STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 29, 2011
v	No. 300145 Oakland Circuit Court
JOSE EMILIO GARCIA, Defendant-Appellant.	LC No. 2010-230666-FH

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals by leave granted an order that granted the prosecutor's motion to amend the information. For the reasons set forth below, we affirm.

The district court ruled that Southfield police officers illegally entered defendant's residence and that, therefore, all evidence discovered during this initial entry (marijuana and firearms) must be suppressed. The district court also ruled that a search of defendant's bedroom pursuant to his consent was invalid and that, therefore, cocaine discovered at that time must also be suppressed. The district court upheld the search conducted pursuant to a warrant, but ruled that only heroin located in a garage was admissible pursuant to the warrant. As a result, count 1, controlled substance, delivery/manufacture (narcotic or cocaine) 50 to 449 grams, MCL 333.7401(2)(a)(iii), remained intact (because it related to the heroin) and defendant was bound over for trial on that charge. However, the district court dismissed the remaining counts[1], which addressed the cocaine and firearms. The circuit court reinstated all charges and ruled that the initial entry by the police officers was legal.

Defendant argues that the district court properly suppressed the evidence after the preliminary examination. We agree with the district court that the police officer's initial entry

[1] Count 2, possessing a firearm while committing a felony (felony-firearm), MCL 750.227b; Count 3, possession of a firearm by person convicted of a felony, MCL 750.224f; Count 4, felony-firearm; Count 5, possession of under 25 grams of a controlled substance (narcotic or cocaine), MCL 333.7403(2)(a)(v), Count 6, felony-firearm.

into defendant's residence was illegal, but find that an exception to the exclusionary rule applies, allowing the admission of all evidence seized.

This court reviews a trial court's decision to grant a motion to amend the information for an abuse of discretion. *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008). The underlying issue involved suppression of evidence, however, and this Court reviews de novo the trial court's ultimate decision on a motion to suppress. *People v Wilkens*, 267 Mich App 728, 732; 705 NW2d 728 (2005).

The right of persons to be secure against unreasonable searches and seizures is guaranteed by both the United States and Michigan constitutions, US Const, Am IV; Const 1963, art 1, § 11. However:

> The state constitutional standard is not higher than the federal standard. The constitutions do not forbid all searches and seizures, only unreasonable ones. Reasonableness depends upon the facts and circumstances of each case. The applicable test in determining the reasonableness of an intrusion is to balance the need to search, in the public interest, for evidence of criminal activity against invasion of the individual's privacy. [*Id.* at 733.]

"In order to show that a search was legal, the police must show either that they had a warrant or that their conduct fell under one of the narrow, specific exceptions to the warrant requirement." *People v Eaton*, 241 Mich App 459, 461; 617 NW2d 363 (2000). "Among the recognized exceptions to the warrant requirement are exigent circumstance, searches incident to a lawful arrest, stop and frisk, consent, and plain view. Each of these exceptions, while not requiring a warrant, still requires reasonableness and probable cause." *People v Brzezinski*, 243 Mich App 431, 433-434; 622 NW2d 528 (2000) (internal citations omitted). However, here, "probable cause to search is not required in . . . the 'emergency aid' exception and the 'community caretaker' exception." *Id*. at 434.

The emergency aid exception to the search warrant requirement:

> . . . allows police officers to make an entry or search without a warrant where they reasonably believe it is necessary to assist a person who may be in serious need of medical aid. However, the entry must be limited to the justification given, and the officer must be motivated primarily by the perceived need to render aid or assistance. The officer may not do more than is reasonably necessary to determine whether a person is in need of assistance and to provide that assistance. [*Id*.]

In addition, while "such 'entries' need not be subject to traditional probable cause analysis," *People v Davis*, 442 Mich 1, 13; 497 NW2d 910 (1993), the police "must possess specific and articulable facts" that lead them to believe that "a person within is in need of immediate aid," *id*. at 25-26. Finally, "it is important to place strict limits on the application of this emergency aid exception. A finding that police are entering to administer aid and not to search for evidence is implicit in a finding that their entries fall under this exception." *Id*. at 26 n 12.

