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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DANIEL JAMES DONALDSON, Defendant and Appellant.	2d Crim. No. B277735 (Super. Ct. No. 2015013012) (Ventura County)

Daniel James Donaldson appeals judgment after he pled guilty to being a felon in possession of a firearm (Pen. Code, § 29800)[1] following denial of his motion to suppress evidence of firearms and ammunition found in a "lean-to" in which he lived. We affirm.

BACKGROUND

Ventura County Deputy Sheriff Kevin Kipp and his partner went to the house of Terry McCall to execute a

[1] All statutory references are to the Penal Code.

misdemeanor arrest warrant for petty theft. Kipp was not familiar with the property or its residents. Kipp knocked at the front door and called "Sheriff's office" through a metal security screen. He heard a woman yell, "The sheriffs are here," and heard footsteps running toward the back of the house.

Kipp asked a woman in the front room "if [he] could come in and look for McCall." He said he had a warrant for McCall's arrest. The woman said "okay" and opened the door. The woman said McCall "was here a minute ago, but I don't know where she went." Kipp's sergeant arrived and they "cleared" the house while Kipp's partner stayed with the woman in the front room. Kipp and his sergeant did a "protective sweep" of the house, finding two people, and then swept the backyard, "to locate any outstanding subjects that may have fled."

Kipp approached a plywood lean-to against a shed in the backyard. With his gun drawn, he pulled aside a piece of plywood and a blanket, to "determine if [McCall] had fled and was hiding in there [and] if there were any other persons . . . in there or any other threats to [himself] or [his] partners."

Kipp saw Donaldson and a woman inside on a bed. He also saw drug paraphernalia. He told the couple to come outside, then searched the lean-to, looking for McCall. After he "cleared the rest of the backyard," Kipp checked with "dispatch" and learned that Donaldson was on felony probation with search terms.

After Kipp "determin[ed] [McCall] was not in the backyard," he "accessed" a locked bedroom in the house, found McCall, and took her into custody. He then returned to the lean-to and conducted a "methodical" probation search. He found a semiautomatic handgun and a loaded magazine in the pocket of a

jacket that would fit Donaldson, and 400 rounds of ammunition on a shelf, among other things.

Kipp described the lean-to as "a plywood structure," but "not a structure necessarily. It was literally made of sheets of plywood with two very small hinges. . . . [T]he door was very flimsy." It was 10 by 12 or 8 by 10 feet and it was "held together such that it was upright and standing." There were no windows. He said he ordered the couple out of the lean-to because, "going into unknown houses with unknown subjects and unknown weapons and unknown circumstances is a very dynamic, very rapidly evolving, sometimes dangerous situation, and we have to make sure that that scene is safe before we can conduct the rest of our investigation or business at the location." He "had no heads up that there was some sort of threat there, but the unknown is exactly that. It's the unknown."

After his motion to suppress was denied, Donaldson pled guilty to being a felon in possession of a firearm (§ 29800), and he was sentenced to two years in state prison.

DISCUSSION

Donaldson contends Kipp's initial entry into the lean-to violated his constitutional right to be free from unreasonable search and seizure because the lean-to was his home, consent to enter the main house did not extend to it, and no facts justified a protective sweep. (U.S. Const., 4th & 14th Amends.) He also contends Kipp should have knocked and announced his presence before he pulled aside the door. (§ 844.)

We review for substantial evidence the trial court's findings of fact and we independently apply the requisite legal standard to the facts presented. (*People v. Ayala* (2000) 23 Cal.4th 225, 255.) A warrantless entry into a home is

presumptively unreasonable. (*Payton v. New York* (1980) 445 U.S. 573, 586.) The People can overcome that presumption by showing that an exception to the warrant requirement applies. (*Katz v. United States* (1967) 389 U.S. 347, 357.)

Under the protective sweep exception, officers lawfully executing an arrest may "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." (*Maryland v. Buie* (1990) 494 U.S. 325, 334 (*Buie*).) They may sweep areas beyond the immediate area of arrest if articulable facts give rise to a reasonable suspicion that the area to be swept "harbors an individual posing a danger to those on the arrest scene." (*Ibid.*)

A protective sweep may not be based on a mere inchoate and unparticularized suspicion or hunch. (*People v. Celis* (2004) 33 Cal.4th 667, 677 (*Celis*).) It is not enough that the police are genuinely apprehensive of danger based on their general experience executing arrest warrants. (*People v. Ormonde* (2006) 143 Cal.App.4th 282, 295 (*Ormonde*).) *Buie* requires a reasonable suspicion both that another person is present and that the person is dangerous. (*People v. Werner* (2012) 207 Cal.App.4th 1195, 1206 (*Werner*).) Unlike the exigent circumstances exception, a protective sweep does not require probable cause. (*Celis*, at pp. 676-677.)

Kipp lawfully entered the house to serve the warrant for McCall's arrest with an occupant's consent, as Donaldson concedes. Kipp had reason to believe he might find McCall or others in the lean-to because he heard people running to the back of the house, learned McCall was there "a minute ago" but was no longer inside, and saw that the lean-to was large enough to

conceal a person. Although he did not know McCall to be dangerous, he did have reason to believe he and his sergeant were vulnerable to attack. In addition to Kipp's general concerns about the "unknown," he knew they were exposed in an unfamiliar yard surrounded by outbuildings, the situation was not under control, and McCall was still at large. As the trial court found, "both from the perspective of the officer's safety and the officer's duty to execute the arrest warrant . . . it was perfectly legal and lawful for him to enter the shed."

The circumstances were unlike those in *Celis*, *Ormonde* or *Werner* in which the sweeping officers entered homes after arresting and securing the suspects outside and they had no reason to believe anyone was inside. (*Celis*, *supra*, 33 Cal.4th at p. 679; *Ormonde*, *supra*, 143 Cal.App.4th at p. 294; *Werner*, *supra*, 207 Cal.App.4th at p. 1206.) Here, Kipp had an actual and reasonable suspicion the lean-to harbored a threat. He heard multiple people running to the back of the house when he arrived to serve an arrest warrant. He looked into the lean-to to see if there were any "threats to [himself] or [his] partners." His suspicion was reasonable because he was on an unfamiliar property with people who fled to the backyard that he could not see. His cursory visual inspection to assure himself that it did "'not harbor[] other persons who [were] dangerous and who could unexpectedly launch an attack' [citation]" was therefore reasonable. (*Ormonde*, at p. 292.)

Kipp did not knock on the lean-to door, but he did not violate the knock-announce rule because he had no reason to believe the lean-to was a home. The knock and announce rule extends to an outbuilding only when an officer has reason to believe it is someone's home. (§ 844.) Kipp said he did not

announce himself "because [he] didn't know exactly what that building, structure, shed was," and we defer to the trial court's factual finding that, "when he pushes open the door, he more likely than not expects to see a lawnmower and a rake, not two people sleeping on a bed." As the trial court observed, "[t]here's nothing from the appearance of the structure, whether it's lawful or not, there's been no suggestion of an appearance to the structure that suggests it's a place of habitation." Although Donaldson's lean-to was similar to the hut described in *People v. Franco* (1986) 183 Cal.App.3d 1089, 1093, the circumstances are materially different here because the officer "knew Franco was living in this hut and went directly there to arrest him, knowing he was likely to be inside sleeping." Kipp had "no idea" what was in the lean-to. In any event, violation of the knock-announce rule does not implicate the exclusionary rule. (*Hudson v. Michigan* (2006) 547 U.S. 586, 594; *In re Frank S.* (2006) 142 Cal.App.4th 145, 148.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Mark S. Borrell, Judge

Superior Court County of Ventura

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