Commonwealth of Kentucky
Kentucky Supreme Court

No. 2014-SC-48

RICKY BARRETT JR. — **APPELLANT**

v.

Appeal from Kenton Circuit Court
Hon. Martin J. Sheehan, Judge
Indictment No. 12-CR-300

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been served this 30th day of March, 2015, as follows: by mailing to the trial judge, Hon. Martin J. Sheehan, Kenton Co. Justice Center, 230 Madison Avenue, Room 600, Covington, Ky. 41011; by sending electronic mail to the Hon. Rob Sanders, Kenton Co. Commonwealth Attorney,; and via state messenger mail to Hon. Roy Durham, Department of Public Advocacy, Suite 500, 200 Fair Oaks Lane, Frankfort, Kentucky 40601.

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INTRODUCTION

The Appellant, Ricky Barrett, appeals from the Kentucky Court of Appeals decision (2012-CA-1564) which affirmed Barrett's conditional guilty plea. (Barrett pled guilty to First Degree Possession of a Controlled Substance, First Offense. He was sentenced to eighteen months imprisonment.) This Court granted Discretionary Review.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth believes that the issues raised on appeal are adequately addressed by the parties' briefs. The Commonwealth does not request oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

On July 16, 2012, the Appellant, Ricky Barrett Jr., pled guilty to First Degree Possession of a Controlled Substance, conditioned on his appeal of the trial court's denial of his earlier motion to suppress. (TR at 52-53).

At the June 25, 2012, suppression hearing, Officers Edwards and Isaacs of the Covington police department testified to the events surrounding Barrett's arrest on March 12, 2012. On that day, Officers Edwards, Isaacs, and Christian were dispatched to 2721 Rosina Avenue in response to an unidentified caller who had informed the police that Barrett was at the residence. (VR (6/25/12) at 3:21:30-3:22:18). Dispatch informed the officers that Ricky Barrett had multiple active warrants for his arrest, that he was listed as the homeowner on file[1] and that the last police contact with Barrett had been at that address. (*Id.* at 3:22:00; 3:35:00).

Officer Edwards arrived first at the residence and proceeded to do a sweep of the outside of the house, searching for escape points. (*Id.* at 3:35:00). Hearing sounds of people inside the house–voices and glasses or dishes clinking–he went back to the front of the house. Officer Isaacs arrived and took a position at the rear of the house. (*Id.* at 3:35:30-3:36:10; 3:41:05-3:41:14). When Officer Christian arrived, Officer Isaacs then went to the front of the house to join Officer Edwards.

(*Id.* at 3:22:40; 3:26:38; 3:35:30).

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[1] This information was later discovered to be incorrect; Ricky Barrett's stepmother Deborah Barrett, and his father, Ricky Barrett Sr., were the actual homeowners. The officers did not know this at the time.

Edwards knocked on the front door and announced himself as Covington Police. The sounds of people talking inside ceased. Edwards knocked again, and then used his flashlight to knock louder on the door. He did not touch the door handle or lock. At this point, the door came open. (*Id.* at 3:23:04; 3:36:00).

At the hearing, the officers said the unsecured door made them concerned that a crime might be occurring inside. They testified that it was common practice for officers to check residences with open doors to ensure they were not being burglarized. The officers identified themselves twice more as Covington Police and announced that they were going to enter the residence. They received no response. (*Id.* at 3:23:14; 3:36:30).

When the officers entered, Isaacs began a quick check of the main floor while Edwards positioned himself at the stairs directly in front of the open door to make sure no one would come down the steps surprising the officers. Edwards then announced their presence again and heard a female voice from upstairs announce that she was there. (*Id.* at 3:37:00). She said she was coming down, although she was unclothed, and Edwards told her to come down anyway. She came down completely clothed and identified herself as Deborah Barrett, the owner of the residence. (*Id.* at 3:37:30). When Officer Edwards asked if Ricky Barrett was there, she answered that Barrett was upstairs hiding in a closet. Isaacs testified at the hearing that he did not recall if Deborah Barrett identified which closet upstairs. Officer Edwards

testified that she said "he's upstairs in the closet." (*Id.* at 3:33:00-3:33:22; 3:38:03). At this point Deborah Barrett was detained. Officer Edwards remained with her while Officers Christian and Isaacs went upstairs to arrest Ricky Barrett. (*Id.* at 3:24:29).

