



# Police Law Bulletin



City Attorneys' Office

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## **Exigent Circumstances Justified Officers' Warrantless Entry Into Home**

### ***State v. Miller, No. COA13-81 (6 August 2013).***

On May 4, 2011, Officer Hill with the Spencer Police Department, responded to a call that a burglar alarm was going off at 404 South Baldwin Avenue. After arriving at the house, Officer Hill noticed that a window at the back of the house was broken. Believing that someone had entered the home and that a suspect may still be inside, Officer Hill requested additional units assist him in searching the residence. Officer Fox arrived on scene with “Jack,” his canine. Jack is trained not only to detect narcotics, but also to search for suspects. Shortly thereafter, Ms. Weant, defendant’s mother showed up at the house. After ascertaining that she had a key to defendant’s home, Officer Hill explained the situation to her, and Ms. Weant gave the officers the key to the house. After unlocking the front door, Officers Fox and Hill announced that they were law enforcement and warned that they had a canine unit with them to deploy inside the home. After the announcements, Jack was released into the premises. Initially, Jack went into a bedroom on the right side of the house. Officer Hill testified that when he and Officer Fox walked into the bedroom, a dresser drawer was open, and they could see a large quantity of brick marijuana laying in the top drawer. In contrast, Officer Fox testified that after entering the bedroom, he noticed Jack was sitting and staring at the dresser, indicating that it contained narcotics. Officer Fox then opened the dresser drawer, found the marijuana, and showed the marijuana to Officer Hill. Since they still had not finished clearing the residence, Officer Fox redeployed Jack to check the rest of the house for a possible intruder. Jack stopped in front of a closet door in the hallway of the home and began barking at the closet door. Officer Fox testified that, generally, barking indicates that Jack has located a suspect. The officers opened the closet door and saw two large trash bags, partially opened, containing marijuana. They did not do anything with the marijuana at that time but continued searching the rest of the residence for suspects. After clearing the house, Officer Hill contacted Sgt Ennis in order to obtain a search warrant. At that point, defendant arrived on the scene. Officer Hill asked defendant whether there was anything in his vehicle that he needed to know about; defendant told Officer Hill he had a handgun under the front seat. After Sergeant Ennis obtained his search warrant, he took possession of the bags of marijuana from the closet and the marijuana from the dresser.

The trial court concluded that the officers deviated from their search for suspects by opening the dresser drawer. Accordingly, the trial court held that opening the drawer violated defendant's constitutional rights, and it granted defendant's motion to suppress with regard to the marijuana found in the dresser. With regard to the marijuana in the closet, the trial court concluded that it was discovered when the officers had resumed their search for suspects and was in plain view. Thus, the trial court denied defendant's motion to suppress with regard to the marijuana found in the closet. After the motion to suppress was denied in part, defendant entered a plea as to all charges. The trial court sentenced defendant to a minimum of five months to a maximum of six months imprisonment for maintaining a dwelling for the keeping or selling of controlled substances and carrying a concealed handgun. Defendant appealed. Defendant argued, in part, that, pursuant to the fruit of the poisonous tree doctrine, the trial court erred in denying his motion to suppress with regard to the marijuana in the closet after it found the officers violated his constitutional rights by opening the dresser drawer. In other words, defendant contended that once officers violated his constitutional rights by opening the dresser drawer, their subsequent discovery of the drugs in the closet was inadmissible as fruit of the poisonous tree. The Court of Appeals disagreed.

A governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement; such an exception is exigent circumstances. To determine whether exigent circumstances existed, the Court must look at the totality of the circumstances. Based on the circumstances of the present case, the officers' warrantless entries into defendant's home did not violate the Fourth Amendment. Where an officer reasonably believes that a burglary is in progress or has been recently committed, a warrantless entry of a private residence to ascertain whether the intruder is within or there are people in need of assistance does not offend the Fourth Amendment.

