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

REPLY BRIEF FOR APPELLANT, RICKY BARRETT JR.

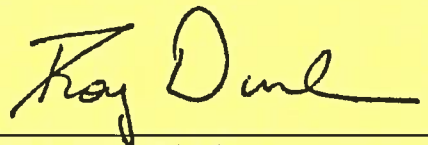
Submitted by:

ROY A. DURHAM
ASSISTANT PUBLIC ADVOCATE
DEPT. OF PUBLIC ADVOCACY
SUITE 500, 200 FAIR OAKS LANE
FRANKFORT, KENTUCKY 40601
(502) 564-8006

COUNSEL FOR APPELLANT

CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Reply 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 April 14, 2015. The record on appeal was not checked out for the purpose of this Reply Brief.



ROY A. DURHAM

Purpose of Reply Brief

The purpose of this brief is to rebut arguments made by the Commonwealth in the Brief for Appellee. The failure to address a particular issue should not be taken as a reflection that Appellant believes the issue has no merit or less merit than issues which have been addressed in this Reply Brief.

Statement of Points and Authorities

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.

A. The Officer's entry into the house was an unlawful entry.

The Appellee argues that "the officers did enter lawfully, pursuant to the multiple arrest warrants for Barrett which they were executing" pursuant to Payton v. New York, 445 U.S. 573, 603) (1980). (Appellee's brief p. 5). Payton mandates that the officer must have reason to believe the suspect is within. Supra at 603. As stated in both Appellant's brief at p. 8 and Appellee's brief p. 6, United States v. Pruitt 458 F.3d 477, 483 (6th Cir. 2006) requires that there be a reasonable belief that the subject of the arrest warrant is within the residence **at that time.** (emphasis added).

The Appellee argues that the officers were sent to the residence on the basis of an anonymous tip that Barrett was at the residence at that time and that the officer was incorrectly informed by dispatch that Barrett was the homeowner on file and the most recent police contact with Barrett was at that residence. (Appellee's brief p. 7). Ricky Barrett's father was in fact the homeowner. There was no testimony of how recent the police contact with Ricky Barrett was or even if it was Appellant or his father because at the time, dispatch was assuming there was only one Ricky Barret. The officer did not elaborate of what the anonymous caller said to make dispatch believe Ricky was at the house at that time. In fact, the anonymous caller refused to even talk to the officer.

Appellee argues "a lesser reasonable belief standard, and not probable cause, is sufficient to allow officers to enter a residence to enforce an arrest warrant." (Appellee's brief p. 6, citing Pruitt at 483). Even though Appellee then cites to United States v. Hardin, 539 F.3d 404 (6th Cir. 2008), he failed to inform that Hardin held "the language in

our Pruitt opinion purporting to adopt 'a lesser reasonable belief standard' is merely dicta." Supra at p. 412.

Although Appellant also cited Hardin in its original brief at p. 7, further facts are warranted. In Hardin, Officer Ed Kingsbury received a tip from a confidential informant (C.I.) that Hardin might be staying with a girlfriend at the Applewood Apartment Complex and described the vehicle Hardin would be driving. Supra at p. 407. The C.I. could not tell the officers the specific apartment number, only the approximate area in the building. (Id.). The officer found the described vehicle near apartment number 48 where Hardin was located. (Id.). The 6th Circuit found "the officers in Pruitt clearly had a great deal of evidence establishing probable cause to believe that the defendant was inside the residence when they entered." (Id. at 413). That evidence being "two witnesses reported the defendant's very recent presence at the address, and, after the officers watched one of the witnesses enter and exit the residence, that witness stated he had just seen the defendant inside, identifying the defendant using his street name." (Id.at p. 414).

The court stated "It is clear that the CI's information in this case, standing alone, did not establish even a lesser reasonable belief that Hardin was inside Apartment 48 at the time of the search." (Id. at p. 421). Hardin continued "In this case, in contrast, the CI—who was new to Kingsbury but who had shown reliability to Kingsbury by providing him accurate information regarding another case—provided relatively limited information." (Id.). In reversing, the Court concluded:

> 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 the time***, Pruitt, 4598 F.3d at 483 (emphasis added), the officers' entry violated the Fourth Amendment.

(Hardin at p. 424). Similarly, in the case at bar, there was no evidence to indicate Ricky Barrett was then inside his father's residence at that time. In Hardin, the officers were dealing with a known C.I. who had been shown to be reliable. In the case at bar, it was an anonymous caller who would not even talk to the officer. There was not even testimony regarding when that caller had last seen Ricky Barnett at that residence or how they knew Ricky Barnett was there.

Finally, by failing to address the issue of whether the officers' entry was permissible due to exigent circumstances of the door coming ajar after the officer repeatedly beat on the front door by fist, then with a flashlight, Appellee appears to have waived the issue.

