

RENDERED: MAY 26, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001394-MR

RODNEY MCDANIEL JR.

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
INDICTMENT NO. 04-CR-01064-002

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2005-CA-001395-MR

ANDREA SHAREE STOKES

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
INDICTMENT NO. 04-CR-01064-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** *

BEFORE: BARBER, KNOFF, AND MINTON, JUDGES.

MINTON, JUDGE: That the police lacked time to get a warrant
without thwarting the arrest or making it more dangerous is the

essence of the exigent circumstances exception to the warrant requirement. In this appeal, Rodney McDaniel Jr. and Andrea Stokes argue that exigent circumstances did not justify the warrantless entry into their apartment because the police had adequate time to get a warrant. Because the trial court failed to make specific findings on the crucial time-lapse issue, we must vacate and remand.

Officers of the Lexington Police Department were dispatched in the early morning hours to an apartment building where a possible domestic disturbance was underway. Officer Joshua Masterson arrived first. He could hear a man yelling and a woman crying in an upstairs apartment. Because of the possible volatile situation and his lack of experience, Officer Masterson did not approach the apartment, awaiting Officer William Richardson's arrival two to three minutes later.

When Officer Richardson arrived, he and Officer Masterson knocked at the apartment door and announced their identity. The sound of argument inside the apartment ceased; and the apartment became quiet, except for the sound of a woman whimpering. Officer Masterson testified that he and Officer Richardson knocked at the door for five to six minutes when they heard what sounded like a firearm being prepared for use. Unsure of the gravity of the situation, Officers Masterson and Richardson retreated from the door of the apartment and

interviewed a neighbor to gather more information. The neighbor told the officers that a fight had been going on for a couple of hours and that someone in the apartment had been "bounced around the walls." Approximately five minutes after the officers retreated, Sergeant William Richmond arrived. Sergeant Richmond talked to the neighbor for fifteen to twenty minutes before he and Officer Masterson returned to the door of the apartment.

Sergeant Richmond also heard a woman inside the apartment whimpering. He then knocked on the door for five to ten minutes more before a female, Stokes, finally opened it. Stokes appeared to be shaken and upset but told the officers that she was alone in the apartment and did not know why the police had been called. Sergeant Richmond asked Stokes to step outside the apartment and into the hallway. He said that an officer had heard a weapon being prepared for use inside the apartment. While he was in the hallway with Stokes, Richmond noticed the silhouette of a man in the rear of the dimly lit apartment. Stokes then changed her story and admitted that her boyfriend, McDaniel, was also there. Sergeant Richmond then ordered McDaniel to come out and show his hands. McDaniel hesitated but finally came as far as the living room where Sergeant Richmond ordered him to lie on the floor. Sergeant Richmond and Officer Masterson then entered the apartment, handcuffed McDaniel, and patted him down for weapons. Sergeant

Richmond informed the uncooperative and belligerent McDaniel that he was not under arrest but that they were going to keep him handcuffed until they could satisfy themselves that the apartment was safe. When they entered the apartment, the officers smelled marijuana smoke.

After Sergeant Richmond and Officer Masterson entered the apartment, Officer Jerry Curtsinger, who had been stationed at the rear of the apartment building to foil an escape attempt, also entered. As Officer Curtsinger glanced around the living room for any possible weapons, he noticed a small plastic baggie containing a white powder lying in a small trashcan. Based on their experience and training, the officers believed the white powder was cocaine.

At that point, Sergeant Richmond and Officer Curtsinger went out into the hall to speak to Stokes. The officers informed her of her rights and told her that they had smelled marijuana in the apartment. They then asked her if there were any weapons or drugs in the apartment. Stokes admitted to the presence of marijuana, and she led the officers to the bedroom where she showed them some marijuana joints in an ashtray. The officers then asked Stokes for consent to search the remainder of the apartment, but she declined. Stokes was then arrested for possession of marijuana.

As Stokes was being led from the apartment, McDaniel stated that he was responsible for any illegal substances in the apartment but declined to consent to a search of the entire apartment. McDaniel was then arrested and removed from the apartment. Officer Masterson stayed at the apartment to secure it while Sergeant Richmond and Officer Curtsinger went for a search warrant. When they returned with the search warrant, they searched the apartment. That search yielded the baggie with the white powder, as well as a firearm and ammunition in a closet.

