

THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 09-1001

Tommy Wayne Scott
Defendant/Appellant

v.

United States
Plaintiff/Appellee

BRIEF FOR APPELLEE

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Questions Presented

- I. Whether the District Court properly denied the appellant's motion to suppress the evidence obtained by the warrantless search of his residence pursuant to exigent circumstances when an informant's tip concerning the presence, and likely exculpating removal, of a volatile meth lab led officers to believe that the operation either posed a significant threat to public safety or was being dismantled, a belief that was bolstered by the observation of movement from within the residence which corresponded with the strong emanation of chemical odors associated with the production of meth.
- II. Whether the District Court properly denied the appellant's motion to suppress the evidence obtained by the warrantless search of his residence pursuant to third-party consent when three officers walked up to the residence, knocked on the front door and announced their presence prompting the resident nanny, who was taking care of the absent homeowners' child, to open the door in an effort to allow the officers entrance into the residence.

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Statement of the Case

Procedural History

On May 26, 2008, the appellant was charged with both the manufacture and the intent to distribute meth in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. (R.3). Shortly thereafter, he filed a motion to suppress the evidence obtained by the warrantless search of his residence, contending that the search was improper because officers lacked the justification needed to effect a warrantless search—i.e. exigent circumstances or consent. (R.7-8). The District Court denied this motion on August 21, 2008 holding that the search was properly conducted pursuant well-established Fourth Amendment exceptions to the warrant requirement. (R.47)

Subsequently, the case went to trial where the appellant was convicted on both charges, after having pled not guilty. (R.48-49). He was sentenced to 120 months on December 18, 2008. (R.49, 51). As a result of his conviction, the appellant filed a timely notice of appeal on January 5, 2009 challenging the District Court's denial of his motion to suppress. (R.50-51).

Statement of Facts

In the spring of 2008, a combination of law enforcement agencies in the state of Oklahoma began an investigation of the appellant, Tommy Wayne Scott, pursuant to numerous reports of strange chemical odors emanating from the garage at his residence. (R.34-35). Accompanied by Officer Jeffrey Brown and Detective Terri Fuller, Detective William Cameron, who was trained in the detection of meth along with the chemicals associated with its manufacture, initially drove by the residence to confirm the reports.

(R.35). Upon confirmation, the officers decided to set up a surveillance of the residence which eventually led to subsequent detections of a strong chemical odor. (Id.)

Specifically, on May 6, officers detected the odor as they witnessed Mr. Scott exit his garage and put two large bags into his truck. (Id.). He was then followed across state lines where he was observed conducting an apparent drug delivery, an act which he had been convicted of previously. (R.35-36).

As a result of potential violations of federal drug law, Federal Agent John Cummings was brought in on the investigation where he too confirmed the smell of odors, likely ether, emanating from Mr. Scott's residence. (R.36) Upon learning that Mr. Scott had previously been convicted of the delivery of a controlled substance, he quickly deputized Det. Cameron as a federal marshal and authorized a full-time surveillance of the residence on May 11, 2008. (R.36-37). After several days of inactivity, the officers gathered for a strategy session regarding the investigation. (R.37). During the course of this session, on May 14, 2008, the officers were approached by a man at a local diner who claimed that Mr. Scott was in the process of cooking a batch of meth stating that he was "wise to the investigation" and planned to dismantle his lab later that day. (Id.). Agt. Cummings immediately decided to obtain a warrant while the other officers returned to Mr. Scott's residence hoping to secure it while waiting for the warrant. (R.37-38).

Upon arriving at the residence around noon, Det. Cameron observed Mr. Scott's truck parked out back as well as movement from within the residence. (R.25). In addition, he noticed a strong smell of ether coming from residence leading him to believe that there was a strong risk of explosion resulting from a volatile meth lab or that Mr.

Scott was in the process of dismantling such a lab. (Id.). Fearing that Agt. Cummings would fail to return in time to execute a successful warrant, the officers decided to conduct a warrantless search of the residence because “time was of the essence.” (Id.). In fact, Agt. Cummings had actually run into some trouble securing the warrant. (R.33).

Meanwhile, Mr. Scott and his wife Janie, along with their five-year-old son, were enjoying a picnic at the local Arboretum. (R.14). Solveig Ericson, the Scotts’ resident nanny, remained at the Scotts’ residence taking care of their infant child; she did not speak English. (R.14-15). At approximately one o’clock, three officers walked up to the residence, knocked on the front door and announced their presence, shouting “[p]olice, open the door!” (R.25). Upon noticing officers, Ms. Ericson opened the door, with the Scotts’ squalling infant in her hands, and allowed the officers to enter the residence. (R.25-26). Without any further communication, the officers entered the residence to conduct the search for meth. (R.26). The search was confined to the room of initial entry, a big open area which consisted of the living room, dining room and kitchen; officers also search the garage. (Id.). Inside the home, officers found drug paraphernalia along with meth and a firearm out in the open. (R.27). In addition, they found evidence of an active lab in the garage. (Id.).

