DATE FILED: December 4, 2023 8:17 PM
FILING ID: 19BDB72C6D1E9
CASE NUMBER: 2023CA1143

COURT OF APPEALS, STATE OF COLORADO

2 E. 14th Avenue
Denver, CO 80203

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Douglas County District Court
Honorable Patricia D. Herron, Judge
Case No. 20CR556

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**PLAINTIFF-APPELLEE**:
PEOPLE OF THE STATE OF COLORADO

**DEFENDANT-APPELLANT**:
BRIAN SALTZMAN

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Attorney for Defendant-Appellant:

Taylor Ivy, Reg. No. 50122
Springer and Steinberg, P.C.
1400 S. Colorado Blvd., Suite 500
Denver, CO 80222
Tel: (303) 232-5160
Fax: (303) 232-5162
Email: sivy@springersteinberg.com

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Case No. 23CA1143

# REPLY BRIEF

## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with the applicable word limit set forth in C.A.R. 28(g). It contains 3,525 words.

2. C.A.R. 28(a)(7)(A) does not apply to this brief. For each issue raised, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

The undersigned acknowledges that the brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Taylor Ivy

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## ARGUMENT

### I. The trial court erred in denying Saltzman's motion to suppress evidence obtained as a result of the warrantless search of his home.

#### A. Standard of review.

The attorney general agrees with the standard of review set forth in the opening brief. (Answer Brief, pp 7-8.)

Review of a trial court's suppression order presents a mixed question of fact and law, and an appellate court defers to the trial court's findings of fact that are supported by the record but assesses the legal effect of those facts de novo. *People v. Hyde*, 2017 CO 24, ¶ 9; *see also People v. Kaiser*, 32 P.3d 480, 483 (Colo. 2001). Preserved errors of constitutional dimension are reviewed for constitutional harmless error, and reversal is required unless this court is convinced that the error was harmless beyond a reasonable doubt. *Hagos v. People*, 2012 CO 63, ¶ 11.

The attorney general asserts, however, that Saltzman did not preserve an argument that police entered his house without consent. (AB, pp 7, 19 n. 6.)

Saltzman did not explicitly state that police entered his house without consent in his suppression motion and did not use the word "consent," but the issue was discussed during throughout the hearing on the motion. Defense counsel questioned witnesses about whether police ever asked for or obtained "permission"

to enter and search the house. (*See, e.g.,* TR 1/6/22, pp 29:12-23 ("You would agree that [the officer] never got permission to go into that house from anyone?"), 48:25-49:1 ("Who gave you permission to do that?"), 49:13-16 ("And so we're also clear, when you arrive at that area going through the house without permission, my client's already in custody?"), 55:20-22 ("And he didn't have permission to do that, to your knowledge, did he?"); *see also* TR 1/11/22, pp 25:22-25 ("And you had no permission from anyone to [go] walking through the house, to go downstairs, did you?"), 27:24-28:15 ("If I suggested you were inside that house for more than an hour without permission or a search warrant would you disagree?"), 31:21-32:4 ("Did you anyone ever ask the person who was in custody or anyone else for permission to search the house?").)

In addition, both defense counsel and the prosecutor addressed the initial entry by police in argument. (*See* TR 4/7/22, pp 3:10-14:14.) The prosecutor argued that the first officer to enter the house, Officer Brown, "[did not] conduct a search or even a sweep" although he was "looking for the victim, someone who has been shot." (TR 4/7/22, p 10:21-25.) Defense counsel responded that Brown had to "have some authority to cross that threshold" because police "can't, under the [Fourth] Amendment, walk into people's houses and walk around." (TR 4/7/22, p 12:1-5.) The court acknowledged the issue, but in its written order stated

only that Brown "did not conduct a protective sweep or clear the residence." (*See* TR 4/7/22, p 14:15-22; CF, p 136.)

The issue of whether police entered the house without consent was sufficiently raised and presented to the trial court at the suppression hearing, and it is therefore properly preserved for review. *See People v. Mapps*, 231 P.3d 5, 8 (Colo. App. 2009) (rejecting the assertion that defendant's staleness argument was raised for the first time on appeal because "the issue was discussed during the suppression hearing").

