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State of Nevada v. Charles Wade McCall, 138 Nev. Adv. Op. 64 (Sep. 22, 2022)

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CRIMINAL LAW: A PROTECTIVE SWEEP DOES NOT REQUIRE A PRIOR ARREST

Summary

In an opinion written by Justice Stiglich, the Court clarifies whether a protective sweep is lawful when a prior arrest did not occur. The Court looked to other courts to determine if a prior arrest should be a requirement of a protective sweep. The majority approach adopted by courts was that an arrest does not have to occur prior to a protective sweep. This Court agreed with the majority approach and analyzed the lawfulness of the protective sweep in this case. Although the protective sweep in this case occurred before an arrest was made, the Court still found the protective sweep to be unconstitutional because a protective sweep is deemed permissible where there are articulable facts that would support a reasonable belief that the premises harbored a dangerous individual; and the Officers in this case did not testify to having a reasonable belief that the premises harbored a dangerous individual.

Background

Colette Winn resided in a home owned by respondent Charles McCall. Winn was on probation and was subject to a search clause that allowed officers to search her living quarters. One of Winn's two roommates, McCall, was an ex-felon, but was not on probation nor subject to a search clause. Winn's probation officer received an anonymous letter claiming Winn was engaging in criminal activity with ex-felons and warned the probation officer to be careful because weapons might be found. The letter did not specifically allege McCall was engaged in any illegal activity or was dangerous. After receiving the letter, Winn was arrested at the probation office and told the officers that she lived with McCall and Santos. Officers later learned McCall was an ex-felon and not subject to supervision.

Winn and eight officers headed to Winn's home to search her place of residence pursuant to the search clause of the probation agreement. Three officers guarded the sides and rear of the home, as four other officers in tactical gear banged on the door, allowing themselves into the home with a key code provided by Winn. When the officers entered the home, they encountered both McCall and Santos. McCall complied with the officers to reenter his room. Three officers followed him into his room and without his consent conducted a sweep of his room. An officer observed shotgun shells on McCall's dresser and detained McCall because they believed they would find guns as well. After being read his *Miranda* rights, McCall admitted to having firearms in the bedroom and identified them to the officers. The officers then obtained a search warrant to further search the home and McCall's vehicle. In his bedroom and vehicle, officers found and seized three firearms, a credit embosser, blank credit card stock, and other items.

McCall was charged with one count of establishing or possessing a financial forgery laboratory, three counts of ownership or possession of a firearm by a prohibited person, and five counts of possession of document or personal identifying information. McCall filed a motion to suppress, arguing that the protective sweep violated his Fourth Amendment rights. The State opposed, and an evidentiary hearing was held by the district court. Officers at the hearing testified that they went into the home with the intention of conducting a protective sweep of the

¹ By Kiana Parkes.

home before they went directly to Winn’s room, explaining that whenever they go into a residence, they always make sure no other people are there. The district court determined that “there was no lawful basis for the protective sweep” because (1) there was no arrest preceding the protective sweep and (2) the officer “failed to testify to a reasonable belief based on specific and articulable facts that the area to be swept harbored an individual posing a danger to those on the scene.” The district court held there were no exigent circumstances to warrant the protective sweep and therefore the suppressed items seized during the sweep, and those obtained from the search warrant, are fruit of the poisonous tree. The State appeals.

Discussion

A protective sweep does not require a prior arrest

The district court determined that a protective sweep requires a prior arrest. The State argued that law enforcement may conduct a protective sweep before an arrest and that the “reasonableness balancing required by the Fourth Amendment weighs towards allowing probation officers to conduct protective sweeps in non-arrest scenarios.” The Nevada Supreme Court reasoned that a protective sweep is an exception to the Fourth Amendment protection against unreasonable searches and seizures and is permissible when an officer holds “a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others.”² A protective sweep serves as a cursory inspection of places where a person may be found and “lasts” no longer than is necessary to dispel the suspicion of danger.³

