricky Barrett's rights under the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution. The officers unlawfully entered the Barretts' residence and the Barretts did not consent to a sweep of the residence. The officers lacked probable cause to believe Ricky Barrett was in the residence at that time or that other dangers were present for a "protective sweep". The contraband discovered during the subsequent search is fruit of the poisonous tree. Thus, this case must be reversed and remanded to Kenton Circuit Court with directions to suppress the evidence and vacate his conviction.

Respectfully submitted,



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