The officers found a hallway closet at the top of the stairs. (*Id.* at 3:28:30). Officer Christian positioned himself at this closet, while Officer Isaacs went to perform a sweep of the two bedrooms and bathroom on the second floor, within the line of sight of the closet. Isaacs testified that he did this for the safety of himself and Officer Christian to make sure that people were not hiding in the bedroom closets or the bathroom. (*Id.* at 3:24:30.) In one bedroom, Isaacs saw syringes and other paraphernalia associated with heroin use lying in plain view on a dresser, as well as a spoon with residue lying on a TV stand. (*Id.* at 3:24:30). Isaacs then heard Christian say " I hear him in the closet." Isaacs discontinued his sweep and went to assist Christian in the arrest of Barret. (*Id.* at 3:25:00). The officers removed Ricky Barrett from the closet and arrested him. Once he was in custody, Isaacs secured the syringes and heroine. Deborah Barrett identified the room which contained the paraphernalia and residue as Ricky Barrett's bedroom. Barrett refused to make a statement. (*Id.* at 3:25: 30).

Based upon the officers' belief that Ricky Barrett was at the residence at that time, the validity of the underlying arrest warrants, and Deborah Barrett's statement to the police that Ricky Barrett was hiding in the

upstairs closet, the trial court overruled Barrett's motion to suppress. Barrett appealed the denial of his motion to suppress to the Kentucky Court of Appeals. The Court of Appeals affirmed the trial court's ruling in a not-to-be-published decision, *Barrett v. Commonwealth*, 2012-CA-1564, rendered November 1, 2014. This Court granted discretionary review.

ARGUMENT

I.

The trial court correctly denied Barrett's motion to suppress.

A. Standard of Review

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,* 516 U.S. 690, 699 (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 (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. The Officers Entered Lawfully, Pursuant to Valid Arrest Warrants

Barrett argues that the officers entered the house unlawfully. However, the officers did enter lawfully, pursuant to the multiple arrest warrants for Barrett which they were executing. "[A]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York,* 445 U.S. 573, 603 (1980).

The U.S. Supreme Court has not definitively expressed whether the "reason to believe" requirement is the equivalent of probable cause, and circuits are split on the issue. However, a majority of circuits have held that

"a lesser reasonable belief standard, and not probable cause, is sufficient to allow officers to enter a residence to enforce an arrest warrant." *United States v. Pruitt,* 458 F. 3d 477 (6th cir. 2006). In *Pruitt,* the Sixth Circuit held that "an arrest warrant is sufficient to enter a residence if the officers, by looking at common sense factors and evaluating the totality of the circumstances, establish a reasonable belief that the subject of the arrest warrant is within the residence at that time." *Id.* at 483. In *United States v. Hardin,* 539 F.3d 404 (6th Cir. 2008), the Sixth Circuit stated that the *Pruitt* holding was the minimum requirement of *Payton,* and decided the case on the grounds that assuming the *Pruitt* reasonable belief standard applied, the officers there had failed to justify their entry.

Further, in *United States v. Buckner,* 717 F.2d 297 (6th Cir. 1983), the Sixth Circuit held that the *Payton* rule, requiring only a valid arrest warrant and reason to believe that the person to be arrested is inside the premises searched, applies in situations where the police enter the home of a third party to arrest the person named on the arrest warrant, and then prosecute the person arrested. Barrett cites *United States v. Steagald,* which requires a search warrant where the police enter a third party's residence to effect an arrest. *United States v. Steagald,* 451 U.S. 204, 212-213 (1981). However, *Steagald* only applies where the third party is prosecuted by the police, not the person named on the arrest warrant. *Buckner,* 717 F.2d at 299. Here, the defendant is Ricky Barrett, the person named on the arrest warrants, not a

third party such as Deborah Barrett. Therefore, the *Payton* rule applies to this case.