McDaniel and Stokes were indicted for trafficking in a controlled substance in the first degree while in possession of a firearm, possession of drug paraphernalia, and possession of marijuana. Each filed a suppression motion, arguing that the officers' initial entry into the apartment was an unconstitutional invasion of their home. The trial court denied suppression following an evidentiary hearing, finding that the warrantless entry was justified under the exigent circumstances exception.

McDaniel later entered a conditional guilty plea to first-degree trafficking in a controlled substance and possession of drug paraphernalia, reserving the right to appeal the trial court's denial of his suppression motion. He was ultimately sentenced to seven years' incarceration, but that

sentence was probated for five years. After the denial of her motion to suppress, Stokes entered a conditional guilty plea to first-degree possession of a controlled substance, possession of drug paraphernalia, and possession of marijuana, reserving the right to appeal the trial court's denial of her motion to suppress. Stokes was ultimately sentenced to one year of imprisonment, probated for five years. Stokes and McDaniel have filed separate appeals. But since these cases share a factual background and present the same questions of law, we have elected to resolve both appeals in this opinion.

Stokes and McDaniel argue that the trial court erred by finding that the exigent circumstances exception to the warrant requirement permitted the police to enter their apartment without a warrant. When reviewing the denial of motions to suppress, the standard of review requires that "[f]irst, the factual findings of the court are conclusive if they are 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."¹

No one questions that the police had no warrant when they first entered the apartment. And "all warrantless searches are deemed unreasonable unless they fall under one of the

¹ Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky.App. 2000) (internal footnote omitted).

exceptions to the warrant requirement.”² The Commonwealth bears the burden of showing that a warrantless search falls within a recognized exception to the warrant requirement.³ If a trial court finds that exigent circumstances existed at the time of the warrantless entry into a person’s dwelling, however, the entry does not violate the Fourth Amendment’s protection from warrantless searches and seizures.⁴ The presence or absence of exigent circumstances is a finding of fact, which we review under the clearly erroneous standard.⁵

Although the exigent circumstances exception applies in many situations, the one relied upon here by the Commonwealth is the need to protect the suspects, bystanders, and the police themselves from possible harm.⁶ So the Commonwealth contends that exigent circumstances existed to justify the officers’ entry into the apartment because the safety of the officers and others was endangered based upon the fact that the officers: had heard sounds of an argument and a woman whimpering; had information from a neighbor that the argument had been ongoing

² Gillum v. Commonwealth, 925 S.W.2d 189, 190 (Ky.App. 1995).

³ *Id.*

⁴ Posey v. Commonwealth, 185 S.W.3d 170, 173 (Ky. 2006) (“[a]bsent exigent circumstances, it is not reasonable for a law enforcement agent or officer to enter a person’s home without consent or a warrant.”).

⁵ Commonwealth v. McManus, 107 S.W.3d 175, 181 (Ky. 2003) (Graves, J., dissenting). See also 68 Am.Jur.2d *Searches and Seizures* § 128 (2005).

⁶ See, e.g., Taylor v. Commonwealth, 577 S.W.2d 46, 48 (Ky.App. 1979) (holding that warrantless search is permissible if necessary to prevent harm to officers); 68 Am.Jur.2d *Searches and Seizures* § 134 (2005).

for a couple of hours and that it sounded like someone was being thrown about the apartment; had heard what they believed to be the sound of a weapon being readied for use; had seen Stokes's distressed condition; did not know how many people were in the apartment; and McDaniel had been belligerent and slow to comply. Conversely, Stokes and McDaniel contend that the Commonwealth's claim that the situation involved exigent circumstances is belied by the fact that approximately thirty minutes elapsed from the time Officer Masterson first arrived and the time Sergeant Richmond and Officer Masterson entered the apartment.

Stokes and McDonald may have a valid issue about whether the exigent circumstances exception to the warrant requirement properly lies in light of the fact that the officers waited for approximately thirty minutes to elapse before entering the apartment. It stands to reason that in a true emergency, the officers would have had to take decisive action much sooner. But courts reviewing the actions of officers must view the facts objectively,⁷ and courts are cautioned against being "unduly demanding in calculating the time at which the warrant clock begins to run[.]"⁸ And several courts have issued opinions on the crucial issue of whether a lapse of time between when the authorities become involved in a situation and when

⁷ Shamaeizadeh v. Cunigan, 338 F.3d 535, 548 (6th Cir. 2003).

