STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2001
v	No. 216050 Macomb Circuit Court
ROBERT PAUL GREENE, Defendant-Appellant.	LC No. 96-003132-FH

Before: Hoekstra, P.J., and Whitbeck and Meter, JJ.

METER, J. (*concurring*).

I concur with the majority's decision but write separately to emphasize two points.

First, I do not agree with the majority that the police officers' testimony at trial should be considered in determining de novo whether the evidence in question should have been suppressed, because defendant did not renew his motion to suppress after the officers testified at trial. Instead, defendant made solely a pretrial motion to suppress the evidence, and a pretrial evidentiary hearing occurred. The trial court based its ruling on the testimony elicited at the pretrial evidentiary hearing, and it is this testimony that should be considered during our de novo appellate review.

Indeed, even though the officers' trial testimony differed in some respects from their evidentiary hearing testimony, it was not incumbent on the trial court to sua sponte modify its pretrial ruling according to the new testimony. If defendant believed that a further basis for suppression arose at trial, he should have renewed his motion to suppress. See, e.g., *People v Ferguson*, 376 Mich 90, 94-95; 135 NW2d 357 (1965) (holding that if a defendant does not learn of facts constituting the illegality of a search until trial, he may move to suppress at trial). By failing to do so, defendant failed to adequately preserve for appellate review his contention that the officers' trial testimony warranted suppression of the evidence.[1]

Nevertheless, even looking solely to the evidentiary hearing testimony, I must conclude

[1] While the officers' trial testimony may potentially be considered on appeal under the standard for forfeited error, this standard differs from the de novo review employed by the majority.

that the trial court erred by failing to suppress the evidence in question. The officers testified at the evidentiary hearing that they (1) opened a desk drawer to find the cocaine vials and (2) lifted a checkbook to find the suspected cocaine (later determined to be a cocaine mixing agent). The actions of opening the desk drawer and lifting the checkbook constituted an illegal search within the meaning of the Fourth Amendment. Indeed, according to the officers' testimony, the cocaine vials and the suspected cocaine were not in plain view prior to these actions, and "[n]o searching, no matter how minimal, may be done under the auspices of the plain view doctrine." *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996). Accordingly, the illegally-obtained items should have been suppressed. Moreover, because the search warrant appears to have rested solely on the existence of the illegally-obtained items, the evidence obtained under the search warrant similarly should have been suppressed.

I emphasize, however, that in some circumstances, a search warrant affidavit containing information obtained from an initial, illegal, warrantless search may nonetheless support a valid search warrant, provided that the remaining, untainted information in the affidavit establishes probable cause to search. *Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978); *People v Griffin*, 235 Mich App 27, 42; 597 NW2d 176 (1999). In other words, the search warrant obtained in the instant case may have been valid, if the supporting affidavit contained information establishing probable cause to search even in the absence of the information regarding the cocaine vials found in the desk and the suspected cocaine found in the file cabinet. Unfortunately, and inexplicably, the search warrant and affidavit in this case are not contained in the lower court file, and we are therefore unable to examine them to determine if sufficient untainted information existed to support probable cause to search. While the arguments by the parties in this case suggest that the search warrant affidavit at issue here did *not* in fact contain sufficient untainted information to support probable cause to search, I nonetheless note that it is generally incumbent on the prosecutor to prove the existence of a warrant, see *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993), and that he or she should therefore ensure that copies of search warrants and supporting affidavits are contained in the file.

/s/ Patrick M. Meter