Barrett argues that the officers did not have enough facts to constitute a "reasonable belief" that Barrett was in the home. He cites to the facts in *Hardin, supra.* In *Hardin*, the police received a tip from a confidential informant that Hardin would be in a certain area, describing a particular apartment but not identifying the specific address of the apartment. In Barrett's case, the officers were sent to the residence on the basis of an anonymous tip that Barrett was at the residence at that time. The officers were informed by dispatch that Barrett was the homeowner on file, and that the most recent police contact with Barrett was at that residence. While it later turned out that Barrett was not the actual homeowner but that his father, Ricky Barrett Sr., was the homeowner, the officers did not know this at the time, and acted in good faith on the information they had been given. When the officers arrived at the scene, Officer Edwards heard voices inside the house, voices that ceased when he initially knocked and identified himself as a Covington police officer.

Based on these facts, the officers clearly had reason to believe that Ricky Barrett was at the premises at the time they were executing the arrest warrants for him. As such, they were lawfully justified in entering the residence to effect his arrest, whatever their subjective motive may have been

in crossing the threshold. This satisfies the *Payton* rule, and, therefore, their entry was lawful.

C. Deborah Barrett's Statement Served as an Independent Source of Knowledge, Removing Any Possible Taint from the Entry.

Even if the officers' crossing the threshold of the home was not justified by the *Payton* rule and was unlawful, the taint of the illegal entry was removed when Deborah Barrett informed the officers that Ricky Barrett was upstairs hiding in a closet; therefore, the trial court properly denied suppression of the evidence.

The exclusionary rule ordinarily acts to suppress evidence that is directly acquired by illegal police conduct, i.e., the "fruit of the poisonous tree"; however, if the evidence is acquired by means "sufficiently distinguishable to be purged of the primary taint," the exclusionary rule does not operate to suppress it. *Hudson v. Michigan,* 547. U.S. 586, 592 (2006) (citing *Wong Sun v. United States,* 371 U.S. 471, 478-488 (1963). The exclusionary rule requires, at least, that there be "but-for causality," meaning that the evidence would not have come to light but for the illegal action. Even if this but-for causality is found, the means of discovery can still be too attenuated from the illegal action to justify excluding the evidence. *Hudson,* 547 U.S. at 592. Further, without but-for causality, the exclusionary rule does not require the suppression of the evidence.

In *Hudson,* the Court held that police violation of the knock-and-announce rule while executing a search warrant, which led to the discovery of unlawful firearms and drugs inside the defendant's home, did not require suppression of that evidence, partly on grounds that "[w]hether that preliminary misstep had occurred *or not,* the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house." *Id.* As the Court explained, the discovery of the guns and drugs was not the fruit of the knock-and-announce violation, and ". . . an impermissible entry does not necessarily trigger the exclusionary rule." *Id.* at 602. Rather, the discovery came from an "independent source," as the police had a valid search warrant for the firearms and the drugs. Similarly, in *Segura v. United States,* 468 U.S. 796 (1984), the Court held that whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized. *Id.* at 815.

The trial court properly held that the same principle applies here: the discovery of the drugs in this case came from an independent source sufficiently distinguishable from the potentially unlawful entry. After crossing the threshold of the home, the police had discovered no evidence of drugs or other illegal activity in the few seconds before Deborah Barrett came downstairs. When she informed them that Ricky Barrett, the subject of their arrest warrants, was upstairs hiding in a closet, that revelation dispelled any taint that may have been acquired from their entry. The touchstone of the

Fourth Amendment is reasonableness[2]. As the trial court observed, it would hardly have been reasonable to expect the officers, upon learning Ricky Barrett's whereabouts, to go away, acquire a search warrant, and return. Barrett would certainly have fled by the time they returned.