⁸ 3 Wayne R. LaFave *Search and Seizure* § 6.1(f) at 281 (3d ed. 1996).

they engage in a warrantless search negates the element of urgency necessary to justify a warrantless entry.⁹ A determination of this time-lapse issue is critical because it “appears to be the essence of ‘exigent circumstances’ that there was ‘the lack of time to obtain a warrant without thwarting the arrest or making it more dangerous. *Where time was adequate, failure to obtain a warrant should not be excused.*’”¹⁰

Although lapse-of-time issue is the most important issue in this appeal and the focus of much of Appellants’ briefs and arguments below, the Commonwealth’s brief does not address it. More importantly, the trial court’s order denying McDaniel’s and Stokes’s motions to suppress also does not fully address the issue since the order contains no specific finding addressing whether the trial court believed that the time lapse before the officers entered the apartment had any impact upon the exigency of the circumstances. Without this factual finding, we may not review this critical issue because the question of whether exigent circumstances existed to justify warrantless intervention is inherently fact-specific. Furthermore, it is well settled that we may only review, not

⁹ See, e.g., United States v. Minick, 455 A.2d 874 (D.C. 1983); State v. Welker, 683 P.2d 1110 (Wash.Ct.App. 1984); United States v. Chuke, 554 F.2d 260 (6th Cir. 1977).

¹⁰ State v. Johnson, 313 S.E.2d 580, 583 (N.C. 1984) (citing Latzer, Enforcement Workshop: Police Entries to Arrest—Payton v. New York, 17 Crim.L.Bull. 156, 165 (1981)) (emphasis added)."

make findings of fact,¹¹ nor may we review issues not fully addressed by the trial court.¹² So we must remand these cases to allow the trial court to make specific findings on the effect, if any, of the time lapse between the officers' arrival on the scene and their entry into the apartment on the existence of exigent circumstances. We are prohibited from addressing whether the officers acted within the bounds of the constitution when, after they entered the apartment, they seized the illegal drugs since the propriety of those seizures rests upon whether the officers' initial entry into the apartment was permissible.

For the foregoing reasons, the order of the Fayette Circuit Court denying McDaniel's and Stokes's motions to suppress are vacated; and the cases are remanded for further proceedings consistent with this opinion.

BARBER, JUDGE, CONCURS.

KNOFF, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KNOFF, JUDGE, DISSENTING: Respectfully, I dissent from the result reached by the majority opinion. Generally, I would agree with the majority that the lapse of time between when the officers arrived on the scene and when they entered the apartment would be relevant to determine whether exigent circumstances existed justifying a warrantless search. But even

¹¹ Parrigin v. Sawyer, 457 S.W.2d 504, 506 (Ky. 1970).

¹² Regional Jail Authority v. Tackett, 770 S.W.2d 225, 228 (Ky. 1989).

without a warrant, the officers at the scene were entitled to continue knocking at the door to elicit a response. The trial court found that Stokes voluntarily answered the door. Stokes's appearance and demeanor further roused the officers' suspicions that domestic abuse was occurring. Stokes denied that anyone else was present in the apartment but changed her story after Officer Richmond saw someone standing in the back bedroom. The individual refused to step out of the darkened apartment or show his hands. Furthermore, Officer Masterson testified that he had heard a weapon being prepared for use inside the apartment.

If Stokes had not answered the door, I would agree with the majority that the thirty minutes which elapsed between the officers' arrival and the search would weigh against a finding of exigent circumstances. But once Stokes opened the door, new circumstances presented themselves which heightened the urgency of the circumstances. Given the trial court's findings regarding the facts known to the officers at the time they entered the apartment, I would find that there were exigent circumstances justifying their warrantless entry into the apartment. Once the officers were lawfully inside the apartment, they were entitled to seize any incriminating items which were in plain view. Consequently, I disagree with the majority that this matter must be remanded for additional factual findings.

BRIEFS FOR APPELLANTS:

Marie Brannon
Frankfort, Kentucky

BRIEFS FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Michael L. Harned
Assistant Attorney General
Frankfort, Kentucky