[Cite as *State v. Koon*, 2015-Ohio-1326.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26296
	:	
v.	:	T.C. NO. 13CR1439/1
	:	
JASON L. KOON	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 3rd day of April, 2015.

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HALL, J.

{¶ 1} Jason L. Koon appeals from his conviction and sentence following a no-contest plea to charges of illegal cultivation of marijuana, endangering children, and possession of criminal tools.

{¶ 2} In his sole assignment of error, Koon challenges the trial court's denial of his

motion to suppress marijuana and other drug-related evidence found inside his home.

{¶ 3} The charges against Koon stemmed from the Kettering Police Department's investigation of a suspected marijuana "grow" operation being conducted inside his residence. Suppression-hearing testimony reflects that the investigation began after police received a complaint about illegal dumping at a nearby apartment complex. In a dumpster at that complex, police found trash bearing Koon's name and addressed to him at 1500 Sacramento Avenue. The trash included a large shipping box for a "hydro grow light." (Suppression Tr. at 6). Police learned that Koon shared the residence at 1500 Sacramento Avenue with Molly Anderson. (*Id*. at 7). An officer then drove past the residence, saw several people standing on the porch, and smelled marijuana from his cruiser. (*Id*. at 7-8). Approximately one week later, police subpoenaed DP&L bills for 1500 Sacramento Avenue and two other comparable houses. (*Id*. at 10). The bills showed that electricity use at 1500 Sacramento Avenue was "extremely elevated" relative to the other two houses. (*Id*. at 11). Specifically, the electricity usage at 1500 Sacramento Avenue averaged approximately three times more than at the other locations. (*Id*. at 37).

{¶ 4} Two weeks after receiving the first illegal-dumping complaint, police received another such complaint. Officers responded to the same apartment complex and looked inside a dumpster. They saw bags of trash containing mail addressed to Koon and Anderson at 1500 Sacramento Avenue. Inside those bags, they saw marijuana stems, leaves, and "hydroponic fertilizer stuff." (*Id*. at 12-13). After collecting this evidence, police commenced surveillance on 1500 Sacramento Avenue and began drafting a search-warrant affidavit. (*Id*. at 14). Before completing the affidavit and seeking a warrant, however, Detective Kevin McGuire and another detective approached 1500 Sacramento

Avenue to attempt a "knock and talk." (*Id*. at 15). As they neared the house, the detectives saw Anderson in the yard. They identified themselves and told her they needed to talk to her about a grow operation. (*Id*. at 15). Anderson responded by expressing disbelief and informing the detectives that she was pregnant and needed to use the restroom. (*Id*. at 15-16). Detective McGuire then told her: "* * * [Y]ou know, you've got to talk to us for a second. You know, we need to figure out what's going on here. You know, we're asking for your cooperation to see if we can take a look inside the house, collect evidence and then we'll be on about, you know, our way." (*Id*. at 16). Detective McGuire described what happened next as follows:

> She said—you know, asked me if I was joking and kind of was upset and started walking in towards the house; "I've got to pee. I've got to pee." And she said, "Just come in with me. You can come in with me," or something to that nature. I followed her. She opened up the front door of the house. I could smell the marijuana odor immediately. I started to follow her inside, and she went to the hallway bathroom with the door open and went to the bathroom.
>
> When she walked inside, she yelled down towards the—I guess, to the basement, "The detectives are effing here and they're effing here; I'm not joking," or something along that—those lines and let them—let whoever was in the basement know that we were there.

(*Id*.).

{¶ 5} Koon then came upstairs from the basement and stepped outside with

Anderson and another family member identified only as a mother in-law. Once outside, McGuire reiterated that police knew a grow operation was being conducted inside the house. He again requested cooperation from Koon and Anderson and sought permission "to go ahead and remove the evidence." (*Id*. at 17-18). Koon and Anderson refused to grant the detectives permission and asked to see a search warrant. (*Id*.). At that point, the detectives waited for additional officers to arrive. According to McGuire, police then "performed a protective sweep of the house to make sure nobody else was inside and secured the house." (*Id*.). When asked why he believed a protective sweep was necessary, McGuire responded:

> We knew that there was a grow operation in the house. All evidence led to that. There was the possibility of the destruction of evidence if there was somebody else in the house, but the most important thing was that there was a possibility that we would be endangering other officers bringing them to the scene without clearing the house and making sure that nobody else was there that could harm any of the officers on the scene.