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 the door had not come open, and they would have learned the same information then that they learned a few feet into the home. They were on the premises to arrest Ricky Barrett pursuant to multiple valid arrest warrants; once they were inside and had learned of his whereabouts, they were justified in proceeding to arrest him. Thus, like *Segura* and *Hudson,* any evidence of criminality they discovered in the process of the arrest was pursuant to a valid arrest warrant, and, therefore, not connected to the entry into the home.

D. The Protective Sweep was Justified Based on *Maryland v. Buie.*

Barrett also argues that the protective sweep the officers conducted was impermissible. In fact, the sweep was lawful. 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 (1990). The sweep is "narrowly confined to a cursory visual inspect of those

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[2] *Abdul-Jalil v. Commonwealth,* 324 S.W.3d 433, 435 (Ky. App. 2010) (citing *Terry v. Ohio,* 392 U.S. 1, 19, (1968).

places in which the person might be hiding". *Id.* The Court in *Buie* primarily discussed protective sweeps occurring after or in the process of an arrest. Before an arrest, the police are entitled to "enter and to search anywhere in the house in which Buie might be found." *Id.* at 333. Once the arrest was made, the police are further entitled to "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334. Finally, for a protective sweep beyond those places, the Court only requires the searching officer to possess "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. at 337.*

Here, Officer Isaacs' protective sweep of the rooms adjoining the closet was justified on multiple levels. Deborah Barrett had informed the officers that Ricky Barrett was hiding in an upstairs closet, but she did not specify which closet. Further, the officers could not have been expected to simply take her at her word that he was hiding in the closet. Thus, the officers were entitled to search anywhere upstairs where Barrett might have been found, per *Buie.* Even if, as Barrett argued in the hearing below, the officers knew that Barrett was in the upstairs hallway closet, under *Buie* the officers were justified in a protective sweep incident to Barrett's arrest. Officer Isaacs only performed a cursory visual check of the rooms immediately within the line of

sight of the hallway closet, to ensure officer safety by making sure no one was hiding in the rooms who could emerge and ambush them. This sweep is justified under *Buie.* Further, when Officer Christian alerted Officer Isaacs that Ricky Barrett had been found in the hallway closet, hiding behind clothes and other items, Isaacs immediately ceased his search and went to assist in the arrest.

The Kentucky Supreme Court's recent decision in *Guzman*, cited by Barrett in his brief to the Court of Appeals is distinguishable from this case. *Guzman v. Commonwealth,* 375 S.W. 3d 805 (Ky. 2012). *Guzman* did not deal with a protective sweep in conjunction with a lawful arrest; rather, the police in *Guzman* were still in the investigative process, and had no warrant or basis for arrest. *Id* at 809. The police were in the living room of Guzman's apartment based on her consent; when an officer conducted a protective sweep of the entire apartment without her permission, the Court held that this exceeded the scope of her consent.

In this case, however, the protective sweep conducted by Officer Isaacs occurred while the officers were executing valid arrest warrants for Ricky Barrett, a sweep which they were entitled to do under *Buie.* The Court's decision in *Guzman* is applicable here in one respect; *Guzman* explicitly adopted the holding in *Buie* as the law of the Commonwealth. As such, Isaacs was entitled to conduct his protective sweep as incident to an in-home arrest on a warrant, for the purpose of protecting officer safety.

CONCLUSION

The opinion of the Kentucky Court of Appeals should be affirmed.

Respectfully Submitted

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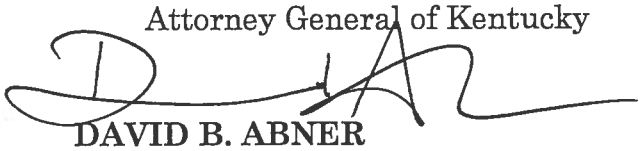

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