B. The officer's search of the residence was impermissible.

Appellee first cites to two cases, Hudson v. Michigan, 547 U.S. 586 (2006) and Segura v. United States, 468 U.S. 796 (1984) and argues "there must be 'but-for causality,' meaning that the evidence would not have come to light but for the illegal action." (Appellee's brief p. 8). However, Appellee's reliance on those cases is misplaced. In both Hudson and Segura, the courts were dealing with exclusion of evidence after the execution of a **search warrant**. (emphasis added). The courts held that the errors were harmless because the evidence would have been found anyway when the search warrant was executed. Appellee also argues "Further, similar to Hudson, the

police would have executed the warrant anyway; Deborah Barrett would **most likely** have come to the door eventually even if it had not come open, and they would have learned the same information then that they did in fact learn." (Appellee's brief p. 10) (emphasis added).

Appellee states most likely; even Appellee cannot truthfully conclusively argue against the "but-for causality". In fact, the evidence shows just the opposite. The officers testified they heard people talking and noises from the house but once they knocked, the noises stopped. This shows that the occupants were trying to avoid coming to the door. The officer repeatedly knocked on the door and no one answered. Even after the officers illegally entered the home, it was not until the officer announced "Covington Police" and "we're coming in" did Mrs. Barrett say she was upstairs. (CD 06/25/12; 03:23:15). She then continued to avoid coming down by saying she was unclothed. The Officer then forced her to come downstairs, even if she was unclothed. Mrs. Barrett verified she lived there by showing her I.D. and was handcuffed.

Finally, Appellee argues that "The Protective Sweep was justified based on Maryland v. Buie and "thus the officers were entitled to search anywhere upstairs where Barrett might have been found, per Buie. (Appellee's brief p. 11). Appellee correctly states the "sweep is 'narrowly confined to a cursory visual inspect (sic) of those places in which the person might be hiding.'" (citing Maryland v. Buie, 494 U.S. 325, 327 (1990) (Appellee's brief p. 10 - 11). However, Appellee fails to add Buie's conclusion, "The 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.** (Buie at p. 337) (emphasis added).

The reason for Buie's finding of the search permissible is distinguishable; following a Maryland armed robbery **by two men**, police obtained arrest warrants for both but went to Buie's home to execute the arrest warrant on Buie. (Id. at 325). After Buie was arrested upon emerging from the basement, one of the officers entered the basement "in case there was someone else" there. (Id.). Buie had just committed a violent offense, armed robbery, with another person. It is reasonable that Buie's cohort could also be in the basement and being still armed, ambush the officers. In the case at bar, there was no information that Ricky Barrett was armed or dangerous. Additionally, there was nothing to indicate that anybody else was upstairs.

Appellee states the sweep as justified because "Deborah Barrett had informed the officers that Ricky Barrett was hiding in an upstairs closet, but she did not specify which closet." (Appellee's brief p. 9). Actually, Officer Issacs testified that he did not remember if Mrs. Barrett specified which closet, not that she did not specify. (CD 06/25/12; 03:33:25). In addition, Officer Issacs testified that Officer Christian stationed himself in front of the closet doors that they all thought Mr. Barrett was in. (Id. at 03:33:50). Officer Issacs testified that "Officer Christian went and stayed by the closet door while I went to the right **to clear the rest of the residence** before we opened the closet door." (Id. at 03:24:27). Officer Christian stated he wanted to make sure no one would come around the corner and ambush them, not that he went into the bathroom and bedrooms looking for Ricky. (Id. at 03:24:45).

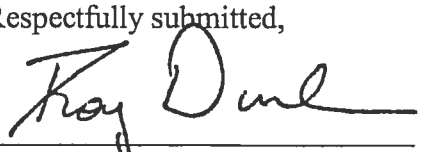
Appellee states "Further, the officers could not have been expected to simply take her at her word that he was hiding in the closet." (Appellee's brief p. 11). However, Buie does require there to be articulable facts that there was another person there posing danger which was not present in the case at bar.

Appellee argues that Guzman v. Commonwealth 375 S.W.3d 805 (Ky. 2012) is distinguishable from this case. (Appellee's brief p. 12). However, in Guzman, the Kentucky Supreme Court reversed based on the facts that there was a full accountability of all the people they knew about and the officers were told by Guzman that no one else was in the apartment. (Id. at p. 808). Unless there are specific and articulable facts to suggest otherwise, the officers do need to take the homeowners word for it. To rule otherwise would negate the Fourth Amendment safeguards against unreasonable searches.

Conclusion

Ricky Barrett reiterates his arguments and statements from his Original Brief. Based on those arguments, and the foregoing arguments made in this Reply Brief, Mr. Barrett respectfully requests that the Judgment of the Kenton Circuit Court be reversed.

Respectfully submitted,



Roy A. Durham II