

NO. 42582-3-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PHILIP GONZALEZ,

Appellant.

STATE OF WASHINGTON
BY _____
DEPUTY
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COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the appellant's motion to suppress evidence pursuant to CrR 3.6. (Clerk's Papers 72-89).

2. The trial court erred in admitting evidence obtained in violation of the appellant's rights under the Fourth Amendment and article I, § 7 of the Washington Constitution.

3. The trial court erred in entering Conclusion of Law 4 regarding the appellant's motion to suppress evidence.¹

4. The trial court erred in entering Conclusion of Law 6.a. regarding the appellant's motion to suppress evidence.

5. The trial court erred in entering Conclusion of Law 6.b. regarding the appellant's motion to suppress evidence.

6. The trial court erred in entering Conclusion of Law 6.c. regarding the appellant's motion to suppress evidence.

7. The trial court erred in entering Conclusion of Law 7 regarding the appellant's motion to suppress evidence.

8. The trial court erred in entering Conclusion of Law 8 regarding the appellant's motion to suppress evidence.

¹The trial court's Amended Findings of Fact and Conclusions of Law Re: Defendant's Motion to Suppress Evidence Pursuant to CrR 3.6" is attached as an Appendix.

9. The trial court erred in entering Conclusion of Law 10 regarding the appellant's motion to suppress evidence.

10. The trial court erred in entering Conclusion of Law 11 regarding the appellant's motion to suppress evidence.

11. The trial court erred in entering Conclusion of Law 12 regarding the appellant's motion to suppress evidence.

12. The trial court erred in entering Conclusion of Law 13 regarding the appellant's motion to suppress evidence.

13. The trial court erred in entering Conclusion of Law 14 regarding the appellant's motion to suppress evidence.

14. The trial court erred in entering a conviction and judgment where, absent the unlawfully seized evidence, the State could not prove the charged offense beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where a "protective sweep" is conducted in the absence of an arrest, and where the "protective sweep" takes place outside of the area immediately adjoining the site of police contact with a suspect, should this Court hold that the search was not permissible under the Fourth Amendment

and article I, § 7 of the Washington Constitution? Assignments of Error 1, 2, 3, 4, 5, 6 and 14.

2. The exigent circumstances exception to the warrant requirement hold that police must identify specific, articulable facts that would warrant a reasonably prudent officer in the belief that the area to be searched harbored a dangerous person. Here, police were investigating a robbery and were apprised that the suspect had purchased two handguns. The suspect was detained at the door of his apartment and police heard other people running toward the rear of the apartment. Should this Court hold that entry into the apartment was not permissible under the Fourth Amendment and article I, section 7 of the Washington Constitution? Assignments of Error 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, and 14.

C. STATEMENT OF THE CASE

1. Procedural facts:

The Grays Harbor County Prosecutor's Office charged Philip Gonzalez with possession of heroin. Clerk's Paper (CP) 1-2. Mr. Gonzalez moved pursuant to CrR 3.6 to suppress evidence obtained pursuant to the execution of a search warrant, which was obtained as the result of a

warrantless entry into his apartment. Report of Proceedings [RP] at 1-46;² CP 9-22. Following entry into Mr. Gonzalez' apartment on March 17, 2011, police applied for a search warrant. CP 10, line 31. The affidavit submitted in support of the search warrant application relied on the fact that the police had seen suspected controlled substances and drug paraphernalia during a warrantless entry into Gonzalez' apartment.. RP at 24; CP 20, 21, 22. In executing the warrant, the police seized scales, methamphetamine and heroin. CP 42, 43.

Following a suppression hearing on August 8, 2011, the Honorable F. Mark McCauley denied the motion. RP at 42. Amended findings of facts and conclusions of law were entered August 30, 2011. CP 79-82.

Following the denial of his suppression motion, Mr. Gonzalez agreed to a trial on stipulated facts. RP at 47-48; CP 83-117. The trial court found Mr. Gonzalez guilty of possessing heroin based on stipulated findings and sentenced him to a standard range sentence. RP at 48, 52; CP 123, 124.