After determining that the initial entry into defendant's home was constitutional, the court had to determine whether the scope of their search inside the home was reasonable. The scope of a warrantless search must be strictly circumscribed by the exigencies which justified its initiation. Here, the scope of the officers' search was confined to places where an individual could hide. Since it was reasonable to believe that an intruder may still have been inside, and because an intruder could have fit in the closet, the Court found the search of the hallway closet was justified. Therefore, their discovery of the marijuana in the closet was the result of constitutional conduct.

Defendant attempted to argue that since the officers acted unconstitutionally in discovering the marijuana in the dresser, "there is no returning to legal conduct." Based on their unconstitutional conduct of opening the dresser drawer, defendant contended that the fruit of the poisonous tree doctrine would require exclusion of the evidence found in the hallway closet. The Court disagreed. The "fruit of the poisonous tree doctrine," a specific application of the exclusionary rule, provides that [w]hen evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the "fruit" of that unlawful conduct should be suppressed. Only evidence discovered as a result of unconstitutional conduct constitutes fruit of the poisonous tree. Here, the evidence discovered as a result of that search was not "fruit of the poisonous tree" because it was found as a result of constitutional conduct.

## **Protective Sweep Supported by Reasonable Suspicion That Residence May Have Harbored An Individual Posing A Danger To Officers**

*State v. Dial, No. COA12-1334 (18 June 2013).*

On May 20, 2011, Deputy Chris Burger, with the Chatham County Sheriff's Office, went to the residence of Paul Dial (defendant) to serve defendant with an order for arrest. Burger had previously served orders for arrest upon defendant at the residence. During the previous encounters, defendant had answered the door promptly when Burger knocked and announced his presence. When Burger arrived at defendant's residence, he observed a van in the driveway. The van's windows were open and there was a buzzing noise coming from the vehicle consistent with the key being in the ignition in the "on" position. Burger knocked on the front door and immediately heard shuffling on the other side of the door that could have been caused by one or more persons. No one answered the door. For five to ten minutes, Burger continued to knock and announce who he was, called defendant by name, and asked defendant to come outside. No one came to the door. Burger called for backup, indicating that defendant had barricaded himself in the residence and that Burger needed assistance. Burger then used his patrol vehicle PA system to try to get someone to come out of the residence for approximately five minutes. Burger was concerned for his safety because he knew firearms were normally inside the residence and defendant usually responded promptly when Burger knocked and announced his presence.

Deputies Tipton and Miller arrived at the residence. Burger informed them he believed weapons to be inside the residence and showed them the order for defendant's arrest. The three deputies developed a plan to try to observe who was in the residence. Tipton and Miller planned to knock on the front and side doors while Burger attempted to look inside the residence through windows. As the deputies approached the residence, the "front door flew open and defendant stepped out." Tipton drew his weapon and gave verbal commands to defendant. Defendant walked down the front steps with his hands raised. Defendant was not resisting arrest, but was not complying with the deputies' instructions. As Burger cuffed him, Tipton and Miller entered the open front door to perform a protective sweep of the residence. Tipton and Miller considered the open door to be a "fatal funnel" that would provide an assailant inside the residence with a clear shot at the deputies. Acting out of concern for Burger's safety, deputies attempted to clear the residence by making sure there was no one else inside either posing a threat to the deputies or who was injured. The protective sweep lasted approximately thirty seconds. Deputies only inspected areas where a person could have been hiding. While inside the residence, deputies observed ammunition magazines on the kitchen table and firearms inside a room. There was no one else inside the residence. Several hours after the arrest, deputies returned with a search warrant and searched defendant's residence and vehicle.

On October 10, 2011, defendant was indicted for possession of a firearm by a felon. Defendant filed a motion to suppress the evidence that was discovered as a result of the protective sweep of his residence. Defendant's motion was suppressed. Defendant subsequently pled guilty to possession of a firearm by a felon, reserving the right to appeal the denial of his motion to suppress. The trial court sentenced defendant to twelve to fifteen months imprisonment. Defendant appealed.

