[Cite as *State v. Burks*, 2010-Ohio-658.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92736

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

JUDITH BURKS

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516637

BEFORE: Jones, J., Cooney, P.J., and Blackmon, J.

RELEASED: February 25, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Plaintiff-appellant, the state of Ohio ("the state"), through counsel, appeals the decision of the lower court granting a motion to suppress. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the judgment of the lower court.

STATEMENT OF THE CASE

{¶ 2} On October 14, 2008, the Cuyahoga County Grand Jury returned a two-count indictment against defendant-appellee, Judith Burks ("Burks"), a 21-year-old male, in Case No. CR-516637. Count 3 of the indictment charged Burks with drug trafficking in violation of R.C. 2925.03(A)(2). Count 4 of the indictment charged Burks with possession of criminal tools in violation of R.C. 2923.24(A). Counts 1 and 2 did not pertain to Burks.

{¶ 3} On January 9, 2009, Burks filed a motion to suppress evidence, and on January 13, 2009, a suppression hearing was held. At the conclusion of the hearing, the trial court granted Burks's motion to suppress evidence and statements.

STATEMENT OF THE FACTS

{¶ 4} On September 19, 2008, members of the Third District Vice Unit of the Cleveland Police were conducting a buy-bust operation with the assistance of confidential informants. The police were focused on a specific location near East 67th Street, south of St. Clair Avenue, in Cleveland, Ohio. Lieutenant Barrow ("Barrow") was positioned in a marked zone car, one block south of East 67th

Street. After being in position for approximately five minutes, Barrow received radio communication from the undercover detectives that the drug sale was complete. The police approached 1062 East 67th Street and observed two or three males on the porch and Burks standing inside the doorway of the home.

{¶ 5} The police detained the males on the porch. As Barrow approached Burks, Barrow heard a toilet flushing and the sound of running water from inside the house. Barrow believed this indicated that evidence was being destroyed. Barrow then entered the home and located the bathroom. Barrow found Burks's brother, Randy Burks, inside. However, in spite of his suspicion, Barrow did not find any evidence being destroyed.

{¶ 6} Upon returning to the living room, Barrow observed a large bag of marijuana on the floor next to Burks. Barrow picked up the bag and asked to whom the bag belonged. Barrow testified that Burks responded that it was his bag. However, Burks denied that the marijuana was his and testified that he was threatened by the officers that if he did not admit that the marijuana was his, the police would be forced to arrest his 79-year-old grandmother. Burks testified that, after hearing that his grandmother would be arrested, he stated that the marijuana was his and was then placed under arrest.

ASSIGNMENTS OF ERROR

{¶ 7} The state assigns two assignments of error on appeal:

{¶ 8} [1.] "Exigent circumstances justified the warrantless entry of a house by law enforcement officers after one officer heard a toilet flushing during the buy-bust operation."

{¶ 9} [2.] "Defendant-appellee was given his *Miranda* warnings prior to making an incriminating statement to law enforcement officers."

LEGAL ANALYSIS

Warrantless Entry

{¶ 10} The state argues in its first assignment of error that exigent circumstances justified the warrantless entry of a house by law enforcement officers after one officer heard running water and a toilet flushing during a buy-bust operation. However, a review of the evidence in the case at bar demonstrates that the circumstances did not justify the warrantless entry of the house.

{¶ 11} It is well settled law that warrantless searches are presumptively unreasonable under the Fourth Amendment to the United States Constitution, subject to certain exceptions. *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 454-455, 91 S.Ct. 2022, 2026, 29 L.Ed.2d 564. The four exceptions to the warrant requirement are: (1) an emergency situation; (2) search incident to an arrest; (3) hot pursuit; and (4) easily destroyed or removed evidence. Id.

{¶ 12} Here, the state argues that the police officer who entered the home without a warrant did so because he heard running water and a toilet flushing, and therefore assumed that the suspects were destroying evidence. "A warrantless entry into a residence may be justified in some circumstances in which evidence is in danger of being removed or destroyed in the amount of time it would take police to obtain a warrant." Katz, Ohio Arrest, Search and Seizure 592 (1998 Ed.) 171,

§T10.02; see, also, *State v. Hickson* (1990), 69 Ohio App.3d 278, 280, 590 N.E.2d 779.