Timely notice of appeal was filed September 12, 2011. CP 136. This appeal follows.

²The RP consists of two volumes of reported proceedings on April 22, 2011, May 23, 2011, (Volume 1), and August 8, 2011, August 26, 2011, September 6, 2011, and September 12, 2011 (Volume 2).

2. CrR 3.6 Hearing:

Two men entered Daniel Smith's and Tiffany Peters' apartment in Grayland, Washington, at 5:00 a.m. on March 17, 2011. RP at 4. They reported that the men assaulted them, took Smith's wallet and then left. RP at 4-5. The men were reported to have left in a white Toyota with tag number 998 TYE. RP at 5.

Grays Harbor County Deputy Sheriff Kevin Schrader responded to the call. RP at 5. Mr. Smith said that he had had an altercation with Philip Gonzalez two months earlier. RP at 6. Deputy Schrader stated that Mr. Gonzalez drove a Toyota that matched the description of the vehicle that was seen leaving the apartment on March 17, 2011. RP at 6. Deputy Schrader knew where Mr. Gonzalez lived and drove to his apartment. RP at 7. Deputy Schrader stated that he had "been receiving tips for about four to six months prior" to the incident that Mr. Gonzalez was selling drugs from his apartment and that he had been trying to obtain sufficient evidence to obtain a search warrant. RP at 8. He also stated that Mr. Gonzalez had recently obtained a concealed weapons permit and had also recently bought two pistols from Dave's Harbor Gun, a local gun dealer. RP at 8-9.

At the apartment, located at 200 East Harms in Westport,

Washington, the deputy found a white Toyota and noted that its hood was warm. RP at 7, 17. Deputy Schrader saw wet footprints on the stairway leading to Mr. Gonzalez' apartment on the second story. RP at 7. The apartment had no back stairs or fire escape. RP at 18.

Deputy Schrader went to the top of the stairs of the apartment and listened at the door on the landing for "maybe up to five minutes." RP at 10. He stated that he could hear at least three male voices through the door, and that he heard "mention of guns and drugs[.]" RP at 10. Two other officers were also present. RP at 20. While Deputy Schrader was standing on the landing, the apartment door opened and Mr. Gonzalez walked out. RP at 11. Deputy Schrader announced that he was from the sheriff's office and Mr. Gonzalez tried to shut the door. RP at 11. The deputy heard noises of people "running toward the rear of the residence." RP at 11. He stated that when the door opened, he smelled the odor of burned heroin and smoked marijuana. RP at 12, 13. Deputy Schrader entered the apartment and went to the back of the apartment where he had heard the noises and found two people in a back bedroom. RP at 13. During this time Mr. Gonzalez remained on the landing outside the apartment while being watched by one of the other officers. RP at 13. After obtaining a warrant based on what he

had seen while in the apartment, police found drugs and two guns. RP at 23. By stipulation, the court also considered the police report attached to the motion to suppress as Exhibit A. RP at 25; CP 15-22.

D. ARGUMENT

1. THE WARRANTLESS SEARCH OF GONZALEZ' APARTMENT WAS UNCONSTITUTIONAL.

a. Standard of Review

The trial court's conclusions of law in a suppression hearing are reviewed de novo. *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). The trial court's findings must support the conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Substantial evidence must support those findings. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

b. The warrantless search of Gonzalez' apartment was illegal because no exception to the warrant requirement applied.

All warrantless entries of a home are presumptively unreasonable. *Welsh v. Wisconsin*, 466 U.S. 740, 749, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) (citing *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)). Absent exigent circumstances, both the Fourth Amendment

and article 1, § 7 of the Washington State Constitution prohibit a warrantless entry into an individual's home in order to make an arrest. *State v. Wolters*, 133 Wn. App. 297, 301, 135 P.3d 562 (2006); *State v. Ramirez*, 49 Wn. App. 814, 818, 746 P.2d 344 (1987) citing *Payton*, 445 U.S. at 587-88).

