REL: April 23, 2021



# Alabama Court of Criminal Appeals

## OCTOBER TERM, 2020-2021

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## CR-19-1110

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**State of Alabama**

**v.**

**Carla Gray and Randall Lipscomb**

**Appeal from Lee Circuit Court**
**(CC-19-878; CC-19-935)**

WINDOM, Presiding Judge.

The State of Alabama appeals the decision of the Lee Circuit Court to suppress evidence seized during a search of Randall Lipscomb's

residence. For the reasons that follow, this Court reverses the circuit court's decision and remands this cause for further proceedings.

On October 10, 2019, Carla Gray and Lipscomb were indicted for first-degree possession of marijuana, see § 13A-12-213, Ala. Code 1975, possession of drug paraphernalia, see § 13A-12-260, Ala. Code 1975, and fourth-degree receiving stolen property, see § 13A-8-19, Ala. Code 1975, based on evidence recovered during a search of Lipscomb's residence. Gray and Lipscomb moved separately to suppress the evidence; the circuit court held an evidentiary hearing on the defendants' motions on August 5, 2020. The State presented the testimony of Investigator Mitch Allen and Captain Van Jackson of the Lee County Sheriff's Office, and the following evidence was tendered.

Early in the morning hours of June 25, 2018, deputies with the Lee County Sheriff's Office were dispatched to the residence of Janerold Philpot based on a report that the odor of marijuana was emanating from the house. Deputies knocked on the front door. From there, the deputies could see individuals running toward a bathroom with large amounts of what appeared to be marijuana.

Deputies obtained and executed a search warrant for the residence. The individuals present were interviewed, and several, Lipscomb among them, told the deputies that they were at the Philpot residence to play poker with a buy-in of $40. Lipscomb and others were thereafter released.

On June 29, 2018, Inv. Mitch Allen obtained a warrant for Lipscomb's arrest on a charge of simple gambling, see § 13A-12-21, Ala. Code 1975. Inv. Allen, along with five other investigators, went to Lipscomb's residence on July 3, 2018, to execute the arrest warrant. Inv. Allen and Capt. Van Jackson stood on the front porch and knocked on the front door. The officers were greeted by Carla Gray, who identified herself as Lipscomb's girlfriend. Once the door was opened, both Inv. Allen and Capt. Jackson could smell the odor of marijuana emanating from the house. Capt. Jackson asked if he and Inv. Allen could enter the house to explain their presence; Gray allowed the officers into the foyer. Capt. Jackson told Gray they had an arrest warrant for Lipscomb and asked if he was present. Gray responded that he was not. Gray was asked but declined to give the officers consent to search the house. At this point, a search warrant for the residence was sought based on the investigators'

smelling the odor of marijuana. In the meantime the investigators secured the residence; the investigators did not search for, nor did they find, any contraband during their sweep of the residence. A search warrant was issued, and investigators executed the search warrant. In the laundry room investigators discovered a digital scale and a large quantity of marijuana sealed in gallon-sized zipper-storage bags. Additionally, investigators recovered several firearms from a closet and checked the serial numbers of the firearms. Inv. Allen testified that the serial-number check revealed that one of the firearms had been reported stolen in 1997.

The parties submitted post-hearing briefs. Gray and Lipscomb argued that their motions were due to be granted because the arrest warrant for simple gambling lacked probable cause and was pretextual and because the investigators' testimony – specifically that they could smell the odor of marijuana – was objectively unreasonable. The State argued that the question as to whether the arrest warrant was pretextual was a "wholly academic exercise because here the evidence was seized

after officers obtained a search warrant based upon probable cause for a residence where they were lawfully present." (C. 89.)

