IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v. CASE NO. 5D17-2423

TRAVIS A. ARCHER,

Appellee/Cross-Appellant.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT/ ANSWER BRIEF OF CROSS-APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #909130
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990
crimappdab@myfloridalegal.com

COUNSEL FOR APPELLANT/
CROSS-APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF FACTS

Cross-Appellee submits the following additions/corrections to the Cross-Appellant's Statement of Facts:

The Defendant notes that the sound was of striking flesh, not fur. (Answer Brief/Cross-Appeal Initial Brief at p. 3). As evidenced by the bodycam footage, the dog involved was a labrador retriever, a breed with a very short, smooth coat.

The Defendant asserts that the trial court "found at least one portion of Bines' testimony not credible." (Id. at p. 5). In fact, the trial court's finding on this matter was as follows:

> **The Court accepted the majority of the testimony of Officer Bines as credible and consistent with the weight of the evidence** except for his testimony regarding hearing the Defendant say "sit" or "get down" after he arrived at 76 Aurora Avenue and prior to making contact with the Defendant. This testimony was inconsistent with Officer Bines' testimony at his deposition on May 25, 2017, which the Court finds to be a more accurate statement of Officer Bines' observations at the scene.

(R. 897) (emphasis added).

SUMMARY OF ARGUMENT

STATE APPEAL: The trial court erred in suppressing the evidence found in plain view during the investigation of the exigency, including the dog's body, the items around the dog, and the pictures of the residence and backyard. That the exigency was over when the officer re-entered the house to *gather* this evidence does not require suppression, as the evidence was actually *discovered* in plain view when the officer was in a position where he had a legitimate right to be. No additional search took place.

CROSS-APPEAL: The trial court properly found that the officers initially entered the Defendant's house based on exigent circumstances. This well-established exception to the warrant requirement allows law enforcement officers to enter a house to preserve life or render first aid. This is exactly what the officers did here, entering the house to check on the well-being of the dog. The totality of the circumstances, including the neighbor's report, the officer's own observations, and the Defendant's admissions, fully supports the trial court's finding that the officers' entry into the Defendant's house and yard was justified by the medical emergency doctrine.

ARGUMENT

STATE APPEAL

THE TRIAL COURT ERRED IN CONCLUDING THAT THE OFFICERS COULD NOT GO BACK INSIDE TO RECOVER AND PHOTOGRAPH EVIDENCE DISCOVERED IN PLAIN VIEW WHEN THEY INITIALLY ENTERED THE HOUSE AND BACKYARD.

In his answer brief, the Defendant contends that the trial court correctly concluded that once the emergency dissipated (that is, once it was discovered that the dog was dead and the Defendant was arrested), the officers could not re-enter the house or seize any evidence without first securing a warrant. As demonstrated in the State's initial brief, this contention is not supported by Florida law.

The Florida Supreme Court has expressly recognized that "items in plain view may be seized when (1) the seizing officer is in a position where he has a legitimate right to be, (2) the incriminating character of the evidence is immediately apparent, and (3) the seizing officer has a lawful right of access to the object." Pagan v. State, 830 So. 2d 792, 808 (Fla. 2002), cert. denied, 539 U.S. 919 (2003). This was exactly the case here.

As to the dog's body, the Defendant contends that the State could not satisfy the second part of this test. That is, he claims that the incriminating character of the dog's body was not immediately apparent, as the yard was dark and the officer could

not immediately tell if the dog was dead. This argument is refuted by the record.

As explained in the State's initial brief, the incriminating character of the evidence is immediately apparent where the police have probable cause to associate the item with criminal activity. See Jones v. State, 648 So. 2d 669, 678 (Fla. 1994), cert. denied, 515 U.S. 1147 (1995).

Here, Officer Bines testified that he located the dog pinned up in the corner of the fence in the backyard, consistent with where he had heard the noises when he had been outside. (R. 37). At first Bines thought the dog was bound and gagged, but when he got closer he realized that the dog's tongue was hanging out of his mouth, bloodied. (R. 37).