A warrantless search is per se unconstitutional unless it falls within an exception to the warrant requirement. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); *Minnesota v. Dickerson*, 508 U.S. 366, 372, 113 S. Ct. 2130, 2135, 124 L. Ed. 2d 334 (1993). "Exceptions to the warrant requirement are limited and narrowly drawn." *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). The State always carries the "heavy burden" of proving a warrantless search is justified. *State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). The State therefore has the burden of establishing an exception to the warrant requirement by "clear and convincing evidence." *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

c. The warrantless search of Gonzalez' apartment was illegal because no exception to the warrant requirement applied.

The trial court relied in part on the protective sweep exception to the warrant requirement as a reason justifying the search of Gonzalez' apartment.

RP at 37-39; CP 81; Conclusions of Law 1-6. The facts, however, do not support the conclusions of law that this exception applies. First, the exception only applies when officers have arrested someone inside the home. Here, Deputy Schrader did not arrest Mr. Gonzalez and in any case, an arrest—had one occurred prior to the search—would have taken place outside the apartment on the landing or at the door's threshold. RP at 13. Second, even if the exception could be applied to non-arrest situations, police did not have an objectively reasonable belief that the apartment harbored an individual posing a danger to those on the scene, as discussed *infra*.

i. A protective sweep exception requires an arrest.

A protective sweep under the Fourth Amendment is a "quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Maryland v. Buie*, 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). The search lasts "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." *Id.* at 335-36.

Article I, § 7 requires actual authority of law before the State may disturb an individual's private affairs. *State v. Day*, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007). It is the fact of arrest that provides authority of law for any search incident to arrest. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

"While making a lawful arrest, officers may conduct a reasonable 'protective sweep' of the premises for security purposes." *State v. Hopkins*, 113 Wn. App. 954, 959, 55 P.3d 691 (2002) (citing *Buie*, 494 U.S. at 334-35). "The concept of a protective sweep was adopted to justify the reasonable steps taken by arresting officers to ensure their safety while making an arrest." *State v. Boyer*, 124 Wn. App. 593, 600, 102 P.3d 833 (2004) (citing *Buie*, 494 U.S. at 334). "[T]he risk of danger with in-home arrests justifies steps by the officers 'to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack.'" *Boyer*, 124 Wn. App. at 600-01 (quoting *Buie*, 494 U.S. at 333).

The holding of *Buie* allowing officers to search the areas immediately adjoining the area of arrest without reasonable suspicion does not apply as a matter of law to non-arrest situations. Warrantless searches incident to arrest

have been allowed in some situations to ensure officer safety. See *State v. Vrieling*, 144 Wn.2d 489, 496, 28 P.3d 762 (2001) (search of sleeper compartment in truck); *State v. Patton*, 167 Wash.2d 379, 219 P.3d 651 (2009) (search of vehicle incident to the arrest). But it is the fact of arrest that provides authority of law for such intrusion. *O'Neill*, 148 Wn.2d at 571. In the absence of an arrest, *Buie* is inapplicable. The protective sweep exception is therefore limited to in-home arrest situations. Here, police did not arrest anyone in Mr. Gonzalez' apartment before entering the premises, and in any case, Mr. Gonzalez was either on the apartment's landing or at the door's threshold, not inside the apartment. RP at 11, 13. The court's conclusions of law that a "protective sweep" was justified is not supported by law, and therefore any evidence obtained as the fruit of entry into the apartment by law enforcement must be suppressed.

- ii. **The persons heard running away from the door to the back of the apartment did not provide an exigent circumstance to enter the apartment without a warrant.**

As argued *supra*, there was no constitutional basis to conduct a protective sweep of the apartment because no arrest had occurred. The court also found that entry into the apartment was justified under the exigent

circumstances exception to the prohibition against warrantless searches. RP at 40; CP 82; Conclusions of Law 7-14. The issue, then, is whether, pursuant to *Buie*, the deputy reasonably believed the apartment harbored dangerous persons. Although the presence of a person at the doorway may have posed a danger when the deputy first arrived at the scene, Mr. Gonzalez did not run toward the back of the apartment. Instead, he remained on the landing and was detained by another officer. RP at 11, 13. Thus, he no longer posed a danger to the deputy. See *Hopkins*, 113 Wn. App. at 960, citing *United States v. Henry*, 48 F.3d at 1284 (suspect in custody no longer a threat to police).

