

NOTICE

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2011 IL App (5th) 090307-U

NO. 5-09-0307

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Williamson County.
)	
v.)	No. 07-CF-46
)	
BENNY STANLEY,)	Honorable
)	Phillip G. Palmer,
Defendant-Appellant.)	Judge, presiding.

JUSTICE DONOVAN delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err in denying the defendant's motion to suppress where the police officer's nonconsensual and warrantless entry into the defendant's backyard was objectively reasonable given the totality of the circumstances facing the officer at the time of entry.
- ¶ 2 After a stipulated bench trial, the circuit court of Williamson County found the defendant, Benny Stanley, guilty of possession of anhydrous ammonia in an unauthorized container (720 ILCS 646/25(c)(1) (West 2006)). The court sentenced the defendant to 30 days in jail, with credit for time served, and 12 months' conditional discharge and ordered the defendant to pay \$500 for a drug assessment. On appeal, the defendant contends that the trial court erred in denying his motion to suppress where there were no exigent circumstances to justify a nonconsensual and warrantless search of his backyard. We affirm and remand with directions.
- ¶ 3 The defendant, Benny Stanley, was charged with illegal transportation of anhydrous

ammonia in an unauthorized container, a Class 3 felony. During the preliminary hearing, Dustin Whitehead, a Marion City police officer, testified about the events that led to the defendant's arrest. At the conclusion of Officer Whitehead's testimony, the defendant made an oral motion to suppress evidence collected during a warrantless search of his backyard. The defendant had not filed a written motion to suppress. The trial court granted the motion to suppress and dismissed the case. The State appealed.

¶ 4 On appeal, we determined that the defendant's oral motion and the trial court's consideration of the motion without taking evidence were not in compliance with the procedures set forth in section 114-12(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-12(b) (West 2006)), which require the defendant to file a written motion setting forth facts to establish that the search and seizure were unlawful and the trial court to hear evidence on any issue of fact necessary to decide the motion, so we vacated the suppression order and remanded the case for further proceedings. *People v. Stanley*, No. 5-07-0136 (Apr. 15, 2008) (unpublished order under Supreme Court Rule 23 (eff. July 1, 1994)).

¶ 5 On remand, the State filed an amended information and charged the defendant with possession of anhydrous ammonia in an unauthorized container, a Class 3 felony (count I), and possession of anhydrous ammonia with the intent that it be used to manufacture methamphetamine, a Class 1 felony (count II). A preliminary hearing was held on the amended charges. Officer Whitehead again testified about the events leading to the defendant's arrest. The court found that there was probable cause to believe that the crimes charged had been committed and that they had been committed by the defendant. The defendant entered a plea of not guilty to both counts.

¶ 6 The defendant then filed a motion to quash his arrest and to suppress evidence. The defendant asserted that he did not consent to Officer Whitehead's search of his backyard and that in the absence of probable cause or exigent circumstances, Officer Whitehead was not

justified in entering and searching the backyard. During the hearing on the motion to suppress, the prosecution and the defense stipulated to the testimony given by Officer Whitehead during the initial preliminary hearing and the subsequent preliminary hearing, and they asked the court to consider the transcripts of his testimony in deciding the motion.

¶ 7 Officer Whitehead testified that around 10 p.m. on January 26, 2007, he was fueling his patrol car at the Farm Services gas station in Marion, when he saw an older model Jeep Cherokee emerge from the rear of the station and exit the premises. He observed that there were two people inside the Jeep, but he could not identify them. Officer Whitehead stated that he recognized the Jeep because he often saw it parked at a residence on East Plum Street when he patrolled in that neighborhood. Officer Whitehead stated that he became suspicious when he saw that the Jeep had come from the rear of the service station, because the station was closed for the night, anhydrous ammonia tanks were stored in the rear of the station, and his department had received a number of calls about thefts of anhydrous ammonia from the station. Officer Whitehead acknowledged that at the time he observed the Jeep, he had no specific evidence that a crime had been committed.

¶ 8 Officer Whitehead testified that once he refueled his patrol car, he began to look for the Jeep. He did not catch up to it, so he headed to the residence on East Plum Street where he had often seen it parked. When Officer Whitehead arrived at the residence, he observed the defendant standing outside the Jeep. Officer Whitehead parked his patrol car, exited it, and walked toward the defendant. Officer Whitehead testified that he smelled the odor of anhydrous ammonia as soon as he got out of his patrol car and that the odor became stronger as he approached the defendant. Officer Whitehead asked whether the defendant had just left the Farm Services station. The defendant stated that he had just returned from the station. Officer Whitehead asked why the defendant was in the back of the station. The defendant said that he drove to the back of the station so that his friend could use the bathroom. Officer

Whitehead asked the defendant about the odor of anhydrous ammonia in the area. The defendant did not answer. He acted as if he could not smell anything.

