

No. 33289 *State of West Virginia v. Kenneth Bookheimer*

and

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Benjamin, Justice, dissenting:

I agree with the principle espoused by the majority that the protection of citizens from unwarranted search and seizure by the state is a valuable right entitled to great protection. However, I believe the majority opinion goes far beyond the protections heretofore recognized by this Court and by the United States Supreme Court in situations such as the case before us, and establishes a rigidity of unreasonableness which infringes upon other potential rights, exigencies and obligations of the state.

Here, I fear the majority's understandable zeal for protecting the sanctity of one's home from unreasonable searches and seizures ironically may have the harmful effect of placing the safety of innocent persons, particularly those who are unable to speak for or defend themselves, in jeopardy. By ignoring any meaningful balancing as required by our search and seizure jurisprudence, I fear the majority opinion in this matter could have the unfortunate effect of placing the lives of victims of domestic violence in harm's way. Now,

police responding to an emergency domestic violence call may be stopped in their duties by the unverified representation that all is well by the first person they encounter at a residence where violence has been reported and is reasonably suspected. An abuser may now stop, or effectively delay, the police from rendering assistance and aid to a victim spouse or child by precluding the law enforcement officer from entering a home to verify the well-being of all present. And while the argument can be made that all the victim would have to do is request assistance or inform the police that he or she is injured, the reality is that responding law enforcement officers have no way of knowing who may be at risk within a residence when they respond to such an emergency call. Many domestic violence victims live in fear and, so long as the abuser is present, will not contradict their abuser's representation to the police that all is well and there is no need for assistance. Moreover, responding to an emergency domestic violence call places the responding police officers themselves at an increased risk of harm. No reading of either the United States Constitution or West Virginia Constitution supports the proposition that such valid concerns should be disregarded or even minimized. The specific exigencies of the situation must be balanced – a task best suited to trial courts – and reasonable expectations of privacy should be considered.

In the instant matter, law enforcement was alerted to a potential domestic violence incident with gunshots fired by way of an anonymous 911 telephone call.¹ Upon

¹The majority's perfunctory dismissal of the validity of this call is troubling to me.
(continued...)

arriving at scene, law enforcement personnel found Appellant Jessica Marie Tingler (hereinafter “Ms. Tingler”) outside the mobile home in an agitated state.² Upon questioning, she denied any domestic dispute and indicated to deputies that Appellant Kenneth Bookheimer (hereinafter “Mr. Bookheimer”) was in the mobile home. Thereafter, the officers entered the mobile home to verify the location and condition of Mr. Bookheimer. At that time, the officers noticed evidence of a clandestine drug lab in plain view. After hearing all testimony at the suppression hearing, the trial court specifically found: 1) at the time they entered the premises, the officers did not know if Mr. Bookheimer “had been injured in the reported incident of domestic violence or if he was in the residence with a weapon”; 2) “that exigent and emergency circumstances existed in that [Mr. Bookheimer]

¹(...continued)

To justify its holding in this case, the majority likens the 911 caller to an informant without a proven track record, thereby casting doubt on the very presence of law enforcement at the Tingler residence. I believe this analogy ignores the reality of domestic violence situations where neighbors and friends seek to obtain assistance for the victim, but fear disclosure of their identity due to the likelihood of retaliation or alienation of the victim. Does the majority really intend for law enforcement to ignore anonymous calls regarding domestic violence situations because the validity of the information cannot be independently verified? I worry that such may be the unintended consequence of the majority’s opinion.

²After listening to all of the testimony at the suppression hearing, the trial court specifically found that Ms. Tingler was “in what the officers described as an agitated state when they arrived.” Ignoring this factual finding by the trial court, the majority substitutes its judgment for that of the trial court finding that Ms. Tingler’s “anger and yelling were not caused by circumstances occurring prior to the arrival of the officers. Rather, [the majority now concludes,] her agitation was aimed at the fact that the officers were present on her property.” Majority opinion, p. 10. I believe it to be improper for this Court to so cavalierly disregard the record and the findings of a trial court (made after seeing and comprehending all forms of evidence not readily available or apparent to an appellate court on its review of a cold record) on such factual issues.

could have presented a danger to officers or others if he had been inside the residence with a weapon”; 3) “that exigent and emergency circumstances existed [because Mr. Bookheimer] could have been inside the residence injured based upon the report of domestic violence with a weapon being discharged and the agitated state in which the officers found Jessica Tingler”; and (4) the “officers had a right to enter the residence based on the said exigent and emergency circumstances to determine if [Mr. Bookheimer] was present and armed with a weapon or injured.”

