STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 29, 2008
v	No. 279829 Wayne Circuit Court
ROGER SWEET, Defendant-Appellee.	LC No. 07-005651

Before: White, P.J., and Hoekstra and Schuette, JJ.

PER CURIAM.

The prosecution appeals by leave granted the trial court's order granting defendant's motion to suppress evidence discovered during the fire investigation of defendant's home and all statements made by defendant to the police. We reverse the trial court's order and remand for further proceedings.

I. FACTS

On January 8, 2007, around 10:00 a.m., the Brownstown Fire Department responded to a fire on Dawnshire Street, where a residence was emitting very heavy smoke obscuring the entire street. Once the fire was extinguished sufficiently to allow a quick search for the cause of the fire, the arson investigator, Chief Drouillard, noticed the door-wall was wide open, a garden hose was sitting on the deck running, and there was a gas can on the floor in the family room. There was heavy fire damage to the living room, family room, and kitchen. The bathroom, master bedroom, and home office suffered severe smoke damage. The residence was in a "disarrayed condition," and there were boxes throughout the home "as if someone was moving out." In the hallway, there was a dresser, a bench, a tower computer, a lap top computer, a flat screen computer monitor, and a camera, all appearing as if they had been tossed there haphazardly. The cables on the tower computer were cut a few inches from the tower.

After this initial walkthrough, and after the fire suppression crew ensured that the fire was completely extinguished, the home was locked down and Drouillard called for additional assistance from the downriver fire investigation team. The team assisted in moving debris, looking for burn patterns, and searching for anything abnormal. In the living room, Drouillard noticed the remains of several boxes that contained clothing and towels. Digging through the debris in the family room, the following items were uncovered: a marble table, the remains of a couch, and a small, white diary. Reading a few pages of the diary, Drouillard realized that the

diary contained an account of the marital problems between defendant and his wife, and Drouillard secured the diary in his vehicle because evidence of marital strife can be motive for burning a residence.

The Brownstown Police Department also began investigating the fire at defendant's residence on January 8, 2007. Brownstone Detective Lieutenant Robert Grant and Drouillard spoke with defendant to ascertain the circumstances surrounding the fire. Grant, trying to be cooperative and polite, asked if defendant would step into the arson vehicle so he and Drouillard could speak with him. Defendant agreed. Defendant was very calm in speaking with the investigators, and the conversation took place without defendant being arrested or having been read his rights. The conversation began with defendant asking if anybody knew where the fire started. At the time, both Grant and Drouillard were unsure about the cause and origin of the fire. Speculating about who may have started the fire, defendant opined that his wife "probably started the fire and went out in the woods and killed herself."

After the arson investigation was complete, Drouillard and Grant walked defendant through the residence so defendant could remove any valuables he wanted to protect. During the walkthrough, defendant was cooperative but showed no "real excitement" about discovering his house was a total loss. Defendant was asked about the computers in the hallway, and he indicated that the last time he had seen them, they were in the office on the desk. Defendant further said that his wife placed them in the hallway to burn because she did not like him being on the computer all the time. Defendant clearly indicated the computers were his, that he kept them locked in the office, and they contained no pornography. Defendant maintained that the "only thing I do on the computer is on-line gambling." Grant asked defendant if he knew where his wife was, to which he replied, "the last time I saw her alive was on the couch where she sleeps."

Detective Michael McCarthy of the Brownstone Police Department also spoke with defendant in the garage of the residence. Defendant was not detained or arrested, and stated he was at work when the fire occurred and his soon to be ex-wife started it. Defendant consented to the search of his wife's car, a red Lincoln, that was parked in the driveway Defendant also consented to a canine search of himself and his vehicle. The dog alerted on defendant's shoes, which the arson investigator collected. In defendant's vehicle, McCarthy discovered notes from defendant's wife to defendant about him having an affair "with the retard down the street." In answering questions about the whereabouts of his wife, defendant named his wife's friend. In speaking with the wife's friend about the possible whereabouts of defendant's wife, the friend indicated defendant's wife had come to her with concerns about defendant having an affair with a co-worker, and she feared for defendant's wife's safety. Returning to the residence, McCarthy spoke with defendant about his having an affair. Defendant denied an affair but named the impaired girl referenced in the notes. In speaking with the impaired girl, McCarthy learned she was 19 years old, acknowledged a sexual relationship with defendant, but could not give any dates or times as to the when the sexual contact occurred.

On January 9, 2007, McCarthy asked defendant to come to the Brownstown Police Department to talk about the fire. During this conversation, defendant was not detained in any way, was not advised of his *Miranda*[1] rights, and was told he was free to leave at any time. Initially, defendant denied having a sexual relationship with the impaired girl, but, ultimately, confirmed the sexual relationship.