Defendant argues that Southfield Police Sergeant Gary Lask had no objective evidence that anyone else was present in defendant's residence on the date in question. Defendant points out that Sergeant Lask did not ask defendant whether anyone else was in the condominium unit. Moreover, according to defendant, the officers' conduct upon entry into the residence establishes that they were pursuing a criminal investigation — i.e., looking inside drawers, under mattresses, etc. Thus, defendant maintains that the entry in this case was unlawful, and the circuit court erred in reversing the district court's decision regarding the initial warrantless entry.

We agree that the emergency aid exception does not apply to the initial entry into defendant's condominium. Sergeant Lask responded to dispatch reports that a man was running around in traffic, wearing only his underwear in 50-degree weather, in the area of 12 Mile and Northwestern in Southfield. The sergeant saw defendant, who was, in fact, wearing only his underwear, as well as a coat given to him by a passer-by. Defendant "was shivering, he was breathing heavy, he was drooling, [and] seemed incoherent." When the officer asked defendant what was wrong, defendant "stated he had used too much cocaine." Further, when asked from where he had come, defendant "didn't know the address but he stated that it was . . . the fourth house in on the right of Pilot's Cove . . . ." Once paramedics had responded to the scene, Sergeant Lask and another officer went to Pilot's Cove. Sergeant Lask explained his subsequent actions by noting, "it was obvious from his medical condition that . . . [defendant] needed serious medical attention and *I was concerned that there may be additional people* . . . where he was at . . . . that may be in – in dire need of immediate medical attention." (Emphasis added.)

When they arrived at the condominium complex, the officers noticed a unit with an open garage door, located north of the fourth unit, and made contact with an elderly couple. The female was the association president, and upon being given a brief description of the incident, she pointed the officers to the fourth unit. Sergeant Lask further testified:

> There are two doors, a screen door and then a [sic] interior door. The screen door was shut but not locked; the interior door was standing wide open. While standing on the outside we could hear a television on inside the condominium and we knocked and we announced ourselves you know very loudly numerous times without getting a response.

Although they received no response to their repeated announcements and did not observe anyone in need of help, the officers entered the condominium, "looking for anybody that could need . . . immediate medical attention." When they reached the upper level, which had at least two bedrooms, the officers first went into what appeared to be the master bedroom where they observed marijuana on a nightstand and on the bed. Officer Thomas pointed out marijuana located on the nightstand, as well as on a table that was on the bed, but was "reasonably sure" that there were no people in the bedroom. The second bedroom had a heavy tobacco odor, as did the entire house, according to Sergeant Lask. Upon entering the second bedroom, Sergeant Lask noticed that the dresser drawer was open, and he then opened it the rest of the way to search for identification. Instead, he found bullets, which led him to "instinctively" turn and look under the mattress, where he observed two firearms.

Thus, the officers were not responding to a 911 call or other report indicating that persons needing help were located at the residence. Compare *People v Tierney*, 266 Mich App 687, 704-

705; 703 NW2d 204 (2005), *Brzezinski*, 243 Mich App at 433-434. Nor, in this case, did the officers actually observe anyone in the house, injured or otherwise. Compare *People v Beuschlein*, 245 Mich App 744, 747; 630 NW2d 921 (2001). Rather, it is clear from Sergeant Lask's testimony that, based solely on defendant's condition, Sergeant Lask speculated that there was *a possibility* that other people at the residence *could* need assistance. Notably, like the officers in *Davis*, in which our Supreme Court ruled that the emergency aid exception did not apply, Sergeant Lask did not actually attempt to determine beforehand whether there was anyone in the condominium that needed help. *Davis*, 442 Mich at 26-29. He did not ask defendant whether he had been with other people. Although defendant was "incoherent," he was at least capable of stating where he lived. Further, Sergeant Lask gave no indication in his testimony that, when he spoke with the elderly couple, he asked for or received information regarding the possibility of other individuals located in the fourth unit. Finally, although the prosecutor makes much of the fact that, upon arriving at the residence, the officers could smell cigarette smoke and hear a television, these facts merely indicate that, if any unseen people were in the unit, they were watching television and smoking cigarettes, not suffering from a medical condition in need of immediate attention. Thus, these facts do not support the emergency aid exception to the search warrant requirement.

