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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001801-MR

DANA MERCER

APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 02-CR-00141

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING
** **

BEFORE: GUIDUGLI AND KNOPF, JUDGES; AND EMBERTON, SENIOR JUDGE¹.

KNOPF, JUDGE: Dana Mercer appeals from a judgment of the Grayson Circuit Court, entered August 11, 2003, convicting her pursuant to her guilty plea of manufacturing methamphetamine,² possession of anhydrous ammonia in an unapproved container and

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² KRS 218A.1432.

for the purpose of manufacturing methamphetamine,³ wanton endangerment in the first degree,⁴ possession of marijuana,⁵ and possession of a controlled substance in the first degree (methamphetamine).⁶ She was sentenced to concurrent terms of imprisonment totaling ten years. Mercer contends that the trial court erroneously refused to suppress evidence seized during a warrantless search of her residence. Her guilty plea preserved her right to appeal from that refusal. To the extent that the search of Mercer's residence appears to have exceeded its lawful scope, we agree with her contention and so must vacate the trial court's judgment and remand for additional proceedings.

Pursuing a tip that a suspect with an outstanding arrest warrant was present at 1010 Shain Road in Caneyville, three Grayson County deputies and a state trooper approached the residence at that address at about 10:30 p.m. on October 15, 2002. The officers had not obtained a warrant to search the residence. After a deputy and the trooper had positioned themselves behind the residence where they could see the back door, the other two deputies knocked at the front door. Mercer answered the knock, informed the officers that the suspect was

³ KRS 250.489.

⁴ KRS 508.060.

⁵ KRS 218A.1422.

⁶ KRS 218A.1415.

not present, and denied the officers' request for permission to enter.

At the same time, Mercer's roommate, Frank Magolis, exited the building through the back door. According to the report of the back-yard deputy, Magolis was carrying a large jar or jug, and as soon as he noticed the officers he turned abruptly around and went back inside. Almost immediately the officers heard the sound of breaking glass. The sound seemed to emanate from a window next to the back porch. As the officers approached the window, in which an exhaust fan had been set up, they detected a strong odor of what they believed to be ether. Through the window they saw glass shards on the floor. They also observed on the back porch two starter-fluid cans with holes punched in them and a can of Coleman fuel.

Believing that they may have stumbled upon a methamphetamine lab, the four officers requested assistance from deputy Tony Willen, who was trained to deal with that situation. About thirty minutes later Willen and State Trooper Danny Payne, who has similar expertise, arrived at the scene. Willen and Payne testified at the suppression hearing that they recognized a strong odor of ether coming from the rear window, and because ether is both noxious and volatile they decided that any children in the house should be evacuated.

Although the exact sequence of events following that decision is unclear, it is undisputed that soon thereafter the officers entered the residence and searched every room for occupants. In the course of that search they saw in plain view in a back bedroom (the room with the exhaust fan) chemicals, containers, tubing and other paraphernalia their training enabled them immediately to recognize as implements for the manufacture of methamphetamine. Thereupon, apparently, Mercer and Magolis were arrested and the officers entered upon a general search of the premises, eventually finding additional incriminating evidence.

Mercer contends that the warrantless entry and search of her home violated her right under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution to be free from unreasonable governmental searches and seizures. She correctly notes that a person's interest in being free from unreasonable state intrusions into her home is the principal interest the Fourth Amendment protects.⁷ As a general rule, that amendment and Section 10 of the Kentucky Constitution, prohibit the police from entering and searching a residence unless they obtain either the resident's consent or a

⁷ Steagald v. United States, 451 U.S. 204, 68 L. Ed. 2d 38, 101 S. Ct. 1642 (1981); Coleman v. Commonwealth, Ky., 100 S.W.3d 745 (2002).

search warrant.⁸ We agree with Mercer, furthermore, that she did not consent to the search of her home by allowing her step-father, who happens to be a deputy jailer, to remove her children,⁹ and that the police may not rely on their after-the-fact discovery that Magolis was a probationer.¹⁰