### B. Discussion.

#### (1) The trial court applied an erroneous legal standard.

"[B]oth a trial court's application of an erroneous legal standard in resolving a suppression motion and a trial court's ultimate legal conclusion of constitutional law that is inconsistent with or unsupported by evidentiary findings is subject to correction on review." *Kaiser*, 32 P.3d 483.

Saltzman argued first in his opening brief that the trial court applied an erroneous legal standard in resolving his suppression motion. (OB, pp 12-15.) It is well-settled that under the Fourth Amendment, a search occurs "when the government intrudes upon an individual's legitimate expectation of privacy," *see People v. Davis*, 2019 CO 24, ¶ 15 (citing *Kyllo v. United States*, 533 U.S. 27, 33

(2001); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)), and there is no dispute that Saltzman had a legitimate expectation of privacy in his home. *See Payton v. New York*, 445 U.S. 573, 589-90 (1980) ("…the Fourth Amendment has drawn a firm line at the entrance to the house."). But here, the trial court appeared to conclude that no search occurred when police entered Saltzman's house prior to the so-called "protective sweep." The court found that first officer to enter the house, Officer Brown, "did not conduct a protective sweep or clear the residence," and did not otherwise address Brown's warrantless entry or the entry of any other officer. (*See* CF, p 136.)

The attorney general does not directly address Saltzman's argument that the trial court applied an erroneous legal standard in resolving his suppression motion. The attorney general instead asserts that Saltzman did not specifically preserve an argument that police entered his house without consent, then contends that Brown's entry "was consented; and it was not a search because the officer simply went down the stairs and into the basement leading to the backyard…where the victim was." (AB, p 19.)

As discussed above, the issue of whether police entered the house without consent was sufficiently raised and presented to the trial court at the suppression hearing, and it is therefore properly preserved. *See Mapps*, 231 P.3d at 8. As to

the contentions that Brown's entry "was consented" and was not a search, the attorney general is incorrect.

First, like the prosecution at the suppression hearing, the attorney general fails to explain why Brown's conduct did not constitute a search. Even if Brown's warrantless entry was justified, and even if Brown was just "looking for the victim, someone who has been shot" (*see* TR 4/7/22, pp 10:21-11:2), this was a government intrusion in Saltzman's house wherein he had a legitimate expectation of privacy: it was a search.

Then, regarding Brown's warrantless entry, the attorney general states that the guest who opened the door when police arrived "invited the officers into the house" and had "apparent authority to consent, particularly considering the exigent circumstances." (AB, p 20.) But there is no evidence establishing any of this, and it was the prosecution's burden to provide such evidence.

"At a suppression hearing, the defense has the burden of going forward with evidence that a search or seizure does not conform to constitutional requirements," and "[e]vidence that the police did not have a warrant authorizing their search and seizure satisfies that burden." *People v. Syrie*, 101 P.3d 219, 222 (Colo. 2004). There has never been any dispute as to whether Saltzman met this burden. It is and has been undisputed that the police here did not initially have a warrant to enter

and search his home.

It was the prosecution's burden to prove "that consent was obtained before a search was initiated and that it was freely and voluntarily given." *See People v. Prescott*, 205 P.3d 416, 419 (Colo. App. 2008). If consent was obtained from a third party, like the guest who opened the door, it was the prosecution's burden to prove that the third party had actual or apparent authority to consent to a search. *See People v. Walter*, 890 P.2d 240, 242 (Colo. App. 1994). And it was the prosecution's burden to prove that exigent circumstances existed. *See People v. Miller*, 773 P.2d 1053, 1057 (Colo. 1989).

The prosecution presented no evidence to support a determination that the person who answered the door at Saltzman's house had the authority to consent to a search of the house or that the police reasonably believed that he had such authority. In fact, the officers who testified at the suppression hearing agreed that they did not even attempt to obtain voluntary consent from that person to enter or search the house. (*See*, *e.g.*, TR 1/6/22, pp 29:12-23, 48:23-49:1, 49:13-16, 55:17-22; TR 1/11/22, pp 25:22-26:16.)