With respect to the marijuana found in the master bedroom, "[t]he plain view exception to the warrant requirement allows a police officer to seize items in plain view if the officer is *lawfully* in the position to have that view and the evidence is obviously incriminatory," however, "[i]f the police intrusion was unlawful in the first place, the plain view exception does not apply." *People v Galloway*, 259 Mich App 634, 639; 675 NW2d 883 (2003) (emphasis added). Because the initial entry was illegal, evidence of the marijuana[2] must be excluded unless, as we hold below, an exception to the exclusionary rule applies. Furthermore, even if this Court agreed with the circuit court and found that the emergency aid exception applies, evidence of the firearms would have to be suppressed (unless, again, an exception applies) because, at the time they were discovered, Sergeant Lask was looking in the drawer and under the mattress, locations in which he would not have found a person in need of medical aid. *Brzezinski*, 243 Mich App at 434.

Defendant argues that the circuit court erred when it admitted the evidence seized after the search warrant was issued because, but for the unlawful observation of the marijuana, there would have been no search warrant, and therefore, all of the evidence obtained must be suppressed. When reviewing whether there was probable cause for a search warrant:

> . . . this Court must examine the search warrant and underlying affidavit in a common-sense and realistic manner. Under the totality of the circumstances, this Court must then determine whether a reasonably cautious person could have

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[2] Although, as stated, defendant was not in fact charged with any crimes related to marijuana possession, the issue is relevant with respect to whether the exceptions to the exclusionary rule apply, as will be discussed *infra*.

> concluded that there was a substantial basis for the magistrate's finding of probable cause. When a person of reasonable caution would conclude that contraband or evidence of criminal conduct will be found in the place to be searched, probable cause for a search exists. [*People v Malone*, 287 Mich App 648, 663; 792 NW2d 7 (2010).]

In addition, as stated above, this Court reviews de novo the trial court's ultimate decision on a motion to suppress. *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001).

Here, although the circuit court erred in holding that (1) the initial entry was legal pursuant to the emergency aid exception, and (2) the firearms evidence would be admissible even if the emergency aid exception did not apply, the circuit court also held, in the alternative, that all of the contraband was admissible pursuant to the search warrant.[3] We agree that the search warrant is valid and falls under an exception to the exclusionary rule.

"The exclusionary rule . . . generally bars the introduction into evidence of materials seized and observations made during an unconstitutional search." *People v Hawkins*, 468 Mich 488, 498-499; 668 NW2d 602 (2003) (internal citations and punctuation omitted). "Additionally, the exclusionary rule prohibits the introduction into evidence of materials and testimony that are the products or indirect results of an illegal search, the so-called 'fruit of the poisonous tree' doctrine." *People v Stevens*, 460 Mich 626, 634; 597 NW2d 53 (1999). "However, application of the exclusionary rule is not constitutionally mandated, and the question whether the exclusionary rule's remedy is appropriate in a particular context is regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Hawkins*, 468 Mich at 499. Application of the exclusionary rule "has been restricted to 'those instances where its remedial objectives are thought most efficaciously served.'" *People v Reese*, 281 Mich App 290, 295; 761 NW2d 405 (2008). Moreover, "[t]hree exceptions to the exclusionary rule have emerged: the independent source exception, the attenuation exception, and the inevitable discovery exception." *Stevens*, 460 Mich at 636.

The independent source exception is relevant here. In *People v Smith*, 191 Mich App 644, 648; 478 NW2d 741 (1991), this Court addressed the issue of a subsequent valid warrant in the context of the independent source doctrine, relying on the holding in *Segura v United States*, 468 US 796; 104 S Ct 3380; 82 L Ed 2d 599 (1984), namely, "that an illegal entry by police officers upon private premises did not require suppression of evidence subsequently discovered at those premises pursuant to a search warrant that had been obtained on the basis of information

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[3] The police also conducted a consent search of defendant's bedroom, at which time they discovered the cocaine. The district court ruled that defendant's consent was voluntary, yet not valid because it was not sufficiently attenuated from the taint of the illegal entry. The circuit court did not address consent. Because we hold that the search warrant was valid, and the warrant allowed a search of the entire residence, we will not address the issue of defendant's consent to search his bedroom.

wholly unconnected with the initial entry." *Smith*, 191 Mich App at 648. The *Smith* Court explained, quoting *Segura*:

