

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY FISHER,

Defendant-Appellant.

UNPUBLISHED

December 20, 2005

No. 256027

Wayne Circuit Court

LC No. 04-000969

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's dismissal of charges of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. We reverse and remand for an evidentiary hearing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS¹

Two police officers responded to defendant's residence to investigate reports of unusual noises and behavior. There, they heard and observed defendant inside the residence breaking objects. One of the officers knocked and identified himself as the police, but defendant refused to answer. The police persisted, inducing defendant to state that he would not let them in if they did not have a warrant. One of the officers then opened the front door a short distance before it was stopped by furniture blocking it, and advised defendant to come to the door, inducing another statement of defiance from him. The officers noticed that a nearby vehicle had struck a fence, and saw some blood inside the vehicle, outside the vehicle, and near the front door of the home. One of the officers then pushed defendant's front door open approximately eighteen inches, and observed defendant raise a long gun and point it at him. The police retreated from the scene, but later returned with a search warrant, in response to which, defendant surrendered without incident.

¹ The facts in this case are taken from the information given to the district court at the swearing to the complaint against defendant.

Defendant waived the preliminary examination, but moved the trial court to quash the information or to convene an evidentiary hearing, on the ground that the case against him was based on an illegal search. No evidence was presented at the motion hearing. Based on the information contained in the transcript for the swearing out of the complaint, the trial court found that the emergency aid exception to the warrant requirement did not apply and granted defendant's motion to quash the information because of the police officers' illegal entry into defendant's home.

II. SUPPRESSION HEARING

Plaintiff first argues that the trial court erred in deciding the suppression issue without holding an evidentiary hearing. We agree.

A. Standard of Review.

A trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion. See *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987).

B. Analysis

A court deciding a suppression motion must ordinarily convene its own evidentiary hearing to decide the matter. See *People v Talley*, 410 Mich 378; 301 NW2d 809 (1981). However, where the lawyers agree to have a suppression motion decided on the basis of the preliminary examination transcript and the police report, such process "accords with broader principles regarding the respective roles of defense counsel, the prosecuting attorney, and the court." *People v Kaufman*, 457 Mich 266, 276; 577 NW2d 466 (1998), citing MCR 6.110(D). In this case, the testimonial record before the trial court came not from a preliminary examination, which defendant had waived, but from a police detective's testimony offered in support of the signing of the complaint. See MCR 6.101(B).

We conclude that the trial court erred in determining the motion to quash without holding an evidentiary hearing. First, it is questionable whether both parties agreed to have the motion decided on the basis of the information given to the court during the swearing to the complaint. Although defendant, by requesting the court to quash the information or convene an evidentiary hearing, signaled its willingness to both accept a decision from the existing record, or to proceed with an evidentiary hearing, the prosecutor expressed concern with the procedure. During a hearing held on March 5, 2004, the prosecutor argued that "if [the] defense want's [sic] to challenge the factual basis on which the case is brought, the thing to do is hold an exam. . . . I think procedurally we can't go about this the way we're going about it. We have to have an exam before we can do this." The prosecutor then went on to argue the merits of defendant's motion. However, based on his initial argument, we cannot find that the prosecutor agreed to waive the evidentiary hearing and have the matter decided on the basis of the record before the court.

Additionally, although we note that MCR 6.110(D) permits a party to move the trial court to admit or exclude evidence on the basis of any "prior evidentiary hearing," we conclude that the swearing to the complaint by the police officer was not a prior evidentiary hearing. The

complaint, which is to include “the substance of the accusation against the accused and the name and statutory citation of the offense,” MCR 6.101(A), must be signed and sworn to before a judicial officer or a court officer. MCR 6.101(B). “The primary function of a complaint is to move the magistrate to determine whether a warrant shall issue.” *People v Higuera*, 244 Mich App 429, 443; 625 NW2d 444 (2001), quoting *Wayne Co Prosecutor v Recorder’s Court Judge*, 119 Mich App 159, 162; 326 NW2d 825 (1982). The amount of information required is that necessary to convince the magistrate that there is reasonable cause for a warrant to issue. MCL 764.1a(1). Generally, no attorneys are present at the swearing to a complaint and there is no questioning of the police officer.² It is unlike a preliminary examination, where the officers involved would have been questioned by the prosecutor, cross-examined by the defense attorney, and had the opportunity to give a complete account of what happened and the court would be required to find probable cause that a crime occurred and defendant committed the crime. MCR 6.110(E). The difference between a preliminary examination and a swearing to the complaint and the lack of consent by the prosecutor makes *Kaufman* inapplicable to this situation. There was no prior evidentiary hearing on which the trial court could have decided the motion. Therefore, we remand to the trial court for an evidentiary hearing on defendant’s motion to suppress. *Talley, supra*. In light of our conclusion on this issue, we decline to address the prosecutor’s remaining argument.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Bill Schuette

² Indeed, the detective that swore out and signed the complaint does not appear to be one of the officers involved in the incident with defendant.