As the majority correctly recognizes, under our law:

When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court’s findings are reviewed for clear error.

Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996). Recently, this Court recognized the inherently factual nature of exigent circumstances, finding that whether exigent circumstances exist is generally a question which should be left to the finder of fact. *See State v. Kendell*, 219 W. Va. 686, 694, 639 S.E.2d 778, 785-6 (2006) (*per curiam*) (finding that whether exigent circumstances exist to justify a warrantless entry into a home to secure the arrest of the defendant presents question of fact for jury resolution). However,

instead of affording the appropriate deference to the trial court’s factual findings, the majority has substituted its judgment³ and credibility determinations for that of the trial court and, in so doing, has failed to properly justify its findings under the applicable, established principles of law regarding exigent circumstances, protective searches and warrantless entries into homes.

The preeminent case of exigent circumstances or the emergency doctrine exception to our constitutional warrant requirement is *State v. Cecil*, 173 W. Va. 27, 311 S.E.2d 144 (1983). Therein, this Court recognized that the warrantless entry into a mobile home to attempt to locate a missing and possibly injured child was proper under the “emergency doctrine” exception to the warrant requirement where the record did not indicate the entry was motivated by an intent to make an arrest or secure evidence. Explaining the scope of its holding in *Cecil*, this Court stated in *Wagner v. Hedrick*, 181 W. Va. 482, 489, 383 S.E.2d 286, 293 (1989), that

[w]e adopted the emergency doctrine in *State v. Cecil*, 173 W. Va. 27, 311 S.E.2d 144 (1983), in which we held that the emergency doctrine permitted “a limited, warrantless search or entry of an area by police officers where (1) there is an immediate need for their assistance in the protection of human life, (2) the search or entry by the officers is motivated by an emergency, rather than by an intent to arrest or secure evidence, and (3) there is a reasonable connection between the emergency

³See footnote 2, *supra*.

and the area in question.” *Id.* 173 W. Va. at 32, 311 S.E.2d at 149.

The application of the emergency doctrine requires the existence of a “compelling need to render immediate assistance to the victim of a crime, or insure the safety of the occupants of a house when the police reasonably believe them to be in distress and in need of protection.” *Id.* at 150 (citing *State v. Kraimer*, 99 Wis.2d 306, 315, 298 N.W.2d 568, 572 (1980)).

In the instant matter, law enforcement arrived at the Tingler residence after having been notified of a domestic dispute with gun shots having been fired. The officers found Ms. Tingler outside the mobile home in an agitated state. She denied anything was wrong, asked them to leave and refused their entry into the mobile home even though she admitted Mr. Bookheimer was inside. Having a reasonable suspicion that gunshots had been fired based upon the 911 report, the officers were confronted with a situation where they had knowledge of at least two people on the premises, only one of which was visible, and a report of gunshots. In such a circumstance, I do not find the trial court was clearly wrong in its factual determination that the officers were justified in entering the mobile home to determine if Mr. Bookheimer was injured based upon the report of domestic violence with a weapon fired and Ms. Tingler’s demeanor. Entry into the mobile home was necessary to determine if Mr. Bookheimer was injured and in need of assistance. There was no evidence that entry into the mobile home was motivated by an attempt to secure evidence.⁴ Further,

⁴That the officers may have been alerted to the possibility of drugs in the home is insufficient, without more, to find that their entry into the mobile home was motivated by an
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there was a reasonable connection between the emergency and the area entered as Ms. Tingler had told the officers that Mr. Bookheimer was in the mobile home. Thus, the requirements of *Cecil* were met herein by the officers' entry into the mobile home.

Because the trial court was not clearly wrong in its factual determination that exigent and emergency circumstances existed to permit the officers to enter the mobile home without a warrant, the trial court did not err, in my opinion, in denying the motion to suppress to the extent the evidence of the clandestine drug laboratory was in plain view in this initial entry.⁵ Contrary to the majority's finding, I believe that a simple denial of a reported domestic violence incident by one of the purported participants is insufficient to remove a reasonable suspicion that there may be an injured person nearby, particularly where gunshots fired had also been reported.