> It has been well established for more than 60 years that evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is "so attenuated as to dissipate the taint," *Nardone v United States* [308 US 338, 341; 60 S Ct 266; 84 L Ed 307 (1939)]. It is not to be excluded, for example, if police had an "independent source" for discovery of the evidence:
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> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. *If knowledge of them is gained from an independent source they may be proved like any others.*" *Silverthorne Lumber Co v United States* [251 US 385, 392; 40 S Ct 182; 64 L Ed 319; 24 ALR 1426 (1920)]. [Emphasis in original.]
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> In short, it is clear from our prior holdings that "the exclusionary rule has no application [where] the Government learned of the evidence 'from an independent source.'" *Wong Sun*, [371 US 471, 487; 83 S Ct 407; 9 L Ed 2d 441 (1963)]. . . . [*Smith*, 191 Mich App at 648-649, quoting *Segura*, 468 US at 805 (emphasis added).]

This Court further explained:

> Later, in *Murray v United States*, 487 US 533; 108 S Ct 2529; 101 L Ed 2d 472 (1988), *the Supreme Court extended the independent source doctrine to include evidence that had been previously discovered in plain view at the time of the illegal entry*. *The ultimate question*, said the Court, *is whether the search pursuant to a warrant was "a genuinely independent source" of the evidence at issue*. *Id*. at 542. Thus, *if nothing* seen by the officers upon their initial entry either prompted the officers to seek a warrant *or was presented to the magistrate* and affected the decision to issue the warrant, the evidence need not be suppressed. [*Smith*, 191 Mich App at 649-650 (emphasis added).]

In *Smith*, there was "a single cursory reference to what was seen" by an officer during the initial illegal entry of the defendant's apartment. *Id*. at 650. However, the trial court had excluded that information and determined that there was probable cause to issue a search warrant. *Id*. This Court then concluded, "the evidence at issue was not the fruit of the initial unlawful entry but rather the product of the validly obtained search warrant. Accordingly, the exclusionary rule is inapplicable." *Id*. at 652.

While *Smith* addressed the specific situation of observations made during an illegal entry, a more general rule, articulated by the Court in *People v Melotik*, 221 Mich App 190; 561 NW2d 453 (1997), states that "[w]hen a search warrant is based partially on tainted evidence and partially on evidence arising from independent sources, if the lawfully obtained information

amounts to probable cause and would have justified issuance of the warrant apart from the tainted information, the evidence seized pursuant to the warrant is admitted." *Id*. at 201, quoting *United States v Shamaeizadeh*, 80 F 3d 1131, 1136 (CA 6, 1996). "Probable cause for issuance of a search warrant exists if there is a substantial basis for inferring a fair probability that contraband or evidence of a crime exists in the location to be searched." *Malone*, 287 Mich App at 663. "[T]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *People v Keller*, 479 Mich 467, 475; 739 NW2d 505 (2007).

Here, in contrast to *Smith*, which addressed an affidavit that only had a cursory reference to an item seen during an illegal entry, the unlawfully observed marijuana appears to be the major impetus to seek the search warrant and was featured prominently in the warrant itself.[4] Nevertheless, as the district court found, even striking all references to marijuana, the affidavit also contained the admission by defendant that he had been using cocaine in his condominium, which would give the magistrate a substantial basis to find probable cause that there was contraband located in the unit. *Keller*, 479 Mich at 475. Accordingly, the independent source of defendant's admission provided the basis for a valid search warrant, and *all* items found in the house pursuant to this warrant – marijuana, guns, cocaine, and heroin – are admissible. Therefore, the circuit court properly reinstated counts 2 through 6 of the information, which constituted charges related to the cocaine and firearms.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Pat M. Donofrio

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[4] In Sergeant Lask's testimony, he stated that, during the initial entry, the marijuana was found in the master bedroom, which, apparently, belonged to a co-defendant, while firearms were found in defendant's bedroom. Following the consent search of defendant's bedroom, the officers found ten small packages of cocaine. Sergeant Lask noted that officers did not remove any items from the home until they had obtained a search warrant for the entire house. The fact that the search warrant mentions marijuana and weapons, but not cocaine, confirms that the information used to obtain the search warrant stemmed from the illegal entry.