A search warrant for defendant's home was obtained on January 9, 2007, and defendant's computers were seized. A second search warrant for information contained on the computers was obtained on January 15, 2007. Defendant was charged with three counts of first-degree criminal sexual conduct, MCL 750.520b, and six counts of child sexually abusive activity or material, MCL 750.145c(2).

Defendant moved to suppress the evidence against him. At a hearing on July 14, 2007, defendant argued that the search of the residence was impermissible and the computers, diary, and his statements must all be suppressed. Defendant argued that the moment Drouillard discovered the gas can, he was not searching for anything other than evidence of arson and, therefore, needed a search warrant. Defendant contends that during the illegal search, Drouillard found the diary, which, because it had to be opened to be read, makes the plain view doctrine inapplicable. Further, because the search was illegal, the computers must be suppressed as well. Finally, defendant argued that because this was an arson investigation, defendant was a suspect and, before he was questioned, defendant should have been given *Miranda* warnings.

The prosecution responded by stating that there was no evidence that defendant's statements were anything but voluntary and admissible. Regarding the search, the prosecution argued that Drouillard was conducting a cause and origin investigation and not an arson investigation. The arson investigator was removing debris and looking for burn patterns when he encountered the diary. Looking at the diary and realizing that it contained an account of the marital strife between defendant and his wife, Drouillard realized its evidentiary value. Therefore, the prosecution contended that the plain view doctrine applies because the diary was found in the course of a lawful governmental intrusion into the residence. Additionally, the prosecution argued that defendant had no standing to contest the seizure of the diary because the diary belonged to his wife. Further, the prosecution stated that the computer evidence is still admissible because, even if the contentious portions of the affidavits are struck, enough probable cause is present to authorize the search. Finally, the prosecution asserted that the search was legal because the police acted in good faith, implicating the good faith exception to the exclusionary rule.

In ruling on the motion to suppress, the trial court found that the moment Drouillard discovered the gas can, the investigation became a criminal in nature, necessitating a search warrant for any additional investigation. Regarding the diary, the trial court ruled that defendant had as much a right to privacy in the diary as did defendant's wife, and therefore, it must be suppressed. Continuing, the trial court found the search warrant to have an insufficient factual basis upon which to obtain the computers, and therefore, struck all evidence pertaining to the

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

computers. Finally, the trial court struck defendant's statements because the police interrogation of defendant was confrontational, requiring *Miranda* warnings and an expression that defendant was making free and voluntary statements. The prosecution now appeals.

II. SUPPRESSION OF EVIDENCE

On appeal, the prosecution raises five arguments, challenging the trial court's order granting defendant's motion to suppress evidence. The prosecution first argues that defendant does not have standing to challenge the search or seizure of his wife's diary because defendant failed to demonstrate a reasonable expectation of privacy in the diary. Second, the prosecution contends that the trial court erred in suppressing the evidence discovered as a result of the first search warrant because, even if all references to the diary were stricken from the search warrant, the warrant still contained sufficient probable cause. Third, the prosecution argues that because the warrant still authorized a search of defendant's home, the diary would have been inevitably discovered. Fourth, the prosecution asserts that the trial court erred in not giving reasons for finding the second search warrant invalid and improperly suppressing evidence discovered through the second search warrant. Finally, the prosecution argues that the court erred in failing to apply the good-faith exception to the exclusionary rule. We agree with the prosecution's arguments.

A. Standard of Review

In Michigan, a trial court's ultimate decision on a motion to suppress is reviewed de novo. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003). However, this Court reviews a trial court's findings of fact for clear error, giving deference to the trial court's resolution of factual issues. *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). "Whether a party has standing is a question of law that is reviewed de novo." *People v Gadomski*, 274 Mich App 174, 178; 731 NW2d 466 (2007).

B. Analysis

1. The Search and Seizure of the Diary

The right against unreasonable searches and seizures is guaranteed by both the state and federal constitutions. US Const, Am IV; Const 1963, art 1, sec 11. Generally, a search or seizure conducted without a warrant is unreasonable unless there exists a circumstance establishing an exception to the warrant requirement. *People v Tierney*, 266 Mich App 687, 704; 703 NW2d 204 (2005).

As an initial matter, the prosecutor contends that defendant did not have standing to challenge the seizure of the diary because the diary belonged to his wife. However, to have standing, a person "needs a special interest in the area searched *or* the article seized." *People v Jordan*, 187 Mich App 582, 589; 468 NW2d 294 (1991) (emphasis added). The test is whether "he had a reasonable expectation of privacy in the object *or* area of the intrusion." *Id.* (emphasis added). In this case, defendant had a special interest, and a reasonable expectation of privacy, in the area of the search, i.e., his home. See *People v Taylor*, 253 Mich App 399, 406; 655 NW2d 291 (2002) (recognizing that the Fourth Amendment "viciously protects one's privacy interest in

the home as against warrantless governmental intrusions"). Therefore, defendant had standing to challenge the seizure of the diary.