(*Id*. at 17-18).

{¶ 6} When asked specifically whether there was any particular reason why he thought more people might be inside the house, McGuire stated:

> Obviously, there's cars lined up and down the street. This is an area of a park. It's right next door to a park, so there's—there's often cars parked all around in the area of the house and everything, and we weren't sure who was in the house, who was in the basement or any other area of the house where I had not been. Based on the fact that there was a grow operation in

> the basement, typically, * * * anytime there is a grow operation, you know, it's typically—excuse me. It's—my experience is that it involves more than one person to take care of the plants as well as the amount of product that they get typically is distributed, so there is people involved in and out of a house that has a grow operation.

(*Id*. at 19-20).

{¶ 7} When questioned further regarding his concern about someone else being in the house, McGuire added:

> Well, the officer's safety is the first and the most important concern that we had. Officer safety, and second would be the destruction of evidence. They know we're there already. She's announced it to use—to the house. "You know, detectives are here. The detectives are here. I'm not effing kidding."
>
> So at that point, we were exposed, and anybody we brought to the scene was our responsibility, you know. We're bringing them to the scene knowing that we've been exposed and they know that we're there.

(*Id*. at 20).

{¶ 8} While performing the protective sweep, McGuire and two other officers observed (1) "High Times" marijuana-grow magazines in a bedroom closet, (2) marijuana in a hallway closet, (3) soil and a "sifting screen" in an upstairs closet, (4) a marijuana potted plant and a bag of soil at the bottom of the basement stairs, (5) several marijuana plants, grow lights, and a watering system in another room, (6) a grow light with large marijuana plants in a bathroom, (7) a table with a pile of marijuana buds, and (8)

additional marijuana contained in jars, a plastic container, and baggies. (*Id*. at 22-23). McGuire estimated that the protective sweep took less than five minutes, and no one was found inside the home. (*Id*. at 23).

{¶ 9} After completing the sweep, McGuire posted officers at the front and rear of the house to await a search warrant. (*Id*. at 24). Although no evidence was removed from the house during the sweep, evidence observed inside during the sweep was mentioned in a warrant affidavit. (*Id*. at 25, 50). Police obtained the warrant and executed it that same day. (*Id*. at 25). They recovered marijuana and related evidence that was the subject of a suppression motion.

{¶ 10} Based on testimony presented at the suppression hearing, the trial court declined to suppress the evidence. It reasoned that a protective sweep was justified after Anderson announced the detectives' presence to an unknown number of people inside the home. Therefore, the trial court found that McGuire and the other officers lawfully were inside when they saw the marijuana and other evidence. (Doc. #44 at 2). Following the trial court's ruling, Koon pled no contest to the charges set forth above. The trial court found him guilty and imposed a community-control sanction. (Doc. #54).

{¶ 11} On appeal, Koon contends a protective sweep was impermissible because police lacked reasonable, articulable suspicion that his house harbored one or more individuals who posed a danger to them. He also asserts that suppression of the evidence could not be avoided (1) based on an "inevitable discovery" theory or (2) by excising from McGuire's warrant affidavit all statements about evidence seen inside his house. Koon contends these approaches are precluded by *State v. Sharpe*, 174 Ohio App.3d 498, 2008-Ohio-267, 882 N.E.2d 960 (2d Dist.). Finally, Koon claims statements he made to

police after the protective sweep should have been suppressed under the derivative-evidence rule.

{¶ 12} For its part, the State maintains that the protective sweep was lawful. The State also argues that *Sharpe* is distinguishable and that even without reference to evidence seen during the sweep, McGuire's affidavit established probable cause. The State additionally asserts that Koon's statements to police were admissible.

{¶ 13} "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. "Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Id*.