The report of gunshots being fired provides additional justification for the initial entry into the mobile home to secure Mr. Bookheimer. In syllabus points 5-8 of *State*

⁴(...continued)
attempt to secure evidence where the officers were dispatched to the scene to respond to a reported domestic violence incident with gunshots fired.

⁵A suggestion was made that at least one of the officers re-entered the mobile home without a warrant after Mr. Bookheimer had been found to be uninjured and secured. To the extent that an officer may have re-entered the mobile home after exigent or emergency circumstances had ceased due to the securing of Mr. Bookheimer, any evidence obtained during the re-entry may properly be subject to a suppression motion.

v. Lacy, 196 W. Va. 104, 468 S.E.2d 719 (1996), former Justice Cleckley, writing for the Court, set forth the parameters of law enforcement's ability to conduct a warrantless protective sweep for weapons in light of constitutional search and seizure concerns in this jurisdiction. Therein, this Court held:

5. Law enforcement officials may interfere with an individual's Fourth Amendment interests with less than probable cause and without a warrant if the intrusion is only minimal and is justified for law enforcement purposes. To determine whether the intrusion complained of was minimal, a circuit court must examine separately the interests implicated when the police feel a search for weapons is necessary to keep the premises safe during the search and the privacy interests of the defendant to be free of an unreasonable search and seizure of his or her residence. Only when law enforcement officers face a circumstance, such as a need to protect the safety of those on the premises, and a reasonable belief that links the sought after information with the perceived danger is it constitutional to conduct a limited search of private premises without a warrant.

6. Neither a showing of exigent circumstances nor probable cause is required to justify a protective sweep for weapons as long as a two-part test is satisfied: An officer must show there are specific articulable facts indicating danger and this suspicion of danger to the officer or others must be reasonable. If these two elements are satisfied, an officer is entitled to take protective precautions and search in a limited fashion for weapons.

7. The existence of a reasonable belief should be analyzed from the perspective of the police officers at the scene; an inquiring court should not ask what the police could have done but whether they had, at the time, a reasonable belief that there was a need to act without a warrant.

8. A protective search is defined as a quick and limited search of premises for weapons once an officer has individualized suspicion that a dangerous weapon is present and poses a threat to the well-being of himself and others. This cursory visual inspection is limited to the area where the suspected weapon could be contained and must end once the weapon is found and secured.

The trial court specifically found that the officers responding to the domestic violence call herein were justified in entering the mobile home to determine if Mr. Bookheimer was inside with a weapon.

It bears repeating that the officers were responding to a call reporting gunshots fired. I find the majority's attempt to minimize this fact unpersuasive. Under the majority's reasoning, law enforcement would only be permitted to search for weapons if they actually heard the gunshots fired. That is not the law of this State as set forth in *Lacy*. Under *Lacy*, an officer is justified in conducting a protective sweep for weapons if there are "specific articulable facts indicating danger and this suspicion of danger to the officer or others must be reasonable." Syl. Pt. 6, *Lacy*. The trial court was not clearly wrong in finding that the report of gunshots coupled with Ms. Tingler's demeanor justified the officer's entry into the mobile home to determine if Mr. Bookheimer was armed. To the contrary, the majority has apparently decided this matter based upon its own view of what the officers *could* have done not "whether they had, at the time, a reasonable belief that there was a need to act without

a warrant.” *See*, Syl. Pt. 7, *Lacy*.⁶ Because I believe the trial court did not err in denying the motion to suppress based upon its factual finding of the existence of exigent circumstances and the need for a protective sweep for weapons, I respectfully dissent.

⁶In footnote 14 of *Lacy*, 196 W. Va. at 115, 468 S.E.2d at 730, this Court explained:

Officers should be permitted to search for a suspected weapon and secure it if the officers have a reasonable belief that failure to secure the weapon will endanger themselves or private citizens. Although there is no ready test for determining reasonableness other than by balancing the need to search [or seize] ... [and such searches involve a] severe, though brief, intrusion upon cherished personal security, this Court finds limited searches are reasonable when weighed against the interest in crime prevention and detection, . . . and the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for a search even though something has raised the officers’ suspicions of danger.

(Internal quotations and citation omitted).