On September 18, 2020, the circuit court issued an order granting the defendants' motions to suppress. The circuit court found Inv. Allen and Capt. Jackson "to be reliable and [did] not question their honesty in this matter." (C. 104.) Nonetheless, the circuit court found that the motions to suppress were due to be granted because the simple-gambling warrant issued for Lipscomb's arrest was pretextual and without probable cause:

> "Randall Lipscomb was initially charged with simple gambling under Ala. Code 1975 § 13A-12-21(a). Simple gambling is defined as, 'a person commits the crime of simple gambling if he knowingly advances or profits from unlawful gambling activity as a player.' However, a defense of simple gambling is when it is a social game in a private place. In City of Birmingham v. Richard, 44 Ala. App. 127, 128, 203 So. 2d 692, 694 (Ala. Ct. App. 1967),
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> > " 'Public gaming is prohibited. However, when the gaming is in a private home and not such a continuous and repeated performance as to imply a public usage of the house for gaming [then the ordinance prohibiting gaming cannot have effect on the parties. ...] It is for the protection of those individuals who on occasion, privately and for "fun or amusement,' play for small sums.'

"The gambling events of June 25 that led to Investigator Allen's warrant of June 29 took place at a private residence .... There may be a dispute if the game was social or for small sums; however, in the affidavit charging Lipscomb with simple gambling the buy in for the game was stated to be $40.00 and was hosted by the homeowner Janerold Philpot. This was a game hosted at a private residence, by the homeowner, for a rather small 'buy in.' Further, while the Lee County Sheriff's Office was at the Philpot residence the night of June 25, they did not arrest Lipscomb that night. Instead, Investigator Allen waited for four days to secure an arrest warrant that he then elected to serve with a large number of officers at [Lipscomb's] home. This simple gambling charge was then dismissed by the State.

"Being engaged in a social game or activity for small amounts of money is a defense to the charge of simple gambling. It would seem that Mr. Lipscomb was engaged in a social game since the State elected to dismiss the simple gambling charge in District Court. The dismissal of the charge by the State, even with conditions, supports [Lipscomb and Gray's] contention that the issuance of the warrant for simple gambling was pretextual. Therefore, the Court cannot help but find this warrant to have been pretextual. In Ex parte Scarborough, 621 So. 2d 1006, 1010 (Ala. 1993), the Alabama Supreme Court stated, 'it is well established that '[a]n arrest may not be used as a pretext to search for evidence.' [621 So. 2d at 1008.] A pretextual arrest is one where a minor offense is used as a way of obtaining evidence believed related to a greater offense that law enforcement otherwise lacks probable cause to obtain. ..."

"....

> "The Court finds the warrant for simple gambling to be pretextual and without probable cause. This is further supported by the fact it was later dismissed. Therefore, the defendants' motions to suppress are hereby granted."

(C. 103-04; footnote omitted.) On September 21, 2020, the State timely filed a notice of appeal. See 15.7, Ala. R. Crim. P.

On appeal, the State does not challenge the circuit court's conclusion that the arrest warrant was pretextual. Instead, it argues, as it did below, that regardless of whether the arrest warrant was pretextual, the investigators had an objective legal basis on which to conduct the search of Lipscomb's residence. This Court agrees.

> "In reviewing a trial court's ruling on a motion to suppress, this Court reviews the trial court's findings of fact under an abuse-of-discretion standard of review. 'When evidence is presented ore tenus to the trial court, the court's findings of fact based on that evidence are presumed to be correct,' Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994); '[w]e indulge a presumption that the trial court properly ruled on the weight and probative force of the evidence,' Bradley v. State, 494 So. 2d 750, 761 (Ala. Crim. App. 1985), aff'd, 494 So. 2d 772 (Ala.1986); and we make ' "all the reasonable inferences and credibility choices supportive of the decision of the trial court." ' Kennedy v. State, 640 So. 2d 22, 26 (Ala. Crim. App. 1993), quoting Bradley, 494 So. 2d at 761. '[A]ny conflicts in the testimony or credibility of witnesses during a suppression hearing is a matter for resolution by the trial court.... Absent a gross abuse of discretion, a trial court's resolution of [such]