{¶ 13} However, the record demonstrates that there was no applicable exception involved in this search. The evidence that first prompted the police to believe that a crime was being committed stemmed from a police investigation and buy-bust operation focused on a specific location of East 67th Street, south of St. Clair Avenue, where the unit had received citizen complaints concerning drug activity. Undercover vice detectives were positioned in an unmarked car near 1062 E. 67th Street.[1]

{¶ 14} This particular investigation involved a great deal of planning and police personnel. The operation was significant, and involved "a cooperating civilian, officers, including 'maybe five (5) take down officers, two (2) undercover detectives, and at least two (2) uniform officers.'"[2] Due to the extensive planning and organizing, it would not have been difficult for the police to secure a warrant prior to implementing the buy-bust operation.

{¶ 15} Moreover, the police were already well aware of the area in question and had a good idea where the activity was going to take place. In addition, the investigation was conducted with the "assistance of confidential informants" who knew the area and the parties involved and could have, and most likely did, provide detailed information to the police concerning what specific house was involved in the operation.

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[1]Tr. 9-10.

[2]Trial court's January 26, 2009 Order, p. 1; tr. 9-10.

{¶ 16} Thus, we cannot uphold a determination that the state proved sufficient exigent circumstances that would sanction a warrantless intrusion into the sanctity of someone's home under the circumstances in this case. We find no error on the part of the lower court.

{¶ 17} Accordingly, appellant's first assignment of error is overruled.

***Miranda* Warnings**

{¶ 18} The state argues in its second assignment of error that "[d]efendant-appellee was given his *Miranda* warnings prior to making an incriminating statement to law enforcement officers." However, a review of the evidence in this case demonstrates that the state's allegations are unfounded. The lower court's rationale is sound.

{¶ 19} In *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, the United States Supreme Court held that an individual must be advised of his or her constitutional rights when law enforcement officers initiate questioning after that person has been taken into custody or otherwise deprived of his or her freedom in any significant way. Any statement given under custodial police interrogation, without the *Miranda* warnings first being given, may later be excluded from use by the state in any resulting criminal prosecution. Id.

{¶ 20} Here, the police detained two or three individuals on the front porch and seized numerous bags of marijuana *on the porch*. In fact, Detective Sims

testified that he had no reason to believe that anyone was selling drugs "out of the house."[3]

{¶ 21} Although the drugs were recovered on the porch, Barrow stated that he heard running water and a toilet flushing inside the house and needed to go inside to prevent the destruction of evidence. Barrow went inside the house to the bathroom; however, he did not find any drugs. Barrow then returned to the living room where he recovered marijuana that was behind the couch.

{¶ 22} The police put Burks in handcuffs and asked if the marijuana was his. Burks testified that he told the police the marijuana was not his. Barrow then told Burks that if the marijuana was not his, then it must belong to the owner of the house, Burks's 79-year-old grandmother. Burks testified that it was only after hearing Barrow involve his grandmother, as the owner of the house, that he claimed ownership of the marijuana.

{¶ 23} A review of the transcript reveals the following testimony:

Q. "Did there every come a time when someone questioned you about the marijuana that was in the house?"

A. "Yes."

Q. "Do you recall at what point in time was it when you were questioned about the marijuana in the house?"

A. "A little bit later he showed it to the female officer then he started questioning me about it."

* * *

[3]Tr. 54.

Q. "Had you been given your Miranda Rights before he asked you about the marijuana?"

A. "No."[4]

{¶ 24} Burks also testified that he was held at gunpoint. Burks's statements were the product of direct questioning by Barrow. Barrow erroneously claimed that Burks's answer to his question was not a direct answer to the gunpoint interrogation, but rather "sort of a sudden utterance."[5] Barrow is a Cleveland police lieutenant with 30 years of law enforcement experience and his claim that he simply asked Burks a "spontaneous question" is insufficient, erroneous, and does not constitute a proper *Miranda* warning to Burks in this instance.

{¶ 25} Accordingly, we find the trial court's actions to be proper. Appellant's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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[4]Tr. 65-66.

[5]Tr. 34-35.

LARRY A. JONES, JUDGE

COLLEEN CONWAY COONEY, P.J.,
CONCURS IN JUDGMENT ONLY;
PATRICIA A. BLACKMON, J., CONCURS