The prosecution likewise presented no evidence to support a determination that Brown's initial entry and search was justified by exigent circumstances. To the extent the prosecution's argument that Brown was "looking for the victim"

could be construed as an argument that exigent circumstances existed as a justification for Brown's warrantless entry and search, the trial court failed to address this issue in its order.

Finally, as explained in Saltzman's opening brief, because the trial court never addressed the issue of exigent circumstances as justification for Brown's warrantless entry and search, the court could not and did not properly assess the existence of exigent circumstances following Brown's entry and at the time of the so-called protective sweep. "[T]he existence of exigent circumstances must be assessed as of the time immediately prior to the search or arrest [at issue]," *see People v. Santisteven*, 693 P.2d 1008, 1013 (Colo. 1984), and here, the record shows that the victim was transported to the hospital before the officer who directed the protective sweep arrived on the scene. (TR 1/11/22, pp 14:2-5, 22:16-19.) Even if the prosecution had established that Brown's initial entry and search was justified by exigent circumstances—namely, the need to render emergency assistance to an injured person—there remained the issue of whether officers could continue to enter and search Saltzman's home *after* the exigency was addressed.

The trial court misapprehended the legal standards applicable to the suppression issues raised in Saltzman's motion and at the motions hearing. The court erred.

### (2) The trial court's ultimate legal conclusion was inconsistent with or unsupported by its evidentiary findings.

The attorney general mischaracterizes Saltzman's second argument, stating that "the trial court's findings regarding the protective sweep were supported by the record and the law" and "[i]t is the function of the trial court and not the reviewing court to weigh the evidence and determine the credibility of the witnesses." (AB, p 21.) Saltzman does challenge the trial court's factual findings, which are indeed entitled to deference if supported by the record. "However, at least when a constitutional right is implicated…appellate courts should not defer to a lower court's judgment when applying legal standards to the facts found by the trial court." *People v. Matheny*, 46 P.3d 453, 459 (Colo. 2002). Saltzman asserts that here, the trial court's ultimate legal conclusion of constitutional law is inconsistent with or unsupported by its evidentiary findings and the record.

First, the trial court found that Saltzman "was not arrested until 3:19 a.m. until 3:19 a.m. on May 25, 2020," but found that the so-called protective sweep was conducted at 1:00 a.m., over two hours prior. (CF, p 138.) A protective sweep is defined as "a quick and limited search of premises, *incident to an arrest* and conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327 (1990) (emphasis added). Based on the court's findings, the

search conducted here was not incident to an arrest.

The attorney general does not appear to argue that Saltzman's placement into "protective custody" could be considered an arrest for the purposes of the protective sweep or that his placement into "protective custody" otherwise justified the protective sweep, and none of the cases in the accompanying parenthetical string citation support this position. (AB, pp 22-23.)

In *United States v. Starnes*, 714 F.3d 804 (7th Cir. 2013), the court held that a protective sweep conducted incident to a search warrant was constitutional because of the "substantial, particularized factors that would allow a reasonable officer to conclude that he, his fellow officers, or another bystander might face danger" and because the search was "short, cursory, and limited to only those places that a person might be hiding." *Starnes*, 714 F.3d at 808-10.

In *United States v. Lawlor*, 406 F.3d 37 (1st Cir. 2005), the court held that a protective sweep conducted inside a house where a person was arrested outside the house was constitutional because the officer had specific reasons to believe the house harbored an individual posing a danger to those at the scene, and it was "immaterial" that the defendant was "not formally arrested until after the sweep because there was probable cause to arrest prior to the sweep and the arrest occurred immediately after the sweep." *Lawlor*, 406 F.3d at 41 n. 4.

