RENDERED: APRIL 25, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-000334-MR

DUSTIN LEE HAGGARD — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 01-CR-00136

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BAKER and HUDDLESTON, JUDGES.

EMBERTON, CHIEF JUDGE. Dustin Haggard entered a conditional plea of guilty to possession of a controlled substance, first degree. He alleges that the trial court erroneously denied his motion to suppress evidence seized by police pursuant to a warrantless search of his residence. We affirm.

Officer Bill Ryan responded to a noise complaint at a residence located at 6809 Curtis Lane, Florence, Kentucky. The defendant's brother, Justin, answered the officer's knock on the door. When the door opened, Officer Ryan smelled marijuana

smoke in the residence. After Justin denied that marijuana was being smoked, Officer Ryan entered the residence. Upon Officer Riddle's arrival, the officers conducted a search of the residence and found small marijuana roaches in the kitchen. When Officer Riddle approached Haggard to conduct a Terry search he noticed a white pill bottle in Haggard's pajama top pocket. The bottle was seized and found to contain Oxycotin.

Haggard challenges the officer's warrantless entry into his residence. All warrantless searches are unreasonable unless they fall into one of the exceptions to the warrant requirement.[1] Where there is probable cause combined with exigent circumstances police have the authority to conduct a warrantless search.[2]

The officer in this case approached Haggard's residence in response to complaints about excessive noise. Immediately, when Haggard's brother opened the door Officer Ryan smelled marijuana and after entering the residence, smelled the same odor. Officer Ryan testified that he was familiar with the odor of marijuana through his police work and training. In

---

[1] Cormney v. Commonwealth, Ky. App., 943 S.W.2d 629 (1996).

[2] See Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

Johnson v. United States,[3] the court upheld the warrantless entry into a hotel room where government agents smelled the odor of burning opium outside the room. Johnson established a two-prong test when determining whether the odor of illegal drugs is sufficient to establish a probable cause to search: (1) the affiant must be qualified to know, to recognize and be able to identify the odor; and (2) the odor must be sufficiently distinctive to identify a forbidden substance. Officer Riddle testified that as a police officer his experience and training have enabled him to identify the odor resulting from the burning of marijuana. In Cooper v. Commonwealth,[4] the court upheld a warrantless search of an automobile ashtray where the smell of marijuana emanated from a car stopped by police for a traffic violation. As the court noted:

> As long ago as 1925, this state's highest court held that a warrantless search could be based on smelling illegal liquor. The federal courts have also recognized a "plain smell" analogue to the "plain view" doctrine.[5] (Citations omitted)

The warrantless entry into the residence was permissible. The search that followed was justified under the

---

[3] 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed.2d 436 (1948).

[4] Ky. App., 577 S.W.2d 34 (1979)(overruled on other grounds Mash v. Commonwealth, Ky., 769 S.W.2d 42 (1989)).

[5] Id. at 36.

exigent circumstances exception to the warrant requirement. Where an officer must act at the moment to avoid the probable destruction of evidence of a crime, it is reasonable to permit a search without prior judicial evaluation.[6] Haggard and his brother were aware of the presence of Officer Ryan and knew he suspected illegal drug activity. The officer's decision to conduct a warrantless search was justified in view of the possibility that evidence would be destroyed before a warrant could be obtained.

Haggard's contention that the smell of marijuana could justify only the belief that a misdemeanor was being committed is without merit. The officer had no way of knowing how much marijuana was in the residence or what other illegal activities may have been occurring.[7]

The officers were in Haggard's residence pursuant to probable cause and exigent circumstances. As Officer Ryan approached Haggard, he saw a pill bottle in plain view in Haggard's pocket. When an officer is where he has a right to be, he may seize contraband that is in plain view.[8]

---

[6] Cormney, supra.

[7] See State v. Hughes, 223 Wis.2d 280, 607 N.W.2d 621 (2000).

[8] Gillum v. Commonwealth, Ky., 925 S.W.2d 189 (1995).

The trial court properly denied Haggard's motion to suppress and the judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Frederick J. Johnson
Covington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky