RENDERED: AUGUST 26, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001227-MR

MANSOUR IBRAHIM — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 03-CR-01475-1

COMMONWEALTH OF KENTUCKY — APPELLEE

CONSOLIDATED WITH
NO. 2004-CA-001228-MR

STEPHANIE IBRAHIM — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HON. PAMELA R. GOODWINE, JUDGE
ACTION NO. 03-CR-01475-2

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: Appellants Mansour and Stephanie Ibrahim appeal the Fayette Circuit Court’s denial of their motion to suppress.

The Ibrahims entered a conditional plea of guilty to charges of cultivating marijuana and possession of drug paraphernalia. We affirm the trial court's ruling.

On July 24, 2003, Lexington police officers received two dispatch calls regarding the Ibrahims' residence. The first call sought assistance for ambulance personnel to treat a man who was having chest pains at his residence. The second call referenced a man who had allegedly attempted to kill himself with a knife at the same address. When officers arrived at the address, Mr. Ibrahim was in the bathroom being attended to by ambulance personnel. Mrs. Ibrahim was outside the bathroom. The officers testified that Mrs. Ibrahim informed them that Mr. Ibrahim had taken doses of Methadone and insulin. After taking his medication for diabetes Mr. Ibrahim became confused, and informed his wife that he believed that there was a bubble in his vein heading to his heart. He had stabbed himself several times with a knife in an attempt to keep the "bubble" from getting to his heart.

While officers were in the home, Mrs. Ibrahim mentioned her son. The officers asked where her son was, and Mrs. Ibrahim replied that he was asleep in bed. It is uncontroverted that Mrs. Ibrahim did not ask the officers to find or check on the child. The officers admit that Mrs. Ibrahim did not express any concern about her son's whereabouts

or safety. Of his own volition, the officer began to look through the house and enlisted a second officer to help him find the child.

The officers contended that they looked in all the rooms of the house looking for the child. The officers also looked in closets and cabinets and the laundry room. The officers found objects used to grow plants in a bedroom closet. No illegal substances or growing plants were found in the closet. The officers continued to search through the house until they found several marijuana plants in the laundry room. The officers then called a narcotics officer to come to the residence. While one officer was locating the plants, the other officer returned to Mrs. Ibrahim and asked her where the child was sleeping. Mrs. Ibrahim then showed them the child asleep in the master bedroom. It is uncontroverted that no contraband was in plain sight in the Ibrahim residence. It is uncontroverted that the child was asleep in the master bedroom at all times relevant to this action. The officers contended that they ceased searching once they had “found” the child.

Mrs. Ibrahim testified that her husband suffers from chronic pancreatitis and diabetes. Mrs. Ibrahim called an ambulance because her husband seemed unwell. During the hubbub at the residence, Mrs. Ibrahim informed the officers that her son was asleep in the master bedroom, and asked that they please

be quiet so as not to wake the child. Mrs. Ibrahim did not ask the officers to check on her child. She was not concerned for the safety of the child, as she knew him to be asleep, tucked in bed in the master bedroom. She claimed that the officers began opening closets and cupboards and searching the house without her consent.

When Mrs. Ibrahim's mother-in-law arrived at the home, she found cabinet drawers open and an officer using her daughter-in-law's laptop computer. The officers told her that they "smelled something," so they had gone into the laundry room to check on it. At that point, the officers claimed to have found marijuana plants. A search warrant was obtained later that day. Police officers conducted a search of the Ibrahims' residence. Additional items were found and seized at the Ibrahim residence during the search.

The Ibrahims filed a Motion to Suppress, claiming that the search was violative of Section 10 of the Kentucky Constitution and the Fourth and Fourteenth Amendments to the United States Constitution. The trial court denied the motion. After conducting a hearing the trial court ruled that the police had been confronted with an emergency situation, and that the police did not act unreasonably in attempting to find the child. The court held that no improper warrantless search was conducted as the officers were acting in accordance with an emergency.

This ruling was based on the officers' claim that they were concerned for the safety of the child, and were simply looking everywhere for the child, rather than searching for contraband. The officers claim to have looked in the master bedroom, but assert that they did not see the child asleep in the bed. The officers assert that the intensive search was no more than a "limited walk-through" of the residence.

The Commonwealth argues that rulings upon admissibility of evidence are within the discretion of the trial court, and should not be reversed absent a clear abuse of discretion. Freeman v. Commonwealth, 425 S.W.2d 575 (Ky. 1967). Review of a court's determination on a motion to suppress shall be reviewed in light of Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). See, Stewart v. Commonwealth, 44 S.W.3d 376 (Ky.App. 2000). The Ornelas court ruled that "as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal." 517 U.S. at 699. Kentucky law holds that:

> Our standard of review of a circuit court's decision on a suppression motion following a hearing is twofold. First, the factual findings of the court are conclusive, if supported by substantial evidence. The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law.

Stewart, supra 44 S.W.3d at 380. The law presumes that all searches without a warrant are unreasonable unless the Commonwealth proves that the search falls under an exception to the laws requiring a warrant. Commonwealth v. McManus, 107 S.W.3d 175, 177 (Ky. 2003).

The burden of proof is on the Commonwealth to prove that the search was reasonable and proper. Colbert v. Commonwealth, 43 S.W.3d 777, 779 (Ky. 2001). Entering a home with consent does not constitute grounds to rummage through cabinets and search out of sight areas. See: Coleman v. Commonwealth, 100 S.W.3d 745, 751 (Ky. 2002), holding that parole officers' required visits to the home of a parolee did not permit a wholesale search of the residence. The officers are limited to noting items that are in "plain view." Hazel v. Commonwealth, 833 S.W.2d 831, 833 (Ky. 1992).

Before a warrantless search is committed, the police officers must have a reasonable belief that an individual is in need of immediate aid inside the residence. Gillum v. Commonwealth, 925 S.W.2d 189, 190 (Ky.App. 1995). Once inside the residence, if the officer is where he has a right to be, he can seize contraband which comes into plain view. Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978). Plain view may be extended to mean open doorways and cabinets, and not just the room in which the officer is standing.

Hazelwood v. Commonwealth, 8 S.W.3d 886, 887 (Ky.App. 1999). Warrantless searches must be strictly limited to actions which are necessary and reasonable under the circumstances. Commonwealth v. Whitmore, 92 S.W.3d 76, 79 (Ky. 2002), discussing the reasonable suspicion exception to the law requiring a search warrant. A similar limitation should apply with regard to the emergency exception to the law.

The Commonwealth cites Mills v. Commonwealth, 996 S.W.2d 473 (Ky. 1999), and Gillum v. Commonwealth, 925 S.W.2d 189 (Ky.App. 1995), as supporting their right to a warrantless search of the Ibrahim residence. In Mills, an actual blood trail into the home justified warrantless entry. Similarly, in Gillum, the fact that the owner of the residence was in ill-health, and had left his truck door open outside the residence for more than a day created a valid concern for the health of the owner. Here, locating the child was an exigent circumstance justifying the police officer's actions which led to the discovery of the illegal substances.

For the foregoing reasons, we affirm the trial court's ruling.

BUCKINGHAM, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING: I respectfully dissent. Under the circumstances of this case, I must conclude that there

was insufficient evidence to support a finding that the Lexington police officers had a reasonable belief that the child was in need of immediate aid so as to permit a constitutional warrantless search of the Ibrahims's residence.

As a general rule, all searches require a valid warrant; and for the warrantless search in this case to be constitutional, the Commonwealth must prove that the search was within one of the exceptions to the general rule.[1] The exception known as the emergency aid doctrine has been applied in Kentucky in several cases,[2] and was discussed by the United States Supreme Court in Mincey v. Arizona,[3] as follows:

> We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid [footnotes omitted].

In the case before us, I conclude that there was insufficient evidence to support the trial court's finding that the police officers had a reasonable belief that the child was in need of immediate aid. While I acknowledge the officers were

[1] Commonwealth v. McManus, 107 S.W.3d 175, 177 (Ky. 2003); Gallman v. Commonwealth, 578 S.W.2d 47, 48 (Ky. 1979).

[2] See e.g. Hughes v. Commonwealth, 87 S.W.3d 850 (Ky. 2002); Mills v. Commonwealth, 996 S.W.2d 473 (Ky. 1999); Todd v. Commonwealth, 716 S.W.2d 242 (Ky. 1986); Gillum v. Commonwealth, 925 S.W.2d 189 (Ky.App. 1995).

[3] 437 U.S. 385, 392, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290, 300 (1978).

confronted with an emergency involving Mr. Ibrahim, who was in need of immediate medical attention, Mr. Ibrahim's need for immediate aid did not provide sufficient grounds for a warrantless search of his home.[4] The warrantless search had to be based on the child's need for immediate aid and there was no evidence to support a finding that the police officers had a reasonable belief that the child was in need of immediate aid. Rather, the officers merely had an unsubstantiated, unarticulated "concern" for the safety of the child. While the officers may have had a sincere concern for the child's safety, a mere concern is insufficient to overcome the Fourth Amendment prohibition against unreasonable searches and seizures.

The approach taken by the Majority in analyzing the police officers' actions removes the "reasonable" standard from the emergency aid doctrine. Such an approach would allow a police officer to conduct a warrantless search whenever he had a subjective belief that someone might be in danger, without requiring the belief to be objectively reasonable. I recognize that law enforcement officers often face split-second life or death decisions. However, a standard which allows a police officer to conduct a warrantless search merely upon a subjective belief, even if in good faith, is not constitutional. Rather, I conclude that the reasonable belief standard places a duty upon

[4] Id. 437 U.S. at 392.

a police officer to make an inquiry sufficient to determine if his initial concerns are warranted.[5] Kentucky case law supports this approach.

In Hughes, the police had received a report that the victim was missing. The police officer only entered the victim's apartment when no one would answer the door and when the officer detected a foul odor coming from the apartment.[6] In Mills, a police officer investigating a murder followed a trail of blood leading away from the victim's body found in the yard of the victim's house, to the exterior of a neighboring house, and into the house, where the alleged murderer was found wounded and bleeding.[7] The warrantless search in Todd was permissible

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[5] A similar standard applies to warrantless seizures and searches under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.E.2d 889 (1968). There the Court held:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. 392 U.S at 30. If a police officer must make reasonable inquiries before searching a person whom he believes to be armed and dangerous, I see no reason to apply a lesser standard here.

[6] Hughes, 87 S.W.3d at 851.

[7] Mills, 996 S.W.2d at 479.

after an ambulance driver told the police that based on his observations during an ambulance call for the victim's sister he had become concerned for the well-being of the victim who was virtually a total invalid. The police then attempted to locate the victim at her home by looking through the windows and by knocking on the door. They entered the victim's home only after they could not see the victim in her bed.[8] Also, in Gillum, the police officers were acting upon a neighbor's report that the owner of the home may be in need of assistance because he had a heart condition, he lived alone, the neighbor had not seen him since 4:30 p.m. the previous day, his truck door had been left open for six hours, the lights had been left on in his residence, and the neighbor had attempted several times to contact him by knocking on the door and by calling his home.[9]

In all of these cases, the police officers in question acted on more than an unsubstantiated hunch or suspicion; they took reasonable steps to determine if their initial concerns or suspicions were correct before taking action. In each circumstance, the police officer's concern for the immediate safety of the person was objectively reasonable.

In the present case, Officer Ingram was told by Mrs. Ibrahim that the child was asleep. Officer Ingram testified at

[8] Todd, 716 S.W.2d at 247.

[9] Gillum, 925 S.W.2d at 189-90.

the suppression hearing that Mrs. Ibrahim "didn't express any concern for the child." She did not ask the police officers to check on the child, and she did not give any indication that the child was in danger. Accordingly, neither her statements to the police nor her actions gave any indication that the child was in need of immediate aid.[10] Nonetheless, Ingram began looking for the child because he was "concerned" for the child's safety.

When asked at the suppression hearing whether he had any "specific, articulate reason to believe the child was in need of any type of immediate aid," Officer Ingram replied that he "didn't know...if he was or wasn't." When asked again whether there was anything specific that led him to believe that the child was in need of immediate aid, Officer Ingram replied that it was "kind of a tricky question" because he did not know how old the child was, what his capabilities were, or how he would "make it" without supervision. Answers to these types of questions are critical to an officer's making an informed assessment of the immediate need for aid. By simply asking Mrs. Ibrahim these questions, the officers could have learned whether the child was in need of immediate aid. I believe that such an

[10] In fact, Mrs. Ibrahim's statement to Officer Ingram that the child was asleep was inconsistent with a concern for the child's safety, because if the child was indeed asleep, it would have been unlikely that he was in need of immediate aid. While it is not my position that the claim the child was asleep should have totally resolved any concern for the child, I note it here because it is a factor to consider in determining whether Officer Ingram's concern that the child was in need of immediate aid as objectively reasonable.

inquiry was necessary before the officers' subjective concern could become an objectively reasonable belief that the child was in need of immediate aid. Thus, the trial court's finding that the officers had been presented with an emergency situation and had acted reasonably in trying to locate the child is not supported by the facts in this case. Rather, the reasonable response would have been for the officers to further inquire about the child, to determine if their concerns were well-founded.

In order for the emergency aid doctrine to be applied in this case, the Commonwealth was required to show that the officers acted upon a reasonable belief that the child was in need of immediate aid. The facts of this case do not support such a legal conclusion. Therefore, I would reverse the trial court's denial of the motion to suppress evidence and allow the appellants to withdraw their conditional guilty pleas.

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