

-----x SUPREME COURT OF NEW JERSEY
STATE OF NEW JERSEY, : SUPREME COURT DXT. NO. 084778
: APP. DIV. DXT NO. A-996-18T1

Respondent-Defendant : Criminal Action

vs. :

: Sat below:

KEITH TERRES, : Hon. Ellen Koblitz, P.J.A.D.
Defendant-Appellant : Hon. Robert J. Gilson, J.A.D.

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PRELIMINARY STATEMENT

The Terres decision extends the circumstances in which the State may enter the home without first obtaining a search warrant. Terres will significantly erode 4th Amendment and State Constitutional protections against unreasonable searches of the home unless the Court reverses its holding. Whereas the recognized exceptions to the search warrant requirement to search a dwelling require either consent or a showing of exigent circumstances, Terres creates a new exception to permit entry into the home without a showing of either an emergency or consent. Terres extends existing caselaw, which permits protective sweeps only *after* the State is lawfully inside the home, to now permit the State *entry into the home*, on the reasonable suspicion that a third party inside the home poses danger to those outside of it at the arrest scene.

Although the Court has previously found that protective sweeps inside the home are constitutional under limited circumstances, the State was required to first show that it was lawfully inside the home prior to the commencement of the protective sweep. Terres attempts to create protections against unreasonable searches by requiring the State, prior to entering the home, to demonstrate a reasonable articulable suspicion that there is danger inside the home to those at the arrest scene. This safeguard is anything but a protection, as it diminishes

the higher "probable cause" standard that the State has always been required to demonstrate, prior to obtaining a search warrant, unless the State shows consent or emergency circumstances that make it unreasonable to obtain a warrant to search the home.

The NACDL and the ACDL-NJ respectfully request that the Court reject the holding in Terres and reiterate the existing law in New Jersey, which bars law enforcement from entering a home to conduct a protective sweep, if the arrest occurs outside the home. Finally, the NACDL and the ACDL-NJ request that the Court reverse Terres, even if the Davila test was extended to permit protective sweeps of dwellings when arrests occur outside of them. The State did not have a reasonable articulable suspicion to believe that there was any individual inside the home posing any danger to them, after its target was already arrested outside the home for violating a pretrial release order.

STATEMENT OF INTEREST FOR THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and the courts of appeals, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in this case due to the erosion of 4th Amendment protections that would result from this Court upholding the constitutionality of the extensive and intrusive search in Terres.

**STATEMENT OF INTEREST FOR
THE ASSOCIATION OF CRIMINAL DEFENSE LAWYER OF NEW JERSEY**

The Association of Criminal Defense Lawyers of New Jersey (the "ACDL-NJ") is a nonprofit voluntary professional association that works on behalf of criminal defense attorneys to ensure justice and due process of those accused of crimes.

ACDL-NJ has a particular interest in this case due to the erosion of 4th Amendment and N.J. Constitution Article I, Section VII protections resulting from Terres extending exceptions to the search warrant requirement to permit law enforcement to enter the home on the reasonable suspicion that there is a third party who poses a danger to the individuals outside the home, at the arrest scene.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The ACDL adopts the Statement of Facts and the Procedural History as set forth by Defendant Terres, but highlights the following facts:

On September 14, 2017, Det. Petrosky of the Gloucester County Prosecutor's Office, was attempting to serve an arrest warrant issued on September 11, 2017, for Tyler Fuller (1T8-10 to 15). The warrant was issued after Mr. Fuller purportedly violated his conditions of pretrial release when he failed to

appear for court for a third-degree theft charge (1T19-12 to 17).¹

Det. Petrosky arrived at Mr. Fuller's last known address in Franklin Township (Gloucester County). An individual advised Det. Petrosky that Fuller vacated the residence approximately one day ago, and no longer resided at the home (1T10-16 to 11-15). The individual advised that he believed Mr. Fuller went to the Ca Nook Trailer park in Salem County to the home of an individual named "Terres." (1T11-13 to 15). As Det. Petrosky drove to the trailer park, he was advised that Terres was already in police custody after the State executed a search warrant on his home on September 12, 2017 and arrested him for possession of CDS (1T12-17 to 25 and 1T18-2 to 5). Det. Petrosky arrived at the trailer park and knocked on the door of a "permanent structure" but did not receive any response (1T11-19 to 12-4).

The following morning, on September 15, 2017, Det. Petrosky learned from pretrial services that Fuller's last known location, according to Fuller's monitoring bracelet, was in the general area of the trailer park at 194 Route 40 (1T13-7 to 11). Det. Petrosky with Sgt. Koeller and two State Troopers- Hershey

¹1T shall refer to the transcript of the suppression hearing on July 26, 2018.

and Smith- went back to the trailer park to effectuate the warrant (1T13-22 to 14-2).