This testimony is fully corroborated by the body camera footage included in the supplemental record on appeal. First, the video shows that while the backyard was dark, the officer had a flashlight that illuminated the dog's body and the surrounding area. The video shows the dog lying on the ground, with his head up against the fence. The dog did not move when the officers approached, even when the officer shook him.

Accordingly, while the fact that the dog was dead was not immediately apparent when the officers first saw him in the corner of the yard, the dog was clearly at the very least gravely injured, as evidenced by his position on the ground and his lack of response to their approach. The officers certainly had the authority, as

part of their investigation of the exigency, to determine if the dog was injured and take appropriate action to treat him. See § 828.073(2)(a), Fla. Stat. (providing that law enforcement officer may lawfully take custody of any animal found neglected or cruelly treated by removing the animal from its location).

Further, whether the dog was dead or only seriously injured, the incriminating nature of his body was immediately apparent under any reasonable understanding of that concept. See § 828.12(2), Fla. Stat. (intentional commission of an act which results in the "cruel death" or "excessive ... infliction of unnecessary pain or suffering" of an animal is a third degree felony). The trial court erred in suppressing this evidence.

The Defendant further claims that allowing the State to introduce the bodycam footage and the pictures taken when Officer Bines went back inside the house would be an unwarranted extension of the plain view doctrine. According to the Defendant, once Officer Bines went outside, he could not reenter the house without a warrant. Florida law again does not support this position.

As discussed in the State's initial brief, there is nothing improper about leaving a house and then going back inside, or even inviting other officers inside who were not there originally, as long as the reentry is a mere continuation of the police presence. Davis v. State, 834 So. 2d 322, 328 (Fla. 5th DCA 2003). See also Montanez v. Carvajal, 2018 WL 2126389 at *7 (11th Cir. May 9, 2018) (once police entered house under exigent circumstances, homeowner

lost any reasonable expectation of privacy in those areas already searched, and officers did not violate Fourth Amendment by entering house again after exigency was over to investigate marijuana and drug paraphernalia in plain view).

That is exactly what happened here. The bodycam video shows that the officer went back through the house the same way he had gone through the first time. He did not enter any other rooms or search anywhere. Instead, he simply photographed the things he had already seen, including the hole in the wall where the Defendant stated he threw the dog, the dog's body on the ground in the backyard, and the area in the dog's immediate vicinity. In short, then, the officer did not continue his search after the exigency was over – he merely went back inside to collect and memorialize evidence he had already seen in plain view during the course of the exigent search.

The Defendant's reliance on Anderson v. State, 665 So. 2d 281 (Fla. 5th DCA 1995), is misplaced. There, the officer entered an apartment based on a possible burglary. However, he initially searched the apartment and found no one present and no indication that a burglary had even occurred. Nonetheless, he remained in the apartment and conducted an extensive search purportedly looking for some way to reach the tenant, ultimately looking in a plastic bag and finding tally sheets that he thought might be connected with a gambling operation. Id. at 282-83.

Under these circumstances, of course this Court found the search improper. This is nothing like the present case. Had the officers gone back inside the house and rifled through the papers on the Defendant's countertop or gone in other rooms to search for evidence, this case would be analogous – the search itself would have been conducted after the exigency had ended. The record reflects that they did no such thing, but merely memorialized and seized those incriminating items already in plain view when they first went in.

As this Court recognized in Anderson, the officer "was entitled to examine what was in plain view while on the premises," but was not entitled to conduct an *additional* search after the exigency was over. Id at 283. See also Seibert v. State, 923 So. 2d 460, 471 (Fla. 2006) (distinguishing Anderson and finding search proper where officer merely looked into the open bathroom from main room of apartment that they had already entered during initial lawful entry), cert. denied, 549 U.S. 893 (2006); State v. Craycraft, 704 So. 2d 593, 593 (Fla. 4th DCA 1997) (distinguishing Anderson and finding search proper where officers observed marijuana and paraphernalia during their initial, lawful entry into the home based on exigency).