¶ 9 Officer Whitehead testified that he began to walk toward the backyard and that the odor kept getting stronger. He did not seek the defendant's consent to enter the backyard. Officer Whitehead stated that the backyard was small and had a lot of stuff in it. Officer Whitehead testified that he observed a pair of black gloves, a plastic baggie with two batteries inside, a blue tarp, and a black trash bag on the ground near the end of the backyard. Officer Whitehead looked inside the trash bag and discovered two Ziploc baggies. One of the baggies contained a clear liquid. Officer Whitehead testified that the odor of anhydrous ammonia was overwhelming and that he suspected the liquid in the baggie was anhydrous ammonia.

¶ 10 Officer Whitehead testified that he had not been trained on how to handle anhydrous ammonia. He had been instructed to call for a lab dismantler if he discovered the substance. Officer Whitehead stated that he was familiar with the odor of anhydrous ammonia. He said that he had never before smelled the odor of anhydrous ammonia in the defendant's neighborhood, and he thought it would be unusual to smell that odor in a residential area. Officer Whitehead testified that anhydrous ammonia is a very dangerous substance that can pose a danger to human health. He stated that it was explosive, that it can burn the skin, and that it can "kill ya." Officer Whitehead noted that anhydrous ammonia has to be stored in special containers because it is caustic.

¶ 11 Officer Whitehead testified that he called for Sergeant Dawn Tondini, a certified lab dismantler. Sergeant Tondini reported to the defendant's residence and tested the liquid in the baggie. It tested positive for anhydrous ammonia.

¶ 12 The defendant was arrested and transported to the police station. After the defendant was given *Miranda* warnings (*Miranda v. Arizona*, 384 U.S. 436 (1966)), he answered

questions. The defendant stated that he and his friend went to the Farm Services station to steal anhydrous ammonia. The defendant stated that he remained in the vehicle while his friend removed anhydrous ammonia from one of the tanks. The defendant admitted that the clear liquid substance in the Ziploc baggie was the anhydrous ammonia that had been stolen from the service station. He also admitted that he and his friend intended to use the anhydrous ammonia to make methamphetamine.

¶ 13 After reviewing the testimony and the law, the trial court entered an order denying the defendant's motion to suppress. In the docket order, the court determined that the primary question is whether the officer was lawfully and reasonably in the defendant's backyard. The court noted that there is no requirement that an officer have actually witnessed a crime before he can begin to investigate suspicious behavior. The court found that Officer Whitehead suspected possible criminal activity based on his observation that the defendant's vehicle had emerged from an area of the business that was closed for the night and on his knowledge of reports of several recent thefts of anhydrous ammonia from that business, that there is no requirement that an officer have actually witnessed a crime before he can begin to investigate suspicious behaviors, that Officer Whitehead had every right to approach the defendant while he was standing in front of his residence as the defendant was not under arrest or otherwise being detained at that point, that Officer Whitehead smelled a strong odor of anhydrous ammonia as he came closer to the defendant, and that Officer Whitehead was familiar with both the smell of anhydrous ammonia and the danger that anhydrous ammonia posed to the public. The court concluded that when faced with the defendant's denial of any knowledge about the odor, Officer Whitehead was "justified for the protection of the public (in a residential area) to determine its source" and that Officer Whitehead had "a legitimate and lawful purpose in being in defendant's backyard."

¶ 14 After a stipulated bench trial, the defendant was convicted of unlawful possession of

anhydrous ammonia in an unauthorized container, and he was sentenced to 30 days in jail, with credit for time served, and 12 months' conditional discharge. He was also ordered to pay \$500 for a drug assessment.

¶ 15 On appeal, the defendant contends that the trial court erred in denying his motion to suppress because the police officer's purported detection of an odor of anhydrous ammonia emanating from the defendant's backyard did not justify a nonconsensual and warrantless entry into and search of the backyard. The question of whether the officer was reasonably justified in entering the defendant's backyard without a warrant or consent presents a question of law that is reviewed *de novo*. *People v. Luedemann*, 222 Ill. 2d 530, 542, 857 N.E.2d 187, 195 (2006).

¶ 16 Absent exigent circumstances, a police officer's nonconsensual and warrantless entry into a private residence or its surrounding curtilage to effectuate a search is presumptively unreasonable. *People v. McNeal*, 175 Ill. 2d 335, 344, 677 N.E.2d 841, 846 (1997). The State bears the burden to demonstrate an exigent need for the warrantless search. *McNeal*, 175 Ill. 2d at 345, 677 N.E.2d at 846.