Det. Petrosky and Trooper Hershey positioned themselves outside the front door of a trailer while Sgt. Koeller and Trooper Smith positioned themselves at the back of the trailer (1T14-22 to 15-2 and 1T42-9 to 13). Det. Petrosky approached the front door of the trailer and observed two men sitting inside. After he announced his presence, one of the individuals began to run "into the structure." (1T15-2 to 8 and 1T15-9 to 18). Det. Petrosky and Sgt. Koeller entered the trailer with Sgt. Koeller detaining an individual sitting on the chair and Petrosky following an individual, later identified as David Boston, into a bedroom (1T15-9 to 18 and 1T45-1 to 8).

Law enforcement proceeded to speak with Willis and Boston. Willis purportedly identified Mr. Fuller's photograph and advised that he was "in the back" of the trailer belonging to Terres with "two males." (1T17-1 to 2 and 1T18-12 to 15). Det. Petrosky and Sgt. Koeller proceeded to Terres's trailer. Each was stationed on a different side of the trailer (1T20-10 to 20). Det. Petrosky looked through the trailer window and purportedly observed Mr. Fuller speaking with a woman (Id). Det. Petrosky screamed at Mr. Fuller who then purportedly ran out of the trailer towards the porch area, where Petrosky observed him

apprehended by Sgt. Koeller (1T21-25 to 22 to 10) (1T36-9 to 12) and 1T22-11 to 17).

Det. Petrosky returned to the trailer and interviewed the woman inside, who stated that there were no other individuals inside the trailer (1T23-20 to 25). Nevertheless, Petrosky still proceeded to enter the trailer where he walked through and searched the trailer "section to section." (1T24-18 to 19). Det. Petrosky noticed a cross bow inside the trailer (1T24-9 to 15). Det. Petrosky also got down on his knees by the washer and drier and looked inside a hole on the floor, where he purportedly found a handgun and rifles (1T25-6 to 13).

Det. Petrosky described his actions inside the trailer as a "protective sweep" and a search for "the other guy." (1T49-4 to 7). The next day, law enforcement obtained a search warrant and secured the firearms purportedly found under a hole of the trailer (1T55-15 to 18).

I. LEGAL ARGUMENT

Terres improperly extends precedent to permit a search inside the home upon a showing of an articulable suspicion that a third party inside of it poses a danger to those at the arrest scene outside of the home.

The Court must reverse the Terres decision to uphold a warrantless search of a residence, where the State failed to demonstrate that consent or emergency circumstances permitted entry into the home. The panel ruled, without precedent, that the State may search a dwelling if it effectuates an arrest outside of the dwelling and has reasonable suspicion to believe that a third party inside the dwelling may pose a danger to those at the arrest scene.

The facts presented fail to satisfy the Davila test, even if it was extended to permit "protective sweeps" of the home originating from arrests made outside of the home. Davila permitted "protective sweeps" only upon the State showing reasonable articulable suspicion that a third party was inside the home, and he posed danger to those at the arrest scene.

The Fourth Amendment to the United States Constitution ensures the rights of "people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures..." U.S. Const. amend. IV. The New Jersey Constitution also ensures the same right against unreasonable searches and

searches. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." N.J. Const. art. I, ¶ 7. Both the Fourth Amendment and the Article 1, ¶ 7 of the New Jersey Constitution require the issuance of a search warrant, upon a finding of probable cause, prior to a search.

A warrantless search may be constitutional if it meets a recognized "exception" to the search warrant requirement. State v. Cassidy, 179 N.J. 150, 159-60 (2004). In this matter, the State did not have a warrant to enter Terres's home on September 15, 2017. Instead, the State asserts that the entry into the home and subsequent search was justified as a "protective sweep" incident to arrest. However, the stated exception has never been extended to a situation where police are permitted to search a home when an arrest occurs outside of it. Under the recognized "protective sweep" exception, police may conduct a "protective sweep" of a dwelling under the following circumstances:

(1) police officers are lawfully within private premises for a legitimate purpose, which may include consent to enter; and (2) the officers on the scene have a reasonable articulable suspicion that the area to be swept harbors an individual posing a danger. Where those substantive conditions are met, as a matter of procedure, the sweep will be upheld only if (1) it is conducted quickly; and (2) it is restricted to places or areas where the person posing a danger could hide.

State v. Davila, 203 N.J. 97, 102 (2010).