In his only argument on appeal, defendant contends that the trial court erred in denying his motion to suppress the evidence of the firearms that was discovered as a result of a protective sweep of his residence. Defendant contends that the trial court's findings of fact did not support its conclusion of law that Tipton and Miller had a reasonable suspicion, based on articulable facts, that the residence may have harbored an individual posing a danger to the deputies and required a protective sweep.

“A ‘protective sweep’ is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others.” These sweeps are “reasonable if there are ‘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 arrest scene.’” Because a protective sweep is aimed at protecting the officers, “[i]t is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.” The sweep must also “last no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.”

In the case at hand, the deputies were attempting to serve an order for arrest. Defendant did not immediately respond to Burger and did not respond after ten to fifteen minutes of Burger knocking and announcing his presence. Burger heard shuffling on the other side of the door and he could not determine if it was caused by one or more persons. When Tipton and Miller arrived, they were briefed on the situation, showed the order for defendant’s arrest, and informed that Burger believed there to be weapons inside the residence. When the deputies approached the residence, “the front door flew open[,]” defendant stepped out, and walked down the front steps with his hands raised. “As soon as Burger had his hands on defendant,” the other two deputies entered the residence and performed a protective sweep, which lasted approximately thirty seconds. While Tipton and Miller’s concern that the open door at an unsecured residence was a “fatal funnel” by itself may not have been a sufficient basis for believing there was another individual in the residence that posed a threat, the trial court’s findings of fact reveal that there were additional factors present that provided a proper basis for the protective sweep. These include: defendant’s unusually long response time and resistance, the known potential threat of weapons inside the residence, shuffling noises that could have indicated more than one person inside the residence, defendant’s alarming exit from the residence, and defendant’s own actions that led him to be arrested in the open doorway. The trial court’s findings of fact indicate that Tipton and Miller acted immediately and responded as soon as Burger was in potential danger. Their sweep was of a very brief duration, and they only looked in places where a person might be hiding. The Court of Appeals found that the trial court’s findings of fact supported the conclusion that Tipton and Miller had a reasonable belief based on specific and articulable facts, that the residence harbored an individual who posed a danger to the safety of the deputies.

### **Neither Plain View Doctrine or Exigent Circumstances Justified Warrantless Seizure of Marijuana**

#### ***State v. Grice, No. COA12-577 (20 November 2012)***

On May 5, 2011, Detectives Guseman and Allen of the Johnston County Sheriff’s Office went to defendant’s home to perform a “knock and talk” in response to an anonymous tip that defendant was growing and selling marijuana. They arrived at defendant’s residence and drove about 1/10<sup>th</sup> of a mile up a driveway to defendant’s home, where they parked behind a white car in the driveway. While Guseman knocked on the door, Allen “looked around the residence from his point of view.” As he looked over the hood of the white car, he observed four plastic buckets in the backyard, about fifteen yards away, beside an outbuilding. Plants were growing in three of the buckets. Allen immediately identified these plants as marijuana. Both detectives then walked to the backyard where the plants were growing. The detectives then contacted their supervisor, who instructed them to seize the plants and return to the Sheriff’s Office to apply for a search warrant. The next day, after applying for and receiving a search warrant, the detectives and two other officers returned to the residence to execute the warrant. Defendant admitted to owning the seized plants and also admitted to having a small amount of marijuana in his living room. Officers arrested defendant.

Defendant was indicted on charges of manufacturing marijuana and maintaining a dwelling house for the keeping of a controlled substance. At trial, defendant moved to suppress the evidence obtained during the “knock and talk” investigation. The trial court denied defendant’s motion. A jury convicted defendant of manufacturing marijuana. Defendant appealed arguing that the trial court erred in denying his motion to suppress because the detectives violated his 4<sup>th</sup> Amendment rights by entering his property and seizing the plants without first obtaining a warrant. The State contended that because the plants were in plain view, their seizure did not implicate defendant’s Fourth Amendment rights.