> conflict[s] should not be reversed on appeal.' Sheely v. State, 629 So. 2d 23, 29 (Ala. Crim. App. 1993) (citations omitted). However, '"[w]here the evidence before the trial court was undisputed the ore tenus rule is inapplicable, and the [appellate] Court will sit in judgment on the evidence de novo, indulging no presumption in favor of the trial court's application of the law to those facts."' State v. Hill, 690 So. 2d 1201, 1203 (Ala. 1996), quoting Stiles v. Brown, 380 So. 2d 792, 794 (Ala. 1980). '"'[W]hen the trial court improperly applies the law to the facts, no presumption of correctness exists as to the court's judgment.'"' Ex parte Jackson, 886 So. 2d 155, 159 (Ala. 2004), quoting Hill, 690 So. 2d at 1203, quoting in turn Ex parte Agee, 669 So. 2d 102, 104 (Ala. 1995). A trial court's ultimate legal conclusion on a motion to suppress based on a given set of facts is a question of law that is reviewed de novo on appeal. See State v. Smith, 785 So. 2d 1169 (Ala. Crim. App. 2000)."

State v. Hargett, 935 So. 2d 1200, 1203-04 (Ala. Crim. App. 2005).

The Fourth Amendment to the United States Constitution insulates citizens from unreasonable searches and seizures. The Supreme Court of the United States has long "emphasized the objective aspect of the term 'reasonable.'" Scott v. United States, 436 U.S. 128, 137 (1978) (citing Terry v. Ohio, 392 U.S. 1, 21-22 (1968)). "Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' and not on the officer's actual state of mind at the time the

challenged action was taken." Maryland v. Macon, 472 U.S. 463, 470-71 (1985) (quoting Scott v. United States, 436 U.S. 128, 136 (1978)). The Alabama Supreme Court, particularly within the context of pretextual police action, has likewise adopted an objective test for assessing whether a Fourth Amendment violation has occurred. See Ex parte Scarborough, 621 So. 2d 1006, 1010 (Ala. 1993).

The warrant for Lipscomb's arrest may very well have been pretextual. Yet the circuit court's focus on the investigators' subjective intent was misplaced. "As long as the police officer is doing only what is objectively authorized and legally permitted, the officer's subjective intent in doing it is irrelevant." Scarborough, 621 So. 2d at 1010.

"At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961). This protection extends to the curtilage of the house. "[T]he curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' Boyd v. United States, 116 U.S. 616, 630 (1886), and therefore has been considered part

of home itself for Fourth Amendment purposes." Oliver v. United States, 466 U.S. 170, 180 (1984).

Even so, officers are not wholly prohibited from entering private property without a warrant. "When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do." Kentucky v. King, 563 U.S. 452, 469 (2011). Here, Inv. Allen and Capt. Jackson approached Lipscomb's front door, stood on his front porch, and knocked on his door. Gray was not obligated to open the door, see id. at 469-70, but she did so nonetheless. It was then that Inv. Allen and Capt. Jackson smelled the odor of marijuana emanating from Lipscomb's residence.[1]

Investigators used the aforementioned odor to establish probable cause to justify the issuance of a search warrant for Lipscomb's residence.

[1]Defense counsel asserted below that the officers' testimony on this point was not credible. The circuit court, however, was the finder of fact, and it found the officers to be reliable and to have testified honestly. This Court gives such credibility determinations great deference. Hargett, 935 So. 2d at 1203-04.

Indeed, this Court has recognized that the odor of marijuana can form the basis of probable cause:

> " 'It appears to be generally accepted that the smell of marijuana in its raw form or when burning is sufficiently distinctive to come within the rule of ... Johnson [v. United States], 333 U.S. 10 [68 S. Ct. 367, 92 L. Ed. 436] (1948), that probable cause to believe that an illegal substance is present may be established by smell]. Consequently, the courts have found probable cause to search when the distinctive odor of marijuana is found emanating from a particular place and have likewise found probable cause to arrest when the odor was detected coming from a particular person.'
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> "[W. LaFave, 2 Search and Seizure] § 3.6(b) [(2d ed. 1987)] (footnotes omitted)."