Davila warned that the "protective sweep" exception must be narrowly applied because of potential abuse by law enforcement.

Enhanced precautions are necessary to stem the possibility that a protective sweep is nothing more than an unconstitutional warrantless search. The police cannot create the danger that becomes the basis for a protective sweep, but rather must be able to point to dangerous circumstances that developed once the officers were at the scene. Where police are present in a home in a non-arrest context, there is too great a potential for the pretextual use of a protective sweep to turn an important tool for officer safety into an opportunity for an impermissible law enforcement raid.

Id. at 103.

Protective sweeps of dwellings are closely scrutinized by courts because of the privacy expectations which arise for their residents. Privacy within the home has been described as "among our most cherished rights." State v. Frankel, 179 N.J. 586, 611(2004). "The home is entitled to particular protection from unwarranted intrusion because 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" Davila, 203 N.J. at 112 quoting United States v. U.S. Dist. Court, 407 U.S. 297, 313, 92 S. Ct. 2125, 2134, 32 L. Ed. 2d 752, 764 (1972); accord State v. Bogan, 200 N.J. 61, 72, 975 A.2d 377 (2009); State v. Hutchins, 116 N.J. 457, 462-63, 561 A.2d 1142 (1989).

"When it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of

a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" Fernandez v. California, 571 U.S. 1, ---; 134 S.Ct. 1126, 1141 (2014) (Ginsberg, J. dissenting), quoting Florida v. Jardines, 569 U.S. 1, ---; 133 S.Ct. 1409, 1416 (2013). "The physical entry of the home is the chief evil against which . . . the Fourth Amendment is directed." Id., at 1142, quoting Payton v. New York, 415 U.S. 573, 585 (1980). Furthermore, "[T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." Mincey v. Arizona, 437 U.S. 385, 393 (1978).

"[C]ourts and society find that a home is where people have the highest expectation for privacy and there is no other place in society with this expectation." Jamie Sotiropoulos, ARTICLE: HOW REASONABLE IS A WARRANTLESS PROTECTIVE SWEEP? AND HOW A LIMITED SEARCH IS BETTER FOR SOCIETY AS A WHOLE, 37 Hamline J. Pub. L. & Pol'y 278, 281 (2017).

The United States Supreme Court emphasized that a protective sweep must be "quick and limited" and confined to a "cursory visual inspection of those places in which a person

might be hiding.” Maryland v. Buie, 494 U.S. 325, 327 (1990).² To justify a search of an area inside a dwelling, law enforcement must have a “reasonable belief based on ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted’ the officer in believing, Michigan v. Long, 463 U.S. 1032, 1049-1050 (1983) (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)), that the area swept harbored an individual posing a danger to the officer or others.” Id. The scope of the sweep is also determined based on the “radius of danger” facing police officers inside the home. State v. Cope, 224 N.J. 530, 547 (2016).

The Radel panel correctly notes that “protective sweeps” are only permissible when law enforcement is inside the home on a constitutionally permissible basis. State v. Radel, 465 N.J. Super. 65, 72 (App. Div. 2020) (noting that in both Buie and Davila, “officers were properly inside the defendant’s home either to execute an arrest warrant or by consent”). Radel suppressed evidence of criminality seized inside a home after the State effectuated an arrest outside of it, but still proceeded to enter and search the home. The State argued that entry into the home was permissible as a protective sweep. The

²Buie held that law enforcement can conduct a protective sweep of areas “immediately adjoining the areas of arrest” but would need articulable suspicion that the home harbors an individual posing danger to those on the arrest scene. Id. at 334.

panel disagreed and reasoned that “[o]nce the arrest was accomplished, the arrest warrants were fulfilled, and the officers had no further legitimate purpose for remaining on the property. See State v. Lane, 393 N.J. Super. 132, 154-55, 157-58 (App. Div. 2007).

Likewise in this matter, law enforcement effectuated the arrest of Mr. Fuller outside of the Terres dwelling. The arrest warrant gave the State authority to arrest Fuller, and when the arrest was effectuated, the State did not have a constitutional basis to return and enter the home. Despite Mr. Fuller being handcuffed outside the home, law enforcement proceeded to enter and search the home. The State justified the search based on Mr. Willis purportedly stating that Mr. Fuller was with another individual inside the Terres residence. The State argued, without a reasonable or credible basis, that the individual posed a danger to law enforcement effectuating Mr. Fuller’s arrest.

The Terres panel incorrectly analyzed this matter under the Davila standard. Despite law enforcement arresting Fuller outside of the residence, the panel stated that the “zone of danger” extended into the home and that a Davila analysis was therefore appropriate. The panel did not cite to any law in support of its application of the Davila test. Instead, the

panel applied the test in an *ad hoc* manner. The State failed to present evidence showing that exigent circumstances existed to justify an entry into the home.

There was no basis to believe that Mr. Fuller was engaged in criminal activity, as his arrest warrant was issued for a failure to appear. Det. Petrosky also had the opportunity to look inside the Terres residence, prior to entering it, and he did not observe any criminal activity. The hearsay assertion that Mr. Willis believed that there were other individuals inside the home did not give rise to exigent circumstances to enter the home. A blank assertion by Mr. Willis that law enforcement needed to "be careful... because there are two males" in the house does not give rise to any reasonable belief that there was danger inside the Terres residence. Again, the justification for arresting Mr. Fuller was his failure to appear on a third-degree theft charge. There was no information suggesting that he was involved in criminal activity or that there was "danger" inside the home. The mere presence of other individuals inside the trailer is not unlawful or suggestive of danger.

Prior to the search inside the Terres residence, Det. Petrosky also spoke with an individual inside the home who stated that there were no other individuals inside. Despite the

individual's statement and Det. Petrosky's own observation of no one else being inside the trailer, he proceeded to search the trailer in an intrusive and extensive manner, eventually getting down on his knees and looking through a hole on the floor by a washer and drier. This was not a "sweep" but an extensive search throughout the home. Det. Petrosky also had an opportunity, with three other members of law enforcement, to apply for and obtain a search warrant. He chose not to apply because the search warrant would not have been issued under the circumstances, as he did not have probable cause to believe that evidence of criminal wrongdoing existed inside the Terres home.

The potential for abuse upon carving out an additional exception to the search warrant requirement to permit the State to enter and search a residence near the location of an arrest, is aptly demonstrated in this matter. Det. Petrosky was unaware of Mr. Fuller's whereabouts when he arrived at the trailer park. Det. Petrosky was advised that Mr. Fuller's monitoring bracelet last placed him at the general area of the trailer park. The State's lack of knowledge about Mr. Fuller's whereabouts resulted in them first entering a different home, detaining two other individuals, and conducting a search of it. The State also attempted to enter another residence at the trailer park looking for Fuller the day before. The State's actions of going house to house, looking for Fuller, and in the process conducting

numerous searches without a warrant, consent or exigent circumstances, is the type of conduct proscribed by the 4th Amendment.

Even if the court applies the Davila standard to this matter, the search would still be unconstitutional. When law enforcement entered the Terres home, there was no credible articulable suspicion to believe that they were in danger and that a protective sweep inside the home was necessary. First, the sweep occurred *after* Fuller was already arrested outside the trailer. There was no basis to believe that Fuller was involved in any criminal activity as the arrest warrant was issued for violating a pretrial release order on theft charges. Second, law enforcement had already searched the home several days prior, and Mr. Terres was already in police custody. As the home was just searched and Terres was just arrested, there was no reasonable articulable suspicion that anything inside the home posed any danger to police. Det. Petrosky's observations from outside the trailer park, showing Fuller engaging in legal conduct by speaking with another individual, further contradicts the State's assertion that any individual inside the home posed any danger to law enforcement.

A prong-by-prong analysis of the Devila test shows that the State cannot satisfy any of its elements to justify the

warrantless search. First, Det. Petrosky was not lawfully inside the home when he commenced his search. After Fuller ran outside the home, Det. Petrosky exited the trailer and observed that Fuller was detained by a Trooper. Det. Petrosky had no legitimate basis to return inside the home and to conduct another search. Again, the arrest warrant against Mr. Fuller was not for new criminal conduct but rather a violation of a pretrial release order for a failure to appear. There was also no other articulable suspicion of crime occurring within the residence. Thus, when Mr. Fuller was arrested and the mandates of the arrest warrant satisfied, law enforcement did not have any probable cause (or even reasonable suspicion) to return into the home to conduct any further investigation.

Finally, the search was not limited to areas where individuals posing a danger could be found. Logically, if an individual was present in the hole under the trailer, he was hiding from law enforcement and was not a danger to them. Also, Det. Petrosky did not observe anyone in the home other than Fuller and a female occupant. Under the circumstances, he did not have any basis to believe that an individual was hiding under the home. Alternatively, the hiding location of a "hole" under a trailer would suggest that an individual is avoiding law enforcement and not intending to harm them.

Conclusion

For the foregoing reasons, the NACDL and ACDL-NJ respectfully request that the court reverse Terres and rule that the search was unconstitutional.

Respectfully submitted,

s/Matthew S. Adams

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