When the Scotts finally returned home, Ms. Scott described the scene as “a madhouse.” (R.16). Mr. Scott was promptly arrested while other officers finished dismantling the lab they had found. (R.28).

Summary of the Argument

The District Court properly denied the appellant's motion to suppress the evidence obtained from the warrantless search of his residence because the search was conducted pursuant to well-established exceptions to the Fourth Amendment's warrant requirement—i.e. exigent circumstances and consent.

The need to ensure public safety and to prevent the destruction of evidence provides officers with ample justification for conducting a warrantless search as a means to quell these well-established exigencies. Officers have a duty to protect the public from dangerous persons and situations. Because the facts of this case indicate that officers acted reasonably and objectively within the scope of this duty, it is clear that their actions fall within the boundaries of exigency set forth by the courts of this nation. To be more precise, the search of the appellant's residence was conducted in a reasonable manner pursuant to circumstances that would lead a prudent officer to believe that the public was in imminent danger. In addition, the search was conducted under clear evidence of probable cause and under circumstances that would lead a prudent officer to conclude that the destruction of evidence, linking someone to serious crime, was likely.

In addition to exigent circumstances, the warrantless search of the appellant's residence was conducted pursuant to valid third-party consent. By obtaining valid consent, an officer is justified in entering a residence to conduct his business. The facts of this case clearly indicate that officers received consent from a third-party that was clear and freely given, free from duress and coercion, before they entered the residence. Moreover, the third-party issuer had the authority, both actual and apparent, to issue valid consent.

Standard of Review

The Tenth Circuit Court of Appeals reviews the denial of a motion to suppress by viewing the evidence in the light most favorable to the prevailing party—i.e. the government. United States v. Burson, 531 F.3d 1254, 1256 (10th Cir. 2008). The District Court’s factual findings are accepted unless they are clearly erroneous for it is within their sole discretion to assess the credibility of witnesses, weigh the available evidence, and draw the appropriate inferences. United States v. DeJear, 552 F.3d 1196, 1200 (10th Cir. 2009). A factual finding is clearly erroneous only if the record contains no factual support for the finding or a determination is made that the District Court made an obvious error. Burson, 531 F.3d at 1256.

The District Court’s legal conclusions, on the other hand, are subject to a de novo review. See United States v. Reeves, 524 F.3d 1161, 1165 (10th Cir. 2008). The reasonableness of the government’s actions under the Fourth Amendment is ultimately a legal conclusion. Id. Thus, the reasonableness of a search or seizure is subject to a de novo review. DeJear, 552 F.3d at 1200. The government bears the burden of proving that a search or seizure is reasonable. United States v. Chavez, 534 F.3d 1338, 1343 (10th Cir. 2008).

Argument

The Fourth Amendment to the Constitution provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Accordingly, warrantless searches and seizures that occur inside a residence are presumptively unreasonable. Payton v. New York, 445 U.S. 573, 586 (1980). Because warrantless searches and seizures ultimately turn upon a question of “reasonableness,” the presumption can be overcome. Illinois v. McArthur, 531 U.S. 326, 330 (2001). Thus, the Fourth Amendment essentially guarantees that all residential searches and seizures will be reasonable, including those conducted pursuant to either the consent or exigency exceptions to the warrant requirement. See Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (holding that a search is reasonable when the exigencies of a situation render the needs of officers particularly compelling); Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) (holding that a search is reasonable when officers receive consent).

I. THE DISTRICT COURT PROPERLY DENIED APPELLANT’S MOTION TO SUPPRESS BECAUSE THE WARRANTLESS SEARCH OF HIS RESIDENCE WAS CONDUCTED TO ENSURE PUBLIC SAFETY AND TO PREVENT THE DESTRUCTION OF EVIDENCE, BOTH OF WHICH JUSTIFIED THE SEARCH PURSUANT TO THE EXIGENCY EXCEPTION TO ILLEGAL SEARCHES UNDER THE FOURTH AMENDMENT.

Because the warrantless search of appellant’s residence was conducted pursuant to well-established exigencies, the District Court properly denied appellant’s motion to suppress. Exigent circumstances provide an exception to the warrant requirement when officers are confronted with situations requiring immediate emergency action on the part of officers in order to perform their duty. Brigham City, 547 U.S. at 403. Both the

imminent destruction of evidence and the risk of danger to officers and the public are two such situations. Minnesota v. Olson, 495 U.S. 91, 100 (1990). Thus, ensuring public safety and preventing the destruction of evidence are well-defined exigencies that provide officers with reasonable justification for search of a residence without a warrant. Id.

- A. The warrantless search of the appellant’s residence in an effort to ensure public safety was justified because it was conducted in an objectively reasonable manner and pursuant to an objectively reasonable belief.

Given that the search of the appellant’s residence was conducted in an objectively reasonable manner and pursuant to an objectively reasonable belief, the warrantless search of his residence was justified by public safety concerns. A warrantless search of a residence pursuant to public safety must be objectively reasonable under the Fourth Amendment—i.e. the circumstances, viewed objectively, must justify it. Brigham City, 547 U.S. at 403-04. In light of this standard, a warrantless search of a residence pursuant to concerns for public safety is justified only if it satisfies a two part test. United States v. Najjar, 451 F.3d 710, 718 (10th Cir. 2006). First, law enforcement officers must “have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others...”. Id. Second, the manner and scope of the search must be objectively reasonable. Id. As a result, warrantless searches pursuant to concerns for public safety are justified when they are based on an objectively reasonable belief and conducted in an objectively reasonable manner. Id.

1. **The warrantless search of the appellant’s residence was conducted pursuant to an objectively reasonable belief that there was an immediate need to protect the public from harm.**

The circumstances surrounding the warrantless search of the appellant's residence prompted an objectively reasonable belief that there was a dire need to protect the public from harm. In determining whether a belief is objectively reasonable, the subjective motivations of an officer are irrelevant. Brigham City, 574 U.S. at 404. The objective reasonableness of a belief is measured by evaluating the circumstances in the light of prudent, cautious and trained officers. Najar, 451 F.3d at 718-19. Thus, the belief that there is an imminent need to protect the public from harm is objectively reasonable when the totality of the circumstances, viewed objectively, justify the belief. See Id.

- a. ***The presence of vapors associated with meth production objectively justified the belief that there was imminent danger posed by a volatile meth lab.***

The presence of vapors associated with meth production objectively justified the belief that a meth lab posed an imminent danger to the public. The awareness of the volatility of meth production coupled with the presence of related vapors can help provide an objective basis for establishing an exigency. United States v. Rhiger, 315 F.3d 1283, 1289-90 (10th Cir. 2003). Because meth production is extremely volatile, an officer trained in this volatility can reasonably believe that meth labs pose a huge threat to public safety. See Id. (holding that an officer's knowledge of the danger of active meth labs helped justify his entry into a residence to quell any potential danger); United States v. Wilson, 865 F.2d 215, 217 (9th Cir. 1989) (holding that an officer's knowledge concerning the explosiveness of ether helped justify his entry into a residence to quell a volatile meth lab). The knowledge of volatility coupled with the smell of odors associated with meth labs will certainly justify a prudent officer in believing that there is

a dire need to protect the public from harm. Rhiger, 315 F.3d at 1289-90 (holding that an officer's knowledge of the dangers associated with meth production objectively justified his entry into a residence when he smelled strong chemical odors emanating from within); see also United States v. Layman, 244 Fed. Appx. 206, 211-12 (10th Cir. 2007) (suggesting that the odor of meth cooking may be enough to establish exigency).

The presence of vapors emanating from Mr. Scott's residence objectively justified the belief that a volatile lab posed an imminent danger to the public. Det. Cameron was trained in meth detection and was familiar with the smell of the volatile chemicals used in its manufacture. (R.19). After having been apprised of a potential lab in late April, Det. Cameron, along with other officers, drove by Mr. Scott's residence confirming the smell of strong chemical odors. (R.18-19). Subsequent surveillance verified the presence of these chemical fumes at the residence. (R.20). On the day of the search, Det. Cameron again sensed the presence of those volatile chemicals emanating from the Scotts' residence. (R.25). His training led him to believe that the residence harbored a volatile meth lab that posed a huge risk of explosion. (Id.). It is clear that Det. Cameron's knowledge of volatility coupled with the presence of chemical odors would lead any reasonable officer to conclude that a meth lab posed an imminent danger to the public.

- b. ***A reliable informant providing information concerning the presence of a volatile meth lab objectively justified the belief that there was imminent danger posed by such a lab.***

The information provided by a reliable informant objectively justified officers in believing that a meth lab posed an imminent danger to the public. Information provided by reliable informants can help provide an objective basis for establishing an exigency.

United States v. Erb, 596 F.2d 412, 417-18 (10th Cir. 1979). An informant's reliability is often established by either corroborating their information through police surveillance or through another independent informant. Id. (holding an informant's tip helped establish an exigency relating to a volatile meth lab when it was verified by police surveillance); United States v. Artez; 389 F.3d 1106, 1114 (10th Cir. 2006) (holding that an anonymous caller confirming the presence meth at a residence bolstered a previous informant's tip).

A reliable informant's tip concerning the presence of a meth lab objectively justified the belief that a volatile lab posed a danger to the public. On May 14, 2008, Det. Cameron, along with other officers, received a tip from an informant stating that Mr. Scott was cooking a batch of meth. (R.23). The officers immediately converged on Mr. Scott's residence and confirmed the presence of vapors associated with meth production, verifying the tip. (R.25). Similar odors were detected near the residence during prior surveillance when officers followed Mr. Scott on an apparent drug delivery. (R.20-21). In addition to surveillance, the informant's tip was also verified by concerned citizens reporting the presence of a strange odor around Mr. Scott's garage. (R.18). Because the reliability of the tipster was independently verified, it is clear that a reasonable officer would have concluded that there was a significant threat to public safety.

2. The warrantless search of the appellant's residence was conducted in an objectively reasonable manner.

The warrantless search of the appellant's residence was objectively reasonable in manner because both the manner and the scope of the search were objectively reasonable. In determining whether an action is objectively reasonable, the subjective motivations of an officer are irrelevant. Brigham City, 574 U.S. at 404. An action is objectively

reasonable so long as the circumstances surrounding the action justify it when viewed in the light of prudent, cautious and trained officers. Najar, 451 F.3d at 718-19. Thus, a warrantless search is objectively reasonable in both manner and scope when an officer conducts the search in a way that is consistent with how a prudent, cautious and trained officer would have conducted the search given identical circumstances. See Id. at 720.

- a. ***The manner of the warrantless search was objectively reasonable because officers first announced their presence and then proceeded to secure the scene by quelling any immediate danger.***

Because officers focused on quelling the exigency which posed an immediate public danger, the manner of the search was objectively reasonable. The manner of a search refers to the way in which officers conduct it, including their actions and behavior. See Brigham City, 547 U.S. at 406-07. An officer announcing his initial presence is a factor that contributes to a search being objectively reasonable in manner. Id. Moreover, a search is objectively reasonable when an officer's actions are limited to achieving the objective which justified his initial entry—e.g. quelling immediate dangers in searches pursuant to public safety. Mincey v. Arizona, 437 U.S. 385, 393 (1978); see Wayne R. LaFave, Search and Seizure § 6.6(a) (4th ed. 2008). In securing a residence during searches pursuant to public safety, officers may either remove the exigency from those to which it poses a danger or vice versa. Compare Layman, 244 Fed. Appx. at 211 (holding that a search was reasonable when it was limited to locating and aiding occupants overcome by the fumes of a meth lab) with United States v. Walsh, 299 F.3d 729, 734 (8th Cir. 2002) (holding that a search was reasonable when it was limited to locating and quelling a meth lab; officers did not waste precious time evacuating occupants).

The search of Mr. Scott's residence was conducted in an objectively reasonable manner. Before entering the house to conduct the search, the officers knocked on the front door and announced their presence, "[p]olice, open the door!" (R.25). The knock was answered by the Scotts' babysitter who allowed the officers to enter. (R.25-26). Upon gaining entry, the officers focused their efforts on locating and dismantling the meth lab instead of removing the babysitter from the residence because she was apparently preoccupied with taking care of the Scotts' baby. (R.26). The lab was ultimately located and officers were still in the process of dismantling it when the Scotts returned home. (R.26-27). It clear that the warrantless search of Mr. Scott's residence was objectively reasonable in manner because the officers announced their presence and then proceeded to dismantle the lab in order to protect everyone in the surrounding areas.

- b. ***The scope of the warrantless search was objectively reasonable because officers confined their search to portions of the residence where threats to public safety were likely present.***

Because officers confined their search to areas of the appellant's residence where threats to public safety were likely present, the search's scope was objectively reasonable. The scope of a search refers to the places of a residence that are searched. See Najjar, 451 F.3d at 720. A warrantless search is objectively reasonable in scope if it is confined to the specific places inside a residence where an exigency would reasonably be located. Id. It is proper to search areas where the primary exigency is likely to be found as well as areas that may contain exigencies caused by the primary one. Compare United States v. Gambino-Zavala, 539 F.3d 1221, 1226 (10th Cir. 2008) (holding that a search pursuant to reports of gunfire was reasonable when it was limited to the rooms of the apartment

where potential victims were likely located) with Walsh, 299 F.3d. at 734 (holding that a search pursuant to a volatile meth lab was reasonable when it was limited the sweep of a nearby shed in an effort to determine if the lab was in operation).

The warrantless search of Mr. Scott's residence was objectively reasonable in scope. Immediately prior to the search, Det. Cameron noticed an occupant moving around within the house. (R.25). Fearing a chemical explosion, he made the decision to search the residence. (Id.). It was limited to the room of initial entry, an open area consisting of a living room, dining room and kitchen. (R.26). Officers also searched the garage. (Id.). During the course of ongoing surveillance, Det. Cameron had observed Mr. Scott exit his garage and load two sacks in his truck before embarking on an apparent meth delivery. (R.20-21). Obviously, the warrantless search of Mr. Scott's residence was objectively reasonable in scope for the garage and the house reasonably could have harbored exigencies, a volatile meth lab and an occupant in harm's way, respectively.

- B. The warrantless search of the appellant's residence in an effort to prevent the destruction of evidence was justified because it was conducted with probable cause coupled with sufficient exigencies.

Given that the search of the appellant's residence was conducted with probable cause coupled with suitable exigencies, the warrantless search was justified in order to prevent the destruction of evidence. The burden to establish exigency is particularly high in cases where the government seeks to seize evidence from a residence to prevent its destruction. United States v. Aquino, 836 F.2d 1268, 1271 (10th Cir. 1988). As a result, in order for officers to initiate a warrantless search to prevent the destruction of evidence, they must first have clear evidence of probable cause coupled with extreme exigencies.

Id. at 1272. Specifically, the search must be (i) “pursuant to clear evidence of probable cause,” (ii) “available only for serious crimes and in circumstances where the destruction of evidence is likely,” (iii) “limited in scope to the minimum intrusion necessary,” and (iv) “supported by clearly defined indicators of exigency that are not subject to police manipulation or abuse.” United States v. Carter, 360 F.3d 1235, 1241 (10th Cir. 2004).

In determining whether the government meets this burden, the circumstances surrounding the search must be evaluated in the light of prudent, cautious, and trained officers. Id.

1. **The search was conducted under clear evidence of probable cause because officers smelled the presence of vapors associated with meth production after having been informed of its likely manufacture.**

The search of appellant’s residence was conducted under clear evidence of probable cause. Probable cause is the existence of a set of circumstances that would lead a reasonably prudent person to believe there is a fair probability that evidence of a crime will be found in a certain place. United States v. Perrine, 518 F.3d 1196, 1205 (10th Cir. 2007). The presence of odors linked to meth production coming from a residence would lead a prudent officer to conclude that the premises harbored a meth lab. United States v. Scroger, 98 F.3d 1256, 1259 (10th Cir. 1996) (holding that officers had probable cause when they smelled the odor of meth production while questioning a man holding a hot plate in his chemically stained hands); see Layman, 244 Fed. Appx. at 210-11 (suggesting that the odors alone may be enough to establish probable cause). Other indicators establishing probable cause include a suspect’s prior criminal record and tips from reliable informants. See Erb, 596 F.2d at 417-18; Artez, 389 F.3d at 1114 (holding that an informant’s reliability is bolstered when an anonymous tip confirms the information).

The search of Mr. Scott's residence was conducted under clear evidence of probable cause. On May 14, 2008, an informant told officers that Mr. Scott was "wise to [their] investigation" and that he planned to dismantle his meth lab later that day, after "cooking just one more batch". (R.23). The officers immediately drove to the residence. (R.24). Upon arrival, Det. Cameron, trained in the detection of meth, confirmed the presence of strong chemical odors coming from the residence, odors that were previously confirmed by both police surveillance and concerned citizens. (R.18-20, 25). During their previous surveillance, officers had also witnessed Mr. Scott exit his garage and load two large bags into his truck before following him on an apparent drug delivery. (R.20-21). Officers were aware of Mr. Scott's previous conviction for the delivery of a controlled substance. (R.22) Given these circumstances, a prudent officer could only conclude that there was a meth lab in operation at Mr. Scott's residence.

- 2. The appellant was likely destroying the evidence that connected him to the serious crime of manufacturing meth because officers observed movement within the residence coinciding with reports that the appellant was dismantling his lab.**

Given the information at the time of the search, it was reasonable to believe that the appellant was destroying evidence that linked him to a serious crime. A warrantless search pursuant to the destruction of evidence is only reasonable when it is likely that evidence of a serious crime will be destroyed. Scroger, 98 F.3d at 1259. It is clear that the manufacture of meth in a serious crime. Id. at 1260. However, in order to justify a search to prevent the destruction of a meth lab, officers need some indication that there are persons around the lab that will likely destroy it. Compare Id. at 1260 (holding that the destruction of a meth lab was likely when a man tried to bar officers from entering his

residence after that they had observed him holding a hot plate in his chemically stained hands; there were indications that others were in the residence) with Carter, 360 F.3d at 1241 (holding that the destruction of evidence inside a garage was unlikely when two individuals in the possession of marijuana ran out to confront officers; there was no indication that anyone else remained in the garage). Reliable informant's can be of valuable assistance in determining whether the destruction of evidence is likely. See Erb, 596 F.2d at 417-18 (holding that an informant's tip concerning a volatile meth lab helped justify a warrantless search, especially since it was verified by police surveillance).

On the day of the search, Mr. Scott was likely in the process of destroying the evidence that would link him to a serious crime. On May 14, 2008, officers received a tip from an informant that Mr. Scott was in the process of manufacturing a batch of meth and planned to dismantle his lab after finishing. (R.23). Upon arrival, officers confirmed the smell of chemicals associated with meth production, a confirmation that surveillance turned up on previous occasions. (R.20, 25). Moreover, they noticed movement within the residence and that Mr. Scott's truck was parked out back. (R.25). Det. Cameron decided to search the residence fearing that Scott was in the process of dismantling his lab. (Id.). Given the available information, officers were clearly justified in searching the residence because it was likely that Mr. Scott was inside dismantling his lab.