The United States Supreme Court has not decided whether a protective sweep requires a prior arrest, so the Court examined the approach other courts have adopted. The New Jersey Supreme Court held that an arrest is not required to conduct a protective sweep where (1) the officers are lawfully on the premises, (2) the officers “have a reasonable articulable suspicion that the area to be swept harbors an individual posing a danger,” (3) the sweep is conducted quickly, and (4) it is restricted to areas in which the persons posing a danger could hide.⁴ The United States Court of Appeals for the Eleventh Circuit also ruled that an arrest is not required prior to a protective sweep where the officers had a reasonable belief that there was another individual present who could do them harm.⁵ The First, Second, Fifth, Sixth, and D.C. Circuits agree that police have the right to conduct a protective sweep whether the police entered lawfully with an arrest warrant, search warrant or exigent circumstances.⁶ The Tenth Circuit ruled that a protective sweep “may precede an arrest, and still be incident to that arrest, so long as the arrest follows quickly thereafter.”⁷

² Maryland v. Buie, 494 U.S. 325, 327 (1990).

³ *Id.* at 335–36.

⁴ State v. Davila, 999 A.2d 1116, 1119 (N.J. 2010).

⁵ United States v. Caraballo, 595 F.3d 1214, 1224–25 (11th Cir. 2010).

⁶ United States v. Martins, 413 F.3d 139, 150 (1st Cir. 2005); *see* United States v. Miller, 430 F.3d 93, 99 (2d Cir. 2005); United States v. Gould, 364 F.3d 578, 586 (5th Cir. 2004), *abrogated on other grounds by* Kentucky v. King, 563 U.S. 452 (2011); United States v. Taylor, 248 F.3d 506, 513 (6th Cir. 2001); United States v. Patrick, 959 F.2d 991, 996–97 (D.C. Cir. 1992), *abrogated on other grounds by* United States v. Webb, 255 F.3d 890 (D.C. Cir. 2001).

⁷ United States v. Torres-Castro, 470 F.3d 992, 997 (10th Cir. 2006).

The Court agreed with the majority approach but declined to adopt a per se rule requiring an arrest before a protective sweep. The Court only concluded that a “protective sweep is permissible where there are articulable facts that would cause a reasonably prudent officer to believe that the area to be swept harbors an individual who poses a danger to those at the scene.”

The district court correctly concluded that the protective sweep was unlawful

As discussed above, an officer needs articulable facts that would warrant a reasonably prudent officer to believe that the area to be swept harbors an individual who poses a danger. The district court found that the officers did not meet this standard because they did not testify to a reasonable belief that the premises harbored a dangerous individual, and thus concluded the protective sweep unlawful.⁸

Police testified that they always do a protective sweep whenever they go into a residence. The State argued that there were articulable facts that supported the officers’ decision to conduct a protective sweep of McCall’s bedroom. McCall opposed, arguing that there were no facts that justified the protective sweep of his room, and that the officers should have been limited to searching only what was within Winn’s control. The Court handled these arguments by emphasizing the test in *Hayes*, which notes that it is insufficient to merely point to the possibility that a dangerous individual could be there because then officers would justify their protective sweeps after the fact.⁹ The officers in this case testified that the protective sweeps were “standard operating procedure” which further proved that the officers did not consider whether the circumstances presented articulable facts that would support a reasonable belief that the premises harbored a dangerous individual. Therefore, the officers’ practice of always conducting a protective sweep regardless of articulable facts is unconstitutional.

This Court agreed with the district court rendering the search in this case as unlawful, but the district court did not specify which pieces of evidence were seized and need to be suppressed. The oral arguments of both parties could not clarify this matter, so the case was vacated in part and remanded to the district court for further clarification.

Conclusion

Protective sweeps are conducted to ensure officer safety and are deemed permissible when the officer can articulate that there was a reason to believe the premises harbored a dangerous individual. The Court holds that a protective sweep does not require a prior arrest but refuses to make a per se rule. Further, the Court affirms the district court’s suppression order in part because the warrantless protective sweep here did violate McCall’s Fourth Amendment rights. The Court vacates in part and remands to the district court to clarify which pieces of evidence were seized and should be suppressed.

⁸ *Hayes v. State*, 106 Nev. 543, 550, 797 P.2d 966 (1990).

⁹ *Id.* at 552, 797 P.2d at 967.