The only remaining possibility is that the deputy feared that other, dangerous persons were in the apartment.³ At the CrR 3.6 hearing, the State argued that the deputy felt he was in danger because of his concern that persons heard running in the apartment could arm themselves. RP at 29. Danger to the arresting officer is an exigent circumstance allowing officers to enter without waiting for admission. *State v. Carson*, 21 Wn. App. 318, 322, 584 P.2d 990 (1978); *State v. Campbell*, 15 Wn. App. 98, 102, 547 P.2d 295 (1976). Requiring police to have an objectively reasonable suspicion that a

³ Assuming *inter alia* that the officers were justified in conducting a protective sweep, “. . . a ‘general desire to be sure that no one is hiding in the place to be searched is not

dangerous individual is present in non-arrest situations before allowing search of immediately adjoined areas is also compelled by article I, § 7 precedent. The Supreme Court has "consistently expressed displeasure with random and suspicionless searches, reasoning that they amount to nothing more than an impermissible fishing expedition." *State v. Jordan*, 160 Wn.2d 121, 127, 156 P.3d 893 (2007) (citing *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 341, 945 P.2d 196 (1997)). The reasonable suspicion requirement protects people against arbitrary searches. *Id.* at 308; *State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008) (founded suspicion necessary to justify *Terry* frisk for weapons, which provides a basis from which the court can determine the search was not arbitrary or harassing).

"[I]n the absence of urgent circumstances officers should not rely on their own discretion, but should instead resort to a neutral magistrate, to determine whether probable cause to conduct a search exists. *State v. Maddox*, 116 Wn. App. 796, 813, 67 P.3d 1135 (2003). Authorities are allowed to bypass a neutral magistrate and conduct a warrantless search only 'where the societal costs of obtaining a warrant, such as danger to law officers of the risk of loss or destruction of evidence, outweigh the reasons

sufficient' to justify a protective sweep outside the immediate area where an arrest has occurred." *Hopkins*, 113 Wn.App. at 960 (citations omitted).

for prior recourse to a neutral magistrate.”” *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)) (internal citations omitted). No such exigency, founded on reasonable suspicion, presented itself here.

The State presented no facts that would have led police reasonably to believe that the other persons the deputy heard running away from the door posed a potential danger. During the CrR 3.6 hearing, Deputy Schrader did not testify that he saw a weapon on the persons he heard moving in the apartment or that anyone had threatened the officers. RP at 13,14. Indeed, the facts suggest the deputy did not have even a subjective fear that the others in the apartment were dangerous. Deputy Schrader entered the apartment alone, leaving a second officer to watch Mr. Gonzalez on the landing outside the apartment. RP at 13. The deputy testified that there was a “history of guns at the residence,” but that “history” pertained to Mr. Gonzalez only, who was being watched at all times by another officer. RP at 13. Leaving aside the Second Amendment implications of “profiling” persons who legally obtain a conceded weapon permit and legally purchase guns in subsequent investigations, the State has provided no other basis or fact on which the deputy felt he was in danger. In fact, the deputy could not provide an

articulable basis for his fear; he only asserted that he said there was a report of a “robbery” and that he “did not feel safe just remaining there and allowing them to arm themselves.” RP at 14. There was no mention of weapons used during the alleged robbery, he did not see a weapon or indicate he had any reason to believe that any person owned a weapon other than Mr. Gonzalez. As noted previously, Mr. Gonzalez was the only person who the police had information regarding weapons, and he remained on the landing being watched by another officer. RP at 13. The fact that the deputy heard someone moving toward the back of the apartment, in a direction that was away from the deputy, does not provide specific, articulable facts from which a reasonable inference could be drawn that the deputy was in danger, thus justifying the warrantless entry.