3. The search was limited in scope and free from police manipulation because officers were waiting for a warrant to be obtained.

The search of the appellant's residence pursuant to the destruction of evidence was conducted in a proper manner; it was limited in scope and free from police manipulation. A search is limited in scope when it is confined to the places within a

residence where an exigency would reasonably be located. Najar, 451 F.3d at 720; see Aquino, 836 F.2d at 1272 (holding that officers are justified in sweeping a residence to eliminate exigencies—e.g. weapons). Moreover, a search is generally free from manipulation when there is clear evidence that officers are diligently seeking a warrant. Id., see Scroger, 98 F.3d at 1260 (holding that officers were not manipulating exigencies simply because they failed to obtain a warrant as soon as probable cause arises).

The search of Mr. Scott's residence was limited in scope and free from police manipulation. Prior to searching the residence, Agt. Cummings had written up a warrant and was in the process of obtaining a signature. (R.32-33). Due to delays, Det. Cameron, fearing the destruction of evidence, decided to conduct a warrantless search after noticing movement within the house. (R.25). The search was limited to the room of initial entry, an open area consisting of a living room, dining room and kitchen; a quick search of this area turned up a firearm that was in plain view. (R.26-27). Officers also searched the garage which turned up an active meth lab. (R.27). During the course of surveillance, Det. Cameron had observed Mr. Scott exit his garage and load two sacks into his truck before embarking on an apparent meth delivery. (R.20-21). The warrantless search of Mr. Scott's residence was clearly free from police manipulation because officers were in the process of obtaining a warrant prior to the search. It was also limited in scope because it was confined to the areas where the destruction of evidence was likely taking place.

II. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS BECAUSE THE WARRANTLESS SEARCH OF HIS RESIDENCE WAS CONDUCTED WITH THIRD-PARTY CONSENT WHICH JUSTIFIED THE SEARCH PURSUANT TO THE CONSENT EXCEPTION TO ILLEGAL SEARCHES UNDER THE FOURTH AMENDMENT.

Because the warrantless search of the appellant's residence was conducted pursuant to third-party consent, the District Court properly denied appellant's motion to suppress. Consent, including third-party consent, is a well-established exception to the warrant requirement. United States v. Matlock, 415 U.S. 164, 165-66, 170 (1974). A third-party's consent to search a residence over which they have common authority is valid. Id. at 170. Of course, the consent must also be given voluntarily. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). As a result, the warrantless search of residence pursuant third-party consent is justified so long as it is issued voluntarily and with the proper authority. Georgia v. Randolph, 547 U.S. 103, 106 (2006).

- A. The warrantless search of the appellant's residence pursuant to third-party consent was justified because consent was given by a third-party who had proper authority.

Because third-party consent was issued with the proper authority, the warrantless search of the appellant's residence was justified pursuant to that consent. A third-party, having common authority over a residence, can give valid consent to conduct warrantless searches of that residence. Matlock, 415 U.S. at 170. A warrantless search is also valid when officers reasonably, though mistakenly, believe that a consenting third-party has common authority over the residence. Rodriguez, 497 U.S. at 188-89. Third-party authority can only be defeated in well-delineated cases where the non-consenting party is physically present and expressly refuses to consent. Randolph, 547 U.S. at 122-23. Thus, barring these cases, a warrantless search of a residence pursuant to third-party consent is justified as long as the third-party has either actual or apparent authority to consent to the search. United States v. Kimoana, 383 F.3d 1215, 1221 (10th Cir. 2004).

1. **The consenting third-party had actual authority over the appellant's residence because she exercised both joint access and control.**

Given that the consenting third-party had both joint access and control of the appellant's residence, she had actual authority over it. The actual authority to consent to a search hinges on the issuing party's common authority over the residence which results from an assumed risk of potential third-party consent. Id. Common authority refers to a party's entitlement to either (i) the mutual use of the residence through joint access or (ii) control over the residence for most purposes. United States v. Rith, 164 F.3d 1323, 1329 (10th Cir. 1999). Thus, a third-party has actual authority to consent to a search when the third-party has either joint access or control over the residence. Id.

a. ***The consenting third-party exercised the mutual use of the residence through joint access because she enjoyed the unfettered freedom to use the residence as any occupant reasonably would.***

Because the consenting third-party enjoyed unbridled access to the appellant's residence, she had mutual use of the residence through joint access. A third-party's mutual use of a residence through joint access is a factual inquiry that requires the third-party to have the benefit of entering the residence at will, "without the consent of the subject of the search." Id. at 1329-30. Actual occupants of a residence generally have this benefit, at least with respect to the common areas of the residence. United States v. Thomson, 524 F.3d 1126, 1132 (10th Cir. 2008); see United States v. Dozal, 173 F.3d 787, 792 (10th Cir. 1999) (holding that an incriminating search was valid against an occupant when his co-occupant consented to a search which was confined to the common areas of the apartment).