¶ 17 While each case must be decided on its own facts, factors that are considered relevant to a determination of the presence of exigent circumstances include the following: (1) whether the offense under investigation was recently committed, (2) whether there was any deliberate or unjustifiable delay by the officers during which time a warrant could have been obtained, (3) whether a grave offense is involved, particularly one of violence, (4) whether the suspect was reasonably believed to be armed, (5) whether the police officer was acting upon a clear showing of probable cause, (6) whether there was a likelihood that the suspect would have escaped if not swiftly apprehended, (7) whether there was a strong reason to believe that the suspect was on the premises, and (8) whether the police officer's entry, though nonconsensual, was made peaceably. *People v. Williams*, 161 Ill. 2d 1, 26, 641

N.E.2d 296, 306 (1994). This is not an exhaustive list of the factors bearing on the presence of exigent circumstances. *Williams*, 161 Ill. 2d at 26, 641 N.E.2d at 306.

¶ 18 The cornerstone of the exigency analysis is whether the officer acted reasonably, and each case must be decided on its own facts. *McNeal*, 175 Ill. 2d at 345, 677 N.E.2d at 847. In considering whether a police officer acted reasonably, the court must look to the totality of the circumstances confronting the officer at the time the entry was made. *McNeal*, 175 Ill. 2d at 345-56, 677 N.E.2d at 847. The circumstances must militate against delay and justify the officer's decision to proceed without a warrant. *McNeal*, 175 Ill. 2d at 356, 677 N.E.2d at 847.

¶ 19 Having considered the factors relevant to a determination of exigency in the case at bar, we find that there was no deliberate or unjustifiable delay by Officer Whitehead during which time he could have secured a search warrant, that Officer Whitehead had a reasonable belief that the strong odor of anhydrous ammonia in the defendant's neighborhood posed a serious risk of danger to the health of residents, and that Officer Whitehead's entry, though nonconsensual, was made peaceably. The record shows that Officer Whitehead's suspicions were aroused by the Jeep exiting from an area of a service station where anhydrous ammonia is stored and that he immediately proceeded to investigate. His investigation led him to a residence where he found the Jeep parked and the defendant standing nearby. Upon exiting the patrol vehicle, Officer Whitehead immediately smelled the odor of anhydrous ammonia, and the odor intensified as he got closer to the defendant's house. Though Officer Whitehead had no specialized training in dealing with anhydrous ammonia, he was familiar with its odor and the danger it posed to human health. Officer Whitehead went into the defendant's backyard with the intent to locate the source of the odor because he knew that anhydrous ammonia could pose a danger to the residents in the neighborhood. We conclude that the totality of the circumstances confronting Officer Whitehead at the time he entered the

backyard militated against delay and justified his decision to proceed without a warrant.

¶ 20 Once a police officer is legitimately on the property, he may properly observe any evidence lying in the open in plain view. *People v. Redman*, 386 Ill. App. 3d 409, 418-19, 900 N.E.2d 1146, 1155-56 (2008). The plain view doctrine applies to anything secured by use of the officer's five senses while he is in a lawful position. *People v. Wright*, 41 Ill. 2d 170, 174, 242 N.E.2d 180, 183 (1968). After Officer Whitehead entered the defendant's backyard, he, through his senses of smell and sight, observed in plain view a number of items of evidence, including a trash bag containing a baggie which was filled with a clear liquid that tested positive for anhydrous ammonia.

¶ 21 Because exigent circumstances justified Officer Whitehead's decision to proceed without a search warrant, there was no constitutional infirmity in Officer Whitehead's entry into the defendant's backyard or the collection of evidence lying in plain view. Accordingly, the trial court did not err in denying the defendant's motion to suppress the evidence seized from his backyard.

¶ 22 In his second point, the defendant claims that he is entitled to a credit of \$5 per day for each day he spent in presentence custody to be applied against his fine. The State agrees. Both parties have noted that the record does not reveal how many days the defendant spent in presentence custody. Therefore, we will remand this case to the circuit court with directions to determine the number of days the defendant served in presentence custody and to calculate the credit to be applied against the defendant's fine.

¶ 23 Accordingly, the judgment of the circuit court is affirmed, and the cause is remanded to the circuit court with directions to determine the number of days the defendant served in presentence custody and to calculate the credit to be applied against the defendant's fine.

¶ 24 Affirmed; cause remanded.