The deputy did not have a reasonable belief that the apartment harbored dangerous persons; nothing in the persons’ movements indicated officer danger. Instead, it is clear that the deputy was grasping for an excuse to enter the apartment to look for evidence of drug dealing; the deputy stated that he had a long-standing desire to gather evidence to obtain a search warrant for the apartment based on his believe that drugs were being sold from that location. RP at 8. He stated:

I had been watching his residence and contacting multiple people that were visiting his residence, and trying to establish enough for a search warrant.

RP at 8.

The trial court erred by finding exigent circumstances existed. The court's order denying the suppression motion should be reversed, and Mr. Gonzalez' conviction should be reversed.

d. Unlawfully obtained evidence must be suppressed and the charge dismissed with prejudice.

"When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *Ladson*, 138 Wn.2d at 359. Evidence is fruit of an illegal search when it "has been come at by exploitation of the primary illegality." *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

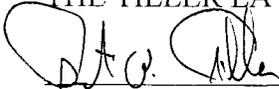
Police discovered drug evidence in Mr. Gonzalez' apartment during the course of an unconstitutional search, which was used as a basis to obtain a search warrant. This Court should reverse the conviction and dismiss the charge with prejudice because no evidence remains on which to find guilt beyond a reasonable doubt. *State v. Kinzy*, 141 Wn.2d 373, 393-94, 5P.3d

668 (2000) (no basis remained for conviction because Court concluded motion to suppress evidence should have been granted); *State v. Boethin*, 126 Wn. App. 695, 700, 109 P.3d 461 (2005) (dismissing charges because remaining evidence insufficient to prove guilt beyond a reasonable doubt).

E. CONCLUSION

The search of the apartment was not a lawful "protective sweep" under *Buie*, and exigent circumstances did not exist to support a warrantless search. Evidence seized as a result of the unlawful search should have been suppressed. *Hopkins*, 113 Wn. App. at 960. For the reasons stated above, Mr. Gonzalez respectfully requests this Court reverse his conviction.

DATED: May 4, 2012.

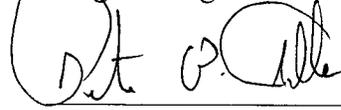
Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
Of Attorneys for Philip Gonzalez

CERTIFICATE OF SERVICE

The undersigned certifies that on May 4, 2012, that this Appellant's Opening Brief was mailed by U.S. mail, postage prepaid, to the Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to Mr. William Leraas, Grays Harbor County Prosecutor's Office, 102 West Broadway, Room 102, Montesano, WA 98563, and Mr. Philip

Gonzalez, 2318 N. Nyhus St., West Port, WA 98595, true and correct copies of this Opening Brief of Appellant.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 4, 2012.

A handwritten signature in black ink, appearing to read 'P. B. Tiller', is written over a horizontal line.

PETER B. TILLER

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR
GRAYS HARBOR COUNTY

STATE OF WASHINGTON

Plaintiff,

vs.

PHILIP JOSE GONZALEZ

Defendant.

NO. 11-1-00144-2

AMENDED FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: DEFENDANT'S MOTION TO
SUPPRESS EVIDENCE PURSUANT TO
CrR 3.6

THIS MATTER came before the court on August 26, 2011, upon motion of the defendant to suppress evidence. The defendant was present and represented by his attorney, Erik M. Kupka. The State was represented by deputy prosecuting attorney, William Leraas. The Court heard the testimony of Deputy Kevin Schrader, considered the police report admitted by stipulation of the parties, and considered the briefs and argument of counsel and hereby makes the following findings of fact and conclusions of law.

UNDISPUTED FACTS

During the CrR 3.6 hearing on August 26, 2011, the only testimony taken was that of the State's witness, Deputy Kevin Schrader. The court also considered the written report of Deputy Schrader. Therefore, the following findings of fact are deemed to be undisputed.