Ms. Ericson had mutual use of Mr. Scott's residence through joint access. As a resident nanny of the Scotts' residence, Ms. Ericson had developed a good rapport with the Scotts' children. (R.15). Ms. Scott described the close relationship between her family and Ms. Ericson as a great one which suggests that Ms. Ericson enjoyed a wide range of freedom with respect to residential access. (Id.). Ms. Ericson had access to the room of initial entrance, the living room. (R.27). She also had access to the kitchen and dining room because they formed "one big open area" with the living room. (Id.). In addition, both Mr. and Ms. Scott's presence in the garage on the morning of the search, a search limited to the living room, dining room, kitchen and garage, suggests that it was a shared common area among the occupants of the residence. (R.14, 26). It is clear that Ms. Ericson had mutual use of Mr. Scott's residence through joint access because she was an occupant with a particularly close relationship to the Scotts giving her unbridled access to the residence, specifically its common areas.

- b. ***The consenting third-party exercised control over the residence for most purposes because her close relationship with the appellant gave rise to a presumption of control.***

The third-party's relationship with the appellant gave rise to a presumption of control over the residence. The control over a residence for most purposes is a normative question concerning whether the relationship between occupants is one that leads to a presumption of control. Rith, 164 F.3d at 1330. Typically, familial relationships such as those between spouses or between parents and their children will give rise to this presumption. Id. However, in some instances, employer-employee relationships can give rise to the presumption—e.g. when "the 'status' of the employee" suggests that they

have “the premises under [their] ‘immediate and complete control.’” See LaFave, supra at § 8.6(c) (maintaining that courts are more likely to find actual authority in an “office manager, foreman or caretaker” rather than “a clerk, secretary, or babysitter”); see also United States v. Trotter, 483 F.3d 694, 698-99 (10th Cir. 2007) (holding that a person’s relationship to a premises can give rise to a presumption of control in some instances); Kasper v. City of Hobbs, 90 F. Supp.2d 1313, 1322 (D. N.M. 2000) (suggesting that resident, as opposed to non-resident, babysitters may be found to have a presumption of control over a residence). The presumption can be rebutted if the search does not fall within the employee’s scope of employment. See LaFave, supra at § 8.6(c).

Ms. Ericson had control over Mr. Scott’s residence for most purposes. Rather than a simple babysitter, Ms. Ericson was a resident nanny—i.e. a house manager—raising a presumption of control over the entire residence, specifically areas that fell within the scope of her employment. (R.15). For example, in performing her babysitting duties in the absence of the Scotts, she had control of the kitchen because it was “pretty close to lunch time.” (Id.). She also had control of the living room because (i) it was the room of primary entrance into the residence and (ii) it was part of “one big open area” along with the kitchen and dining room. (R.27). It is clear that Ms. Ericson had control over Mr. Scott’s residence for most purposes because her duties as a house manger required it.

2. **The consenting third-party had apparent authority over the appellant’s residence because officers had an objectively reasonable belief that the third-party had actual authority.**

Because officers had an objectively reasonable, though false, belief that a third-party had actual authority over the appellant’s residence, the third-party had apparent

authority. Apparent authority arises when officers reasonably, though falsely, believe that a third-party has the actual authority to consent. Kimoana, 383 F.3d at 1221. It is measured by looking at the facts at the time of entry through the eyes of a reasonably cautious person; when the circumstances are ambiguous there is a duty to make further inquiry. Id. at 1222; see United States v. Cos, 498 F.3d 1115, 1129 (10th Cir. 2007) (holding it unreasonable to believe that a party was an occupant, without further inquiry, simply because he was on the premises with others). When a third-party is a babysitter, it may be reasonable to believe that they have actual authority over a residence. Compare United States v. Thomas, 120 F.3d 564, 572 (5th Cir. 1997) (holding it reasonable to believe that babysitters have access to the common areas falling directly within their scope of employment) with Kasper, 90 F. Supp.2d at 1319-20 (holding it unreasonable to believe that a person has joint access when they claim they are a babysitter who stays over sometimes). Certainly, if officers know that a babysitter and an occupant as well, it would be reasonable for them to believe that they have actual authority. United States v. Blunt, 187 Fed. Appx. 821, 826 (10th Cir. 2006) (holding it is reasonable to believe a person has joint access when they enter a house and claim they are a resident nanny).