{¶ 14} Here we see no meaningful dispute about the facts set forth above. The initial issue raised by Koon's assignment of error is whether those facts justified a protective sweep of his house. A "protective sweep" involves "a cursory inspection of those areas whether a person who possesses a threat of danger to the police may be found." *State v. Young*, 2d Dist. Montgomery No. 24537, 2011-Ohio-4875, ¶ 17. Although a protective sweep of a residence often occurs following a suspect's arrest, it also may occur when a suspect merely has been detained. *Id*. at ¶ 22. In either situation, however, a warrantless sweep is permitted only when " 'articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in

believing that the area to be swept harbors an individual posing a danger to those on the * * * scene.' " *Sharpe* at ¶ 36, quoting *Maryland v. Buie*, 494 U.S. 325, 334, 110 S.Ct. 1093, 108 L.Ed.2d 276. "The concern for the safety of officers, which justifies allowing officers to conduct warrantless protective sweeps following the arrest of a suspect, is just as applicable where the suspect has been detained while the officers attempt to ascertain the extent of the situation. In either case, the arresting officers would still have to have a reasonable, articulable suspicion that someone might be in the residence who could pose a threat in order to conduct even a limited protective sweep." *Young* at ¶ 23.

{¶ 15} In arguing that a protective sweep was impermissible, Koon contends his case is analogous to *Sharpe*. Police arrived at the defendant's residence in *Sharpe* to serve him with an arrest warrant for domestic violence involving his girlfriend. Police had reason to believe the defendant was armed, and an hours-long standoff ensued. The defendant eventually vacated the residence and was taken into custody. No weapon was found on him. Officers then performed a "protective sweep" of the residence to check for a firearm and other individuals that may have been involved or may have been inside. This court found the sweep unlawful, noting the absence of any "positive indication" that anyone else remained in the residence that might pose a danger. *Sharpe* at ¶ 46. This court reasoned: "Mere suspicion that a weapon remains inside is insufficient. Likewise, not knowing whether anyone else is there is an insufficient pretext because the need for protection necessarily implies that another person or persons are there. Faced with such doubts, and absent any reason to believe that other persons may be inside, officers must obtain a warrant before they conduct a search of a defendant's house after a defendant's arrest there." *Id*.

{¶ 16} As in *Sharpe*, Koon contends the officers in his case had no reason to believe anyone remained in his residence after he and the others went outside. Koon points out that the officers did not mention seeing or hearing anyone else. He claims the record contains no specific facts leading the officers to believe anyone remained in the house. Conversely, the State maintains that the officers reasonably believed other people might have been inside because Anderson had announced the detectives' presence to an unknown number of occupants who could have been involved in the suspected grow operation.[1]

{¶ 17} Upon review, we do not need to decide the protective-sweep issue. We see no error in the trial court's suppression ruling, even assuming arguendo that the sweep was unjustified. Notably, the subsequent search of Koon's home was conducted *with* a warrant issued by a judge. Only the last paragraph of Detective McGuire's affidavit in support of the warrant mentioned drug-related evidence seen inside the home during the sweep. If we excise that paragraph, the affidavit still contains sufficient untainted evidence to establish probable cause for a warrant. After setting forth his experience and qualifications, McGuire averred: (1) that a box addressed to Koon at 1500 Sacramento Avenue for a light fixture of the type used in marijuana grow operations was found in a nearby dumpster; (2) that utility records showed the electricity usage at 1500 Sacramento Avenue averaged three times higher than at two other houses of comparable size and utility configuration; (3) that police subsequently found trash bags in the same nearby

[1] The State also argues that a warrantless entry into Koon's residence was justified to prevent the destruction of evidence. Just like a protective sweep, however, a warrantless entry to prevent the destruction of evidence still requires a reasonable belief that someone remains inside the residence. *State v. Goode*, 2d Dist. Montgomery No. 25175, 2013-Ohio-958, ¶ 18.

dumpster with items bearing the names of Koon and Anderson and containing marijuana leaves, clippings, and stems as well as two empty hydroponic plant-growth nutrient bottles; and (4) that he smelled raw marijuana when Anderson opened her front door prior to entering the house during the "knock and talk" discussed above.