1. On March 17, 2011, prior to 5:00 a.m., Daniel Smith was the victim of an in-home invasion, which resulted in an assault and robbery.
2. The assault and robbery were committed by three men.
3. The men left the crime scene in a white Toyota car with license number 996TYE.
4. Smith had recently been involved in an altercation with Philip Gonzalez.
5. Deputy Schrader knew that Philip Gonzalez drove a white, Toyota Corolla with license number 996TXK.
6. Smith's girlfriend, Tiffany Peters, saw the white vehicle leave the crime scene, she was familiar with the Gonzalez vehicle, and stated that the vehicle she saw may have been the Gonzalez vehicle.
7. Deputy Schrader knew the location of Gonzalez' residence and drove to that location, where he located the Gonzalez vehicle.
8. He felt the hood of the vehicle and it was warm, as if it had been driven recently.
9. Deputy Schrader observed wet footprints leading up the stairway to the apartment which Deputy Schrader knew to be occupied by Gonzalez.
10. Deputy Schrader knew that Gonzalez had recently purchased two pistols from a local gun dealer and that he had applied for and obtained a concealed weapons permit.
11. Deputy Schrader could hear the men talking about drugs and guns.
12. While standing outside the apartment door, Deputy Schrader could hear the voices of three different males inside the apartment.
13. Gonzalez then opened the door of the apartment to exit and Deputy Schrader immediately noticed the odor of burnt marijuana and burnt heroin emanating from the apartment.

14. Deputy Schrader heard other persons running toward the rear of the residence and slamming doors. Deputy Schrader knew that the rear of the apartment afforded a means of escape to the other persons in the apartment.

From these findings of fact, the Court makes the following:

CONCLUSIONS OF LAW:

1. When making a lawful arrest, officers may conduct a reasonable protective sweep of the premises for security purposes. *State v. Hopkins*, 113 Wn.App. 954, 55 P.3d 691 (2002)
2. An in-home arrest puts an officer at the disadvantage of being being on the suspect's turf and, in some circumstances, an arrest just outside the home may pose an equally serious threat to the arresting officers. *Maryland v. Buie*, 494 U.S. 325, at 334-35, 110 S.Ct. 1093 (1990).
3. If the sweep extends beyond the immediate area of the arrest, officers must point to articulable facts which warrant a reasonable belief that the area involved in the protective sweep may harbor an individual who poses a threat to officer safety. *Hopkins*, at 960.
4. An arrest is not always an indispensable element of an in-home protective sweep. If a suspect is dangerous, he is no less dangerous simply because he is not arrested. *United States v. Gould*, 364 F.3d 578 (5th Cir. 2004)
5. The risk of an ambush upon a police officer by a hidden person is equally applicable to a police investigatory confrontation in the home as to an in-home arrest. *Gould*, at 584
6. In this case, the protective sweep was justified and reasonable for the following reasons:
 - a. there was a reasonable, articulable suspicion that the area to be swept harbored individuals posing a danger to the police officers;
 - b. the scope of the protective sweep did not extend beyond a cursory inspection of those areas where a person might be found; and
 - c. the protective sweep lasted no longer than was necessary to address the reasonable suspicion of danger and no longer than it took to complete the apprehension of the individuals concealed within the premises.

7. All of the factors which the court must consider in determining if exigent circumstances existed to justify a warrantless entry into the defendant's residence are satisfied by the circumstances known to Deputy Schrader at the time of his entry into the defendant's apartment.
8. The crime under investigation was a home invasion assault and robbery, which the court finds to be a violent and serious offense.
9. Deputy Schrader had recent information that Mr. Gonzalez had purchased two handguns and had obtained a permit to carry the weapons concealed on his person.
10. Deputy Schrader had reasonably trustworthy information that the Mr. Gonzalez and the other men in the apartment were guilty of the assault and robbery.
11. Deputy Schrader knew that the suspects were on the premises.
12. Deputy Schrader knew that it was likely that the suspects would escape if not swiftly apprehended.
13. Deputy Schrader was able to make entry to the apartment peaceably.
14. Upon analyzing the totality of the circumstances, it was reasonable for Deputy Schrader to conclude that he needed to act quickly

ORDER

Based upon the Findings of Facts above and the Conclusions of Law found, the Court hereby orders that all evidence seized is admissible in the trial of this case.

DATED: 8/30/11



JUDGE