As for the propriety of the warrantless seizure of the diary, in *Michigan v Tyler*, 436 US 499; 98 S Ct 1942; 56 L Ed 2d 486 (1978), the United States Supreme Court discussed the warrant requirement in the context of a fire investigation. The Court first noted that a "burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable.'" *Id*. at 509. The Court then went on to state that the exigency justifying the warrantless entry does not end with the "dousing of the last flame." *Id*. at 510. Instead:

> [f]ire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims. For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes is also constitutional. [*Id*. at 510. Footnote omitted.]

The Court then concluded:

> In summation, we hold that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative warrants. Evidence of arson discovered in the course of such investigations is admissible at trial, but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime. [*Id*. at 511-512. Citations omitted.]

In *Michigan v Clifford*, 464 US 287; 104 S Ct 641; 78 L Ed 2d 477 (1984), the United States Supreme Court expounded upon *Tyler*. One issue in *Clifford* was the scope of a search under *Tyler*. The Court held that "[c]ircumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined." *Id*. at 294. The Court stated that the scope of a valid search under *Tyler* is "limited to that reasonably necessary to determine the cause and origin of a fire and to ensure against rekindling." *Id*. at 297. However, the Court did acknowledge that evidence of criminal activity that comes into plain view during a search for the cause of the fire may be preserved without a warrant. *Id*. at 295 n 6.

Under the preceding principles, we conclude that the trial court erred in suppressing the diary. Entry into defendant's home to fight the fire did not require a warrant. And once fire

officials, including Drouillard, were in the home, they were allowed a "reasonable time" to investigate the fire. The key question is whether, at the time Drouillard seized the diary, the object of his search was to determine the cause of the fire or to discover evidence of criminal activity. The trial court appeared to find the latter. We disagree.

In *Tyler*, a fire began shortly before midnight on January 21, 1970. *Tyler*, *supra* at 501. The fire chief arrived at 2:00 a.m. and was informed that plastic containers containing flammable liquid were found in the building. *Id*. at 501-502. The fire chief entered to examine the containers and concluded that arson was a possibility. By 4:00 a.m., the fire had been extinguished, and the fire chief and a police detective left the scene (with the plastic containers). *Id.* at 502. Four hours later, the fire chief and an assistant returned to the premises for a cursory examination, and then left again. One hour later, the assistant and a police detective returned and discovered suspicious burn marks. They then left and returned again with tools, seized portions of carpet and stairs, and looked for other evidence of the cause of the fire. *Id*. The United States Supreme Court found that, under the circumstances, all of these entries were proper, as they were, essentially, a continuation of the first, proper, entry. *Id*. at 511.

In contrast, in *Clifford*, firefighters arrived at a house fire at 5:40 a.m., and extinguished the fire and left the scene around 7:00 a.m. *Clifford*, *supra* at 289-290. Investigators were dispatched to the scene because the fire department suspected arson. However, investigators did not arrive until 1:00 p.m., and, at that time, work crews dispatched by the defendants' insurance company were pumping out water and securing the premises. *Id*. at 290. After the work crews left, the investigators entered the home. The investigators entered the basement first and determined that the fire had originated there, and that the fire had been intentionally set. *Id*. The investigators then thoroughly searched the remainder of the house. *Id*. at 291. The United States Supreme Court found *Clifford* to be distinguishable from *Tyler* because the investigators' warrantless search was not a continuation of an earlier search, and because the home had been secured by the owners prior to the investigators' entry. The Court also noted that, even if the entry and search of the basement was proper, because the investigators had determined the cause of the fire was in the basement, the search of the remainder of the house (portions of which were largely undamaged) was improper as it was performed only to discover evidence of a crime. *Id*. at 295-298.

Here, we find the instant action more akin to *Tyler* than *Clifford*. Therefore, we conclude that the search of the family room and seizure of the diary were proper.

At the time Drouillard found the diary, he had discovered a gasoline can, a running garden hose, and other evidence that led him to suspect arson. However, he also stated that, when he found the diary, he still needed to rule out other possibilities, and was still focusing on the cause of the fire. We believe that it would be unreasonable to require Drouillard to stop searching the home simply because he had suspicions the fire was arson. Rather, Drouillard should be allowed to fully investigate the damaged portions of the home to confirm or dispel his suspicions. Further, the scope of a proper search under *Tyler* and *Clifford* includes not only evidence of the cause of the fire, but the origin of the fire. In this case, the gasoline can was found in the family room, where the diary was discovered. Therefore, Drouillard was justified in continuing to search the family room despite his suspicions of arson to determine whether the fire originated in that room. In sum, under the circumstances of this case, at the time Drouillard discovered the diary, the focus of the search was still on the cause and origin of the fire, as

opposed to discovering evidence of a crime, and consequently the seizure of the diary, which was in plain view, was proper.

2. Suppression of Evidence Obtained During Execution of the First Search Warrant

Next, the prosecution argues the trial court erred in