As a general rule, searches and seizures conducted without a warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions. One such exception is the plain view doctrine. Under the plain view doctrine, police may seize contraband or evidence without a warrant if the officer was in a place where he had a right to be when the evidence was discovered; the evidence was discovered inadvertently; and it was immediately apparent to the police that the items observed were evidence of a crime or contraband. The first requirement means not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself. While law enforcement officers are entitled to go to the front door of a residence to inquire about a matter, officers generally may not enter and search the curtilage of a home without first obtaining a warrant. Thus, the Court of Appeals concluded that Detectives Guseman and Allen had no right to walk across defendant’s backyard in order to seize the marijuana plants.

In the alternative, the State argued the seizure of the plants was valid under the exigent circumstances exception to the warrant requirement. The Court of Appeals held that no evidence was presented at trial to support such a finding. Detective Guseman testified that he knocked on defendant’s door numerous times and no one answered; that he had not determined that anyone was present who may have detected his presence; and that there was nothing that prevented him from securing the perimeter of the residence and obtaining a warrant.

### **Officers Warrantless Entry Into Defendant’s Backyard Violated Fourth Amendment**

***State v. Pasour, No. COA12-190 (16 October 2012).***

On August 15, 2010, the Gaston County Police Department received a call that a subject living at 248 Loray Farm Road had marijuana plants growing with his tomato plants at the residence. Three officers went to the address and knocked on the front and side doors. After receiving no response, two of the officers proceeded to the back of the residence while one stayed at the front door to see if anyone would come to the door. In the backyard, the officers discovered various plants, including marijuana plants. The plants were seized. Defendant was arrested that same day for possession of more than 1½ oz. of marijuana. On January 3, 2011, defendant was indicted for the offense and the additional charge of maintaining a dwelling for keeping and/or selling a controlled substance.

Defendant filed a motion to suppress all evidence seized from his property. The trial court denied his motion. Defendant pled guilty but preserved his right to appeal. On appeal, defendant’s argument was that the trial court erred in denying his motion to suppress.

The Fourth Amendment to the United States Constitution protects the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. Searches conducted

without a warrant are presumed to be unreasonable, subject only to a few specifically established and well-delineated exceptions. One such exception is the plain view doctrine, under which a warrantless seizure is lawful when an officer is in a place where he has a right to be when the evidence is discovered and when it is immediately apparent to the police that the item observed constitutes evidence of a crime. Defendant argued that the officers were not in a place that they had a right to be when they went into his backyard. The Court of Appeals has held that entrance onto private property for the purpose of a general inquiry or interview is proper, and as such officers are entitled to go to the door to inquire about a matter. Defendant acknowledged this well-established law, but argued that there was no justification for the officers to go into his backyard after receiving no answer to their repeated knocks on his front and side doors. The Court of Appeals agreed.

The determinative issue is whether or not the homeowner had a reasonable expectation of privacy in the area of the curtilage the officers entered when they first viewed the contraband material. In the case at hand, the officers were within the curtilage of the home when they viewed the plants. There is no indication that the plants were visible from the front or from the road. There was a “no trespassing” sign that was plainly visible on the side of the residence where the officers walked. There was no evidence to suggest that there was a path of any kind or anything else to suggest a visitor’s use of the rear door; instead, all visitor traffic appeared to be kept to the front door. There is no evidence to suggest that the officers had reason to believe that knocking at the defendant’s back door would produce a response after knocking multiple times at his front and side doors had not. The officers admitted that they never saw anyone come out of the house, nor did they hear noises coming from the back of the house. Given these circumstances, the Court concluded that there was no justification for the officers to enter defendant’s backyard and so their actions were violative of the Fourth Amendment. Accordingly, the trial court’s denial of defendant’s motion to suppress was reversed.