Ms. Ericson had apparent authority over the over Mr. Scott's residence. On May 11, 2008, Agt. Cummings authorized a stakeout of Mr. Scott's residence leading to a full-time surveillance of the premises which suggests that officers became familiar with the occupants living within. (R.30). Det. Cameron knew, for instance, that one of the occupants was Ms. Ericson, the Scotts' babysitter. (R.25). Because she was babysitting the Scotts' infant at the time of the search, a reasonable officer would certainly conclude

that, to perform her duties, she had actual authority over the kitchen because it was “[p]retty close to lunch time.” (R.15). Likewise, as an occupant, it would be reasonable to believe that she had authority over the living room and dining room because they formed “one big open area” along with the kitchen. (R.26). Given that the full-time surveillance provided officers with the knowledge that Ms. Ericson was a resident babysitter, it is clear that they could have reasonably concluded that she had actual authority over Mr. Scott’s residence, especially the areas needed to perform her duties.

B. The warrantless search of the appellant’s residence pursuant to third-party consent was justified because the consent was given voluntarily by a third-party.

Because voluntary consent was given by a third-party, the warrantless search of the appellant’s residence was justified. In order to qualify as an exception to the warrant requirement, third-party consent must be voluntary rather than compelled through coercion or duress. Schneckloth, 412 U.S. at 248. “Voluntariness is a question of fact to be determined from all the circumstances.” Ohio v. Robinette, 519 U.S. 33, 40 (1996). Thus, a third-party’s consent is valid as long as the circumstances support (i) the existence of clear and positive testimony that it was unequivocal and specific and freely given and (ii) the necessity that it was given without duress or coercion, express or implied. United States v. Butler, 966 F.2d 559, 562 (10th Cir. 1992).

1. **The third-party’s consent was clear and freely given because opening the door to an officer is a clear indication of acquiescence.**

The consent to search the appellant’s residence was valid because there were clear indications that it was freely given. Verbal or written acquiescence is a common method for obtaining consent that is clear and freely given. See United States v. Guerrero, 472

F.3d 784, 789 (10th Cir. 2007). However, consent need not be verbal as long as it is clear. Id. Consent may be given “through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer.” Id. at 789-90. Generally, opening a door indicates consent whereas closing a door indicates refusal. See United States v. Walls, 225 F.3d 858, 862-63 (7th Cir. 2000) (holding that consent was clearly given when an occupant, shortly after officers announced their presence, opened the door and stepped back to allow their entry); United States v. Curnett, 123 Fed. Appx. 733, 735 (8th Cir. 2005) (holding that the act of pushing the door open and stepping aside to allow an officer into one’s home is a clear indication of an implied consent to search).

Ms. Ericson’s consent to enter Mr. Scott’s residence was clear and freely given. Officers initiated the search by knocking on the front door and announcing their presence. (R.25). Ms. Ericson answered the door, pulling it open in order to allow the officers in. (R.25-26). It is clear that she saw the officers’ uniforms prior to admitting them. (R.26). Without a word, the officers accepted the invitation and entered to conduct the search. (Id.). As a result of this non-verbal encounter, it is clear that the officers garnered Ms. Ericson’s permission to enter the residence even though she did not speak English. (R.15). Ms. Ericson’s consent to enter Mr. Scott’s residence was obviously clear and freely given because opening the door to officers is a clear indication of acquiescence.

2. **The third-party’s consent was free from duress and coercion because it was secured in a manner that would give a reasonable person the belief that they were free to deny it.**

The third-party’s consent to search the appellant’s residence was valid because it was secured in a manner that was free from duress or coercion. Determining whether

consent is free from duress or coercion turns on whether a reasonable person would believe that he was free to deny consent to a requesting officer. Guerrero, 472 F.3d at 790. In securing consent, the threatening presence of several officers, the brandishing of a weapon, the use of aggressive language and the use of a private location are factors that may lead to an indication of coercion. Id. As long as consent is secured without coercion, it is inconsequential whether officers inform the consenting party that they have the right to refuse consent. See Id.; Thomson, 524 F.3d at 1134 (holding that a search was voluntary when a woman, after inviting three officers into the privacy of her home, was approached and asked if she would allow a search; officers did not inform her of her right to refuse, nor did they use threats to coerce her into consenting).

Ms. Ericson's consent to enter Mr. Scott's residence was clearly free from duress and coercion. The search of the residence was initiated by only three officers casually walking straight up to the front door. (R.25). Off. Brown knocked and then proceeded to announce their presence in a tone sufficient for someone, who was behind a closed door, to hear. (Id.). The officers then secured Ms. Ericson's consent to enter before they strode into the privacy of the residence. (R.26). At no time was Ms. Ericson threatened which is evidence by the fact that, upon entering, the officers immediately started the search, leaving Ms. Ericson to herself while she cared for the Scotts' infant. (Id.). In fact, she was on the front porch with the child when the Scott's returned home. (R.16). It is clear that the officers' conduct on the day of the search was not threatening. Because a reasonable person, under similar circumstances, would have concluded that they were free to refuse the search, the search was free from duress or coercion.

Conclusion

For the foregoing reasons, the appellee requests that the decision of the District Court be affirmed.

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