Similarly, in State v. Walker, 729 So. 2d 463 (Fla. 2d DCA 1999), the officers properly seized a bag of cocaine they found in plain view while investigating an alleged burglary (an exigent circumstance). They then used that cocaine to go back and get a

search warrant, which they used to find additional cocaine packaged in various plastic baggies, a handgun, more than $3,000 in cash, and three scales. Id. at 464. Just like in Anderson, the *additional* search required separate justification from the exigency, but the items found in plain view during the exigency itself were properly seized.

Here, the officers memorialized and seized only those items that were in plain view when they initially entered the house to investigate the exigency. They conducted no additional search, and they re-entered the house only as part of a continuation of the police presence, to take pictures and secure the dog's body after taking the Defendant out of the house and placing him safely in the patrol car.

In short, then, the State is not asking this Court to extend the plain view doctrine, but to follow that doctrine as well defined in the cases cited above and in its initial brief. The officers were not precluded from going back inside the house to secure the dog's body and take pictures of what they saw in plain view in the house and yard as they walked through initially. To hold otherwise makes no sense.

The Defendant does not, and cannot, argue that officers are not allowed to make observations of their surroundings when they go through a house or yard during the course of investigating an exigency. Requiring them to stop everything and secure a warrant because they happened to leave the house in order to safely secure

the Defendant in the patrol car before gathering and photographing the evidence they already saw serves no purpose and is contrary to well-established case law in Florida and across the country. That portion of the trial court's order suppressing this evidence must be reversed.

CROSS-APPEAL

THE TRIAL COURT PROPERLY CONCLUDED THAT THE STATE DEMONSTRATED EXIGENT CIRCUMSTANCES JUSTIFYING THE OFFICERS' ENTRY INTO THE DEFENDANT'S HOUSE.

In his cross-appeal, the Defendant contends that the trial court erred in finding that the officers could enter the Defendant's house to begin with, as no exigent circumstances were present. This argument has no merit and should be rejected by this Court.

A motion to suppress involves mixed questions of law and fact. In reviewing the trial court's ruling on such a motion, an appellate court must determine whether competent, substantial evidence supports the lower court's factual findings, construing all the evidence and reasonable inferences therefrom in a manner most favorable to upholding the trial court's decision. See, e.g., Dewberry v. State, 905 So. 2d 963, 965 (Fla. 5th DCA 2005). The trial court's application of the law to the facts is reviewed de novo. Id. Applying that standard here, that portion of the trial court's order finding exigent circumstances should be affirmed.

The trial court's order includes an excellent summary of the exigent circumstances doctrine and its specific application where, as here, the exigency is based on a "feared medical emergency" triggering the "now well-recognized community caretaking function of police officers." (R. 900-03). As the lower court explained, this longstanding exception to the warrant requirement allows

officers to enter houses without a warrant in situations where they are acting to preserve life or render first aid, an authority inherent in the very nature of their duties as peace officers. (R. 901). See Riggs v. State, 918 So. 2d 274, 278-81 (Fla. 2005); Ortiz v. State, 24 So. 3d 596, 600-03 (Fla. 5th DCA 2009), rev. denied, 37 So.3d 848 (Fla. 2010).

That duty was triggered here. The officers received a report from a citizen that a dog was being beaten, and this report was corroborated in relevant part when they heard the Defendant swearing in his backyard, as well as the sound of the striking of flesh. When the Defendant himself confirmed that he had "disciplined" the dog by hitting him, the officers had the right, indeed the duty, to check on the dog's well-being – especially when the dog made no response to the officers knocking on the front door. Anyone even remotely familiar with dogs would recognize that the dog in this house could very well be injured or worse, and the trial court properly concluded that the officers acted appropriately in entering the house to ensure his safety.

The Defendant contends that this Court should reverse this portion of the order because an exigency cannot be created by potential harm to an animal, as such an animal is merely chattel under Florida law. The Defendant asserts that cases recognizing exigencies involve potential harm to human beings, not animals, and extending this exception to animal cases should be a matter for the legislature, not the courts.