Nevertheless, a well established exception to the general warrant requirement authorizes police officers without a warrant to enter a residence in order to address an exigent circumstance, such as the threat of imminent injury or the imminent destruction of evidence.¹¹ It is widely recognized, as Willen and Payne testified, that the chemicals and chemical reactions involved in methamphetamine production, including ether, pose significant health and safety risks.¹² We agree with the trial court that these risks are grave enough to justify

⁸ *Id.*

⁹ Commonwealth v. Fox, Ky., 48 S.W.3d 24 (2001) (Consent is assessed by asking what a reasonable officer would have understood in the circumstances. Here no reasonable officer could have understood Mercer to be consenting to a search.) United States v. Ivy, 165 F.3d 397 (6th Cir. 1998) (consent to search must be unequivocal).

¹⁰ People v. Sanders, 73 P.3d 496 (Cal. 2003).

¹¹ Commonwealth v. McManus, Ky., 107 S.W.3d 175 (2003); Hughes v. Commonwealth, Ky., 87 S.W.3d 850 (2002).

¹² United States v. Walsh, 299 F.3d 729 (8th Cir. 2002).

immediate police intervention.¹³ We also agree that the strong smell of ether, the punched starter-fluid cans, the Coleman fuel, and Magolis's evasive behavior gave the police adequate reason to suspect the presence of a methamphetamine lab.

The authority provided by exigent circumstances, however, is limited to whatever intervention is reasonably necessary to address the exigency.¹⁴ Exigent circumstances do not license the police utterly to disregard the warrant requirement.¹⁵ Here, having become aware of the likely presence of a hazardous methamphetamine lab, the police could lawfully enter Mercer's residence to ascertain whether the lab was operating and if so to stabilize it and to remove any occupants in danger from the fumes of ether and other chemicals. They could, of course, note and seize evidence they came across in plain view as they carried out this limited search.¹⁶

They were not authorized, however, to search beyond what was necessary to address the health and safety emergency.¹⁷

¹³ Kleinholz v. United States, 339 F.3d 674 (8th Cir. 2003); United States v. Wilson, 865 F.2d 215 (9th Cir. 1989); People v. Duncan, 720 P.2d 2 (Cal. 1986); State v. Chapman, 813 P.2d 557 (Or. App., 1991).

¹⁴ Mincey v. Arizona, 437 U.S. 385, 57 L. Ed. 2d 290, 98 S. Ct. 2408 (1978).

¹⁵ *Id.*

¹⁶ *Id.*; Kleinholz v. United States, *supra*.

¹⁷ Mincey, *supra*.

For that a warrant was required. Apparently, however, the police disregarded that requirement and conducted a general search for evidence throughout the property. In an outbuilding, for example, they found a container with anhydrous ammonia. Somewhere, the record does not indicate where, they found marijuana. If these items or any others the police collected were not in plain view during the brief search for occupants, then their seizure without a warrant was unlawful and any evidence based upon them should have been suppressed.

Because the record does not show which seized items were in plain view and which were not (although it seems certain that the container in the outbuilding was not), we are obliged to vacate the trial court's judgment and remand for reconsideration of Mercer's suppression motion in light of this opinion. If it turns out that all the evidence against Mercer was in plain view and so lawfully seized, then the judgment against her should be reinstated. If any of the evidence was not in plain view, however, that evidence should be suppressed and Mercer should be permitted to withdraw her plea and reassess her options.

Accordingly, we vacate the August 11, 2003, judgment of the Grayson Circuit Court and remand for additional proceedings consistent with this opinion.

EMBERTON, SENIOR JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS AND FURNISHES SEPARATE
OPINION.

GUIDUGLI, JUDGE, DISSENTING. I respectfully dissent.
While the majority would vacate and remand for additional
proceedings, I would reverse and remand with instructions that
all evidence seized during the illegal search be suppressed.

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