## UNITED STATES



## SUPREME COURT

### **The Exigent Circumstances Rule Applies When Police Do Not Gain Entry To Premises By Means Of An Actual Or Threatened Violation Of The Fourth Amendment**

***Kentucky v. King, No. 09-1272 (16 May 2011).***

Police officers in Lexington, Kentucky set up a controlled buy of crack cocaine outside an apartment complex. An undercover officer watched the deal take place from an unmarked car. After this occurred, he radioed uniformed officers to move in on the suspect. He told the officers that the suspect was moving quickly toward the breezeway of an apartment building, and he urged them to “hurry up and get there” before the suspect entered an apartment. Just as the officers entered the breezeway, they heard a door shut and detected a very strong odor of burnt marijuana. At the end of the breezeway, the officers saw two apartments. They did not know which apartment the suspect had entered. Because they smelled marijuana emanating from the apartment on the left, they approached the door of that apartment. Officers banged on the door and announced, “This is the police,” or “Police, police, police.” As soon as the officers starting banging on the door, they could hear people inside moving and it sounded as though things inside

the apartment were also being moved. These noises led the officers to believe that drug-related evidence was about to be destroyed. At that point, the officers announced that they were going to make entry into the apartment. One of the officers kicked in the door, and found respondent and others. One of the people was smoking marijuana. They saw additional marijuana and powder cocaine in plain view during a protective sweep of the apartment, and found crack cocaine, cash and drug paraphernalia during a subsequent search.

Respondent was charged with trafficking in marijuana, first-degree trafficking in a controlled substance, and second-degree persistent felony offender status. Respondent filed a motion to suppress the evidence from the warrantless search. The Circuit Court denied respondent's motion, holding that exigent circumstances – the need to prevent destruction of evidence – justified the warrantless entry. The respondent appealed. The Kentucky Court of Appeals affirmed. After respondent appealed again to the Kentucky Supreme Court, it reversed. The court assumed that exigent circumstances existed but it nonetheless, invalidated the search. The court held that the exigent circumstances rule did not apply because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence. In other words, that the exigent circumstances rule does not apply when the officers' actions create the exigency. The State appealed to the United States Supreme Court.

The United States Supreme Court noted that it is well established that exigent circumstances, including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant. The issue before the Court was whether this rule applies when police, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence.

The Kentucky Supreme Court, along with several other lower courts, had developed an exception to the exigent circumstances rule, the so-called "police-created exigency doctrine." (Note that this doctrine had been adopted by our federal 4<sup>th</sup> Circuit Court of Appeals; North Carolina state courts had yet to adopt or reject the doctrine). This doctrine provides that exigent circumstances do not justify a warrantless search when the exigency was "created" or "manufactured" by the conduct of the police. For a warrantless search to stand, law enforcement officers must be responding to an unanticipated exigency rather than simply creating the exigency for themselves.

The United States Supreme Court rejected such a doctrine stating, "the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable." "Where, ..., the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus, allowed." A similar approach has been taken in other cases involving warrantless searches. For example, officers may seize evidence in plain view if they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made; and they may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs.

Applying the above interpretation to the facts of this case, the United States Supreme Court declined to decide whether or not exigent circumstances existed in this case. Recall that the trial court and the Kentucky Court of Appeals had found that the sound of persons moving inside the apartment was sufficient to establish that it was reasonable to believe that evidence was being destroyed. However, the Kentucky Supreme Court did not decide this issue. The Kentucky Supreme Court assumed for the purpose of argument that exigent circumstances existed but that the police had impermissibly caused the exigency. The United States Supreme Court therefore

decided only the question on which the Kentucky Supreme Court had ruled: Under what circumstances do police impermissibly create an exigency? Whether an exigency actually existed in this case is a question that the United States Supreme Court remanded back to the Kentucky Supreme Court. The United States Supreme Court proceeded with its opinion assuming an exigency did exist. The Court found the officers' conduct – banging on the door and announcing their presence – to be entirely lawful. The officers did not violate, or threaten to violate the Fourth Amendment prior to the exigency. The record is clear that the officers' announcement that they were going to enter the apartment was only made *after* the exigency arose. In such a situation, the exigent circumstances rule applies. Therefore, the decision of the Kentucky Supreme Court was reversed and remanded for further action consistent with the Court's opinion.