First, the State notes that the exigency doctrine is not a statutory matter, but instead is a judicially created exception to the general warrant requirement. The parameters of this doctrine are guided by case law, not legislation, and the scope of this doctrine is certainly a matter for the courts to determine.

Further, to the extent that the legislature's input is relevant here, its position on this matter is squarely in favor of the lower court's ruling. Florida law treats domestic animals quite differently from mere chattel. Indeed, an entire chapter of the Florida Statutes is devoted to the proper care and treatment of animals. Chapter 828, Fla. Stat. As mentioned above, animals found in distress can be lawfully removed from their owners if found to be neglected or cruelly treated. § 828.073, Fla. Stat. Further, as the Defendant now certainly understands, cruelty to an animal is a felony under Florida law. § 828.12(2), Fla. Stat. These statutes evidence a strong public policy of preventing mistreatment and cruelty to animals.

While an animal is property for certain purposes, then, it is clearly not property in the same sense as a table or shoe. The latter can be treated in any manner an individual chooses, thrown in the back of a closet or violently chopped to pieces if the owner so desires. Such is not the case with a pet.

Indeed, this Court has specifically recognized that the emergency exception under the Fourth Amendment applies where the distress is suffered by an animal. Brinkley v. County of Flagler,

769 So. 2d 468, 471-72 (Fla. 5th DCA 2000). While this was a civil forfeiture case, rather than a criminal case, the Fourth Amendment principles are no different.

Numerous courts have agreed with this Court's holding in Brinkley, recognizing that exigent circumstances can be present when the life or health of an animal is at stake. See, e.g., Morgan v. State, 656 S.E.2d 857, 860 (Ga. Ct. App. 2008) (exigent circumstances exception applies where police officer reasonably believes that animal is in need of immediate aid due to injury or mistreatment); State v. Stone, 92 P.3d 1178, 1184 (Mont. 2004) (prevention of needless suffering and death of animals on defendant's property created exigent circumstances justifying warrantless search); People v. Thornton, 676 N.E.2d 1024, 1028-29 (Ill. App. Ct. 1997) (emergency exception applied to warrantless search of house to rescue dog); Pine v. State, 889 S.W.2d 625, 631 (Tex. Ct. App. 1994) (emergency doctrine applied where deputy had probable cause to believe animal was being cruelly treated), cert. denied, 516 U.S. 914 (1995); Suss v. ASPCA, 823 F.Supp. 181, 187 (S.D.N.Y. 1993) ("[r]eal immediacy may allow emergency entries to preserve animal life that is threatened because of cruelty"); State v. Bauer, 379 N.W.2d 895, 899 (Wisc. Ct. App. 1985) ("exigent standard test applies to situations involving mistreatment of animals"); Tuck v. United States, 477 A.2d 1115, 1120-21 (D.C. 1984) (upholding warrantless search and seizure based on exigency even though exigency involved protection of animal life rather than

human life). The Defendant has offered no compelling reason to hold to the contrary here.

The Defendant next contends that even if the reported abuse of a dog could constitute an exigency, there was no reasonable basis to believe an emergency existed here. In support, the Defendant asserts that there were no sounds of a fight (save for the single sound of flesh being struck), no signs of a dog in distress, and nothing to indicate that the Defendant was not telling the truth when he reasonably explained that the dog was fine and everything was okay.

The trial court expressly held to the contrary, finding that the neighbor's report of possible animal cruelty in progress, Officer Bines' perception of the sound of the striking of flesh and an angry man swearing, and the Defendant's own admission that he had a dog, that the dog had bitten him, and that he had struck the dog, was sufficient to justify a wellness check of the dog. (R. 903).

In addition to the specific factors cited by the court, the State notes that the citizen caller gave explicit details in his report, explaining that he had heard the sounds of a dog being beaten, including yelping noises, and that he had a confrontation with the person that was possibly beating the dog. (R. 20-22). This confrontation was confirmed by the Defendant himself, as reflected in the bodycam footage. (R. 898). In addition, there was no response by a dog when the officers knocked on the door – no

dog was present in the room, and there was no barking. Anyone with any experience with dogs, including Officer Bines, would recognize that a healthy dog would respond in some manner to this knocking in the middle of the night. (R. 33-34).