In *United States v. Garcia*, 997 F.2d 1273 (9th Cir. 1993), the police conducted a protective sweep only after they obtained lawful consent to enter a house. *Garcia*, 997 F.2d at 1282. And similarly, in *State v. Davila*, 999 A.2d 1116 (N.J. 2010), the analysis involved a protective sweep conducted after a consensual entry—and while the court held that such protective sweeps could be constitutional, it cautioned that "when a protective sweep is performed in a non-arrest setting…a careful examination must be undertaken of the basis for the asserted reasonable articulable suspicion of dangerous persons on the premises." *Davila*, 999 A.2d at 1132.

Next, the record demonstrates that Saltzman was found and handcuffed outside the house in the backyard. (*See* TR 1/11/22, pp 18:6-10, 30:7-12, 31:8-10.) A protective sweep permits police to "look in closets and other spaces immediately adjoining the place of arrest from which an attack could immediately be launched," but "[b]eyond that…there must be articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Buie*, 494 U.S. at 334. Because the search here went beyond any space that could have conceivably been considered immediately adjoining the place of arrest, there needed to be specific, articulable facts supporting a

reasonable belief that someone dangerous could have remained in the area searched. *United States v. Bagley*, 877 F.3d 1151, 1154 (10th Cir. 2017).

The attorney general argues that "the protective sweep was justified because police did not know who the shooter was," because "police could reasonably believe additional individuals were somewhere inside the residence (or outside) given the number of vehicles (some of them with firearms in plain view) and the amount of food and alcohol in the house, and that these individuals presented a danger to police," and because "there were many places inside the large house and outside where someone could be hiding and ambush the officers." (AB, pp 23-26.)

However, the trial court found that Officer Brown entered Saltzman's home, walked through the home multiple times, and escorted medical personnel through the home and outside to the victim; and Officer Ruisi likewise arrived and proceeded to walk into and through the house. (CF, p 136.) All the officers who were called as witnesses at the motions hearing testified that when they arrived, other officers were already inside Saltzman's house. (*See*, *e.g.*, TR 1/6/22, pp 44:5-9, 72:20-25, TR 1/11/22, p 13:17-23.) The trial court found that at the time of the so-called protective sweep, the officers "were trying to determine what had occurred." (*See* CF, p 138.) Clearly, even if the officers reasonably believed that another person or additional people remained in the house, they had no reason,

much less any specific reason, to believe that person or those people would attack them while they were outside. (*See*, *e.g.*, TR 1/6/22, p 75:12-22); *see United States v. Carter*, 360 F.3d 1235, 1242-43 (10th Cir. 2004).

Contrary to the attorney general's assertions, the evidence that every officer who arrived prior to the so-called protective sweep walked directly into and through Saltzman's house (despite not knowing who the shooter was), then escorted other officers and medical personnel into and through the house (despite the number of vehicle, the presence of any firearms in cars or on counters, and the amount of food and alcohol in the house), "is inconsistent with any conclusion that the officer[s] felt threatened or endangered." *See Walter*, 890 P.2d at 244.

The attorney general last attempts briefly to justify the trial court's effort to distinguish this case from *United States v. Bagley*, stating that "there, unlike here, police had a search warrant for [the] defendant and there was no evidence (or any indication) that other dangerous people could be in the house." (AB, p 27.)

If anything, the lack of a search warrant here only affirms that the so-called protective sweep in this case was easily as unconstitutional as the search in *Bagley*—in *Bagley*, at least, the police had a lawful reason to be searching inside the house in the first place. And aside from this, the attorney general's attempt to distinguish the cases fails. Here, as in *Bagley*—also as in, for example, *United*

*States v. Carter*, 360 F.3d 1235, 1242-43 (10th Cir. 2004), and *United States v. Nelson*, 868 F.3d 885, 892 (10th Cir. 2017)—there was no evidence of any clear and non-speculative threat to the officers that existed inside Saltzman's house or anywhere on scene.

In sum, the trial court's ultimate legal conclusion that the protective sweep was reasonable is inconsistent with the record and unsupported by its own evidentiary findings. The court erred.