State v. Mathews, 597 So. 2d 235, 237 (Ala. Crim. App. 1992). The investigators secured the house while they waited on the search warrant to be issued. In general, securing a residence on the basis of probable cause to avert the destruction or removal of evidence while a search warrant is sought is not an unreasonable seizure of either the residence or its contents. See Illinois v. McArthur, 531 U.S. 326, 334 (2001) ("We have found no case in which this Court has held unlawful a temporary seizure that was supported by probable cause and was designed to prevent

the loss of evidence while the police diligently obtained a warrant in a reasonable period of time."). The evidence in Lipscomb's residence was not discovered until the search warrant, which described with particularity the property and place to be searched, was in hand. See Rule 3.9, Ala. R. Crim. P.

The search warrant authorized the investigators to search for "[a]ny and all evidence related to possession of marijuana to include but not limited to: marijuana, paraphernalia, [tetrahydrocannabinol] in any form, production equipment, etc." (C. 129.) Marijuana and a digital scale were found in the laundry room, while firearms were seized from a closet. Clearly, the marijuana and the digital scale were included in the scope of the search warrant. Gray and Lipscomb specifically challenged below the seizure of the firearms, arguing that the firearms were not located in close proximity to the marijuana and that the record did not support an inference that the firearms were contraband. However, because the search warrant authorized the investigators to search Lipscomb's residence for marijuana and marijuana could reasonably be hidden in a closet, the firearms were discovered in an area where the investigators

were authorized to be. See Maryland v. Garrison, 480 U.S. 79, 84 (1987) (recognizing that "the scope of a lawful search is 'defined by the object of the search and the places in which there is probable cause to believe that it may be found' " (quoting United States v. Ross, 456 U.S. 798, 824 (1982))). Further, because the investigators were conducting a lawful search for marijuana, the seizure of the firearms was appropriate:

> "Although neither warrant specifically authorized the seizure of weapons, the police did not err in confiscating weapons when they found them. When law enforcement officers stumble across hidden guns during a lawful search for drugs, they are allowed to draw the reasonable inference that the guns may be related to drug trafficking occurring at the location. United States v. Smith, 918 F.2d 1501, 1509 (11th Cir. 1990) (finding firearms not named in a warrant were properly seized during search of drug house as 'tools of the trade'). That is precisely what the police did in this case."

United States v. Prather, 279 F. App'x 761, 766 (11th Cir. 2008) (not selected for publication in the Federal Reporter). See United States v. Folk, 754 F.3d 905, 910 (11th Cir. 2014) ("This circuit has routinely recognized that firearms can be so connected to the sale of narcotics that their seizure is implicitly authorized by a warrant to search for narcotics."), and the cases cited therein.

The core rationale for the exclusionary rule is to deter unlawful police conduct. Davis v. United States, 564 U.S. 229, 246 (2011). "On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired." Nix v. Williams, 467 U.S. 431, 443 (1984). But, the rationale is not intended to place the prosecution in a worse position, either. Id. The investigators were not required to obtain an arrest warrant to knock on Lipscomb's front door and to talk to any occupant who may answer. It would seem unreasonable, then, to place the prosecution in a worse position for the investigators' obtaining, as far as the search of Lipscomb's house was concerned, a superfluous arrest warrant.

In sum, the officers developed probable cause to search Lipscomb's residence while standing in a place where they were "objectively authorized and legally permitted" to be. Ex parte Scarborough, 621 So. 2d at 1010. Additionally, the investigators obtained a search warrant for Lipscomb's residence and executed the search pursuant to the warrant. Consequently, the circuit court erred in granting the defendants' motions to suppress.

Accordingly, the order of the circuit court suppressing the evidence is reversed, and the cause is remanded to that court for further proceedings.

REVERSED AND REMANDED.

Kellum, McCool, Cole, and Minor, JJ., concur.