As the court explained, "a reasonable person could conclude that there was an urgent and immediate need to check on the safety and well-being of the dog." (R. 903). This factual finding is fully supported by the record and should be affirmed.

The Defendant further contends that there was no connection to his house, referencing the 911 caller's failure to provide a correct address. As the trial court noted, the address given turned out to be a vacant wooded lot. (R. 897). However, the officers were not required to simply throw up their hands and leave in the face of this mistake. Instead, they acted reasonably – getting out of their cars and canvassing the area. (R. 23). This was a small residential area, with only three houses, and the Defendant's house was in that area. (R. 46).

Within a couple minutes they found the house that the 911 caller had described, as evidenced by the presence of a man in the back of the house, after midnight, pacing behind the fence, cussing, and hitting something – consistent with what they had been told over dispatch. (R. 70). (R. 23-26, 44-45, 70). Here, as in Ortiz, "[a]ll of the evidence pointed to the [defendant's] residence as the site of the feared medical emergency." 24 So. 3d at 603.

Concerned for their safety, the officers did not immediately announce their presence or barge into the backyard. (R. 29, 51-53). Instead, they listened to make sure there were no indications that it would not be safe, then approached the residence when they saw the Defendant move to the back of the house, knocking on the door and making contact with the Defendant through the screen door. (R. 29-31).

The Defendant finds fault with this process, contending that the officers' own behavior showed that there was no emergency and they had plenty of time to get a warrant. In support, the Defendant notes that the officers did not approach the fence nor announce their presence, but instead, he claims, casually walked to the front of the house and knocked on the door, like any routine investigation.

Again, this assertion is not supported by the record. An exigency does not require law enforcement officers to act recklessly, and one can only imagine the outrage by defense counsel if the officers had impetuously scaled every fence in the area or knocked down every door, rather than taking a few minutes to listen and confirm what was going on and then going to the door of the house to interrupt what was happening when they heard suspicious sounds in the backyard.

In short, the officers did not alert the Defendant to their presence because they were concerned for their safety – they had no way of knowing if this angry man was armed or posed a danger to

them. Further, the bodycam footage from Officer Bines shows that they knocked on the front door of the residence within minutes of arriving at the scene – they did not meander around the neighborhood as the Defendant implies.

The officers did not need a warrant, or an exigency, to knock on the Defendant's door. In doing so, they confirmed that they had the right house – the Defendant admitted that he had a dog, had hit the dog, and had argued with his neighbor. Accordingly, they were, as discussed at length above, entitled to enter the house to administer first aid and preserve the life of the animal. In light of all the circumstances – the neighbor's call, the sounds from the backyard, and the admissions from the Defendant himself – it would have been grossly irresponsible for the officers to walk away and start the lengthy warrant process (R. 36) while crossing their fingers that the dog would survive while they waited.

The trial court found as a matter of fact that the officers were acting appropriately in addressing this emergency (R. 897-99, 903), and this finding is fully supported by the record. Because there were exigent circumstances here, a warrant was not required. The lower court's decision on this matter should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein and in its Initial Brief, Appellant/Cross-Appellee respectfully requests this honorable Court reverse that portion of the trial court's order granting in part the Defendant's motion to suppress, and affirm that portion of the order denying in part that same motion.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Kristen L. Davenport
KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #909130
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990

COUNSEL FOR APPELLANT/
CROSS-APPELLEE

DESIGNATION OF EMAIL ADDRESS

Undersigned counsel can be served at the following email address: crimappdab@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Reply Brief/Cross-Appeal Answer Brief has been furnished to Aaron D. Delgado, 227 Seabreeze Boulevard, Daytona Beach, Florida 32118, by email to adelgado@communitylawfirm.com, this 25th day of May, 2018.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

/s/ Kristen L. Davenport
Kristen L. Davenport
Counsel for Appellant/
Cross-Appellee