**(3) The error was not harmless beyond a reasonable doubt.**

The attorney general bears the burden of proving that the error here was harmless beyond a reasonable doubt. *Hagos*, ¶ 11. The attorney general fails to meet this burden. The attorney general asserts that "overwhelming evidence established guilt," but fails to identify what exactly the evidence was other than Saltzman's "concession" that he "acted with criminal negligence and was intoxicated." (AB, pp 14-15.)

"The constitutional harmless error test 'is not whether, in a trial that occurred without the error, a guilty verdict would have surely been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'" *People v. Frye*, 2014 COA 141, ¶ 15 (quoting *Bernal v. People*, 44 P.3d 184, 200-01 (Colo. 2002)). "If there is a reasonable possibility that the

defendant could have been prejudiced the error cannot be harmless beyond a reasonable doubt." *Id*. (internal quotations omitted).

Here, the fruits of the warrantless search were used to obtain the warrant to search Saltzman's house, and the evidence recovered from that search—namely, the Colt 1911 that was found and tested for the presence of Saltzman's DNA—was critical to the prosecution's case. The prosecution relied on this evidence to argue that Saltzman was in possession of the Colt 1911 and used it to fire the shot that hit the victim. (*See* TR 4/27/23, pp 174:20-175:14.) Closing arguments make clear that evidence was important to the prosecution's case: it was one of the last things the prosecution emphasized in rebuttal. (*See* TR 4/27/23, p 191:22-24 ("He had that Colt. That's what he fired with.").)

And it was not just the assault charge for which this evidence was important. In fact, it was arguably more relevant to the charges of prohibited use of a weapon. The attorney general neglects to address the fact that Mr. Saltzman was convicted of two counts of prohibited use of a weapon—one that was specifically premised on the evidence of the Colt 1911 found inside the house. (*See* CF, pp 277-78.)

The attorney general alternatively contends that "the evidence would have been discovered independent of any illegality" under the independent source doctrine or the inevitable discovery doctrine. (AB, pp 16.)

"When…the People assert the applicability of the independent source doctrine, they bear the burden of proving by a preponderance of the evidence the doctrine's applicability." *People v. Thompson*, 2021 CO 15, ¶ 22. Here, the prosecution did not mention the independent source doctrine at any point during the proceedings related to the suppression issue in the trial court. Even if the prosecution's brief statement that the fruits of the warrantless search "would be subject to an inevitable discovery" (*see* TR 4/7/22, pp 7:23-8:3) could be construed as an argument about the independent source doctrine instead of inevitable discovery, this cannot have satisfied the prosecution's burden of establishing the applicability of the doctrine. *See Thompson*, ¶ 25.

The brief statement could not satisfy the prosecution's burden of establishing inevitable discovery either, as the prosecution offered no support for its statement other than "the fact that [evidence] would have then been found when officers proceeded with [a] search warrant." (TR 4/7/22, pp 7:23-8:3.) Standing alone, "[t]he ability to obtain a lawful search warrant after an illegal search has occurred does not satisfy the inevitable discovery exception requirements." *People v. Nelson*, 2012 COA 37M, ¶ 52. Nothing in the record indicates that a warrant would have been sought or obtained, or that evidence would have otherwise been obtained, independently from the illegal warrantless search of Saltzman's house.

Because the fruits of the warrantless search were used to obtain the warrant to search Saltzman's house and no exception to the exclusionary rule applied, and because the evidence recovered from that search was critical to the prosecution's case, the guilty verdict actually rendered in this trial was not surely unattributable to the trial court's error in denying Saltzman's motion to suppress. The error was not harmless beyond a reasonable doubt. Reversal is required.

## CONCLUSION

Defendant-Appellant Brian Saltzman respectfully requests that the court reverse the judgment of conviction and remand this case for a new trial.

Respectfully submitted,
Springer and Steinberg, P.C.

s/ Taylor Ivy

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Taylor Ivy, Reg. No. 50122
Attorney for Defendant-Appellant

## CERTIFICATE OF SERVICE

I certify that on the 4th day of December 2023, this **REPLY BRIEF** was served via Colorado Courts E-Filing on Senior Assistant Attorney General Carmen Moraleda.

s/ Taylor Ivy