{¶ 18} In our view, the foregoing averments—which do not include the final paragraph of McGuire's affidavit detailing what police saw inside the home during the protective sweep—establish probable cause to believe a marijuana grow operation was being conducted inside 1500 Sacramento Avenue. "The U.S. Supreme Court * * * has held that, after excising tainted information from a supporting affidavit, 'if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant was nevertheless valid.' " *State v. Bell*, 2d Dist. Greene No. 2012 CA 15, 2012-Ohio-4853, ¶ 14, quoting *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984). The ultimate inquiry " 'is not whether the underlying affidavit contained allegations based upon illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause.' " *Id*., quoting *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 17.[2] *See also State v. Booker*, 2d Dist. Montgomery No. 11255, 1989 WL 140201, *4 (Nov. 20, 1989) (recognizing that "[i]f sufficient untainted evidence is present in the warrant affidavit to establish probable cause, the warrant is

[2] In *Gross*, the Ohio Supreme Court found no need to decide "whether officer observations made during the initial, warrantless entry into Gross's trailer could constitute grounds for a search warrant because, even assuming arguendo that they could not, the search warrants properly issued." *Gross* at ¶ 17. The court reasoned: "Here, the officers' observations during the initial entry into Gross's trailer are not critical to establishing probable cause. Excising the observations, we conclude that the remainder of the supporting affidavit independently suffices to establish probable cause for the search warrants." *Id*.

valid").

{¶ 19} Here the officers' observations during the protective sweep were not critical to the existence of probable cause. Because McGuire's affidavit establishes probable cause without considering anything observed during the sweep, we see no error in the denial of Koon's suppression motion even if the sweep was unlawful. In reaching this conclusion, we reject Koon's argument that *Sharpe* precludes determining whether probable cause exists after excising challenged evidence from an affidavit. In *Sharpe*, police conducted an unlawful protective sweep based on their belief that a firearm remained inside the defendant's home after his arrest. During the sweep, they discovered drugs in the home. Immediately after the sweep, police obtained a search warrant. The drugs seen during the unlawful sweep provided "the basis for probable cause to obtain the warrant[.]" *Sharpe* at ¶ 31.Because the information establishing probable cause was illegally obtained, the warrant was irreparably tainted, and the evidence seized was subject to suppression. *Id*. at ¶ 65.

{¶ 20} In *Sharpe*, this court rejected an argument that police could have obtained a warrant, prior to the protective sweep, based on probable cause to believe a firearm was inside the defendant's home. The State argued that upon executing such a warrant police would have found the drugs and, therefore, that the drugs were admissible under the inevitable-discovery doctrine. This court disagreed, reasoning:

> A legitimate, alternative line of investigation that would inevitably have resulted in the same evidence being discovered is necessary in order to apply the inevitable discovery rule. * * * In the present case, police were not actively pursuing any alternative line of investigation when they entered

> Sharpe's residence and discovered drugs. That the officers then had probable cause is subject to dispute. However, in any event, an illegal search conducted without a warrant, even when probable cause exists, is still illegal.

(Citations omitted.) *Id*. at ¶ 63.

{¶ 21} The most significant distinction between Koon's case and *Sharpe* is that Detective McGuire's affidavit established probable cause even without consideration of evidence seen during the protective sweep. In contrast, the affidavit in *Sharpe* depended on evidence observed during the warrantless sweep to establish probable cause. *See Sharpe* at ¶ 31, 65. That being so, the State in *Sharpe* did not raise the issue before us, namely whether observations during an allegedly unlawful protective sweep can be excised from a warrant affidavit. Instead, the State argued inevitable discovery based on a theory that police could have obtained a warrant to retrieve a gun in the house and, upon doing so, would have seen the drugs. Because *Sharpe* did not address the issue we face, it does not conflict with our analysis herein.[3]

{¶ 22} Based on the reasoning set forth above, we see no error in the trial court's denial of Koon's suppression motion even assuming arguendo that the challenged protective sweep was unlawful. The assignment of error is overruled, and the judgment of

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[3] In *Sharpe*, this court did opine that "when information supporting probable cause for a search warrant was illegally obtained, the warrant is irreparably tainted, and any evidence obtained pursuant to the warrant must be suppressed." *Sharpe* at ¶ 30. But the illegally-obtained information in *Sharpe* did not merely "support" probable cause. It alone *supplied* probable cause. *Sharpe* did not address whether suppression is required when probable cause exists even after improperly-obtained supporting information is excised from a warrant affidavit. The case law discussed above demonstrates that suppression is not required in such a situation.

the Montgomery County Common Pleas Court is affirmed.

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FAIN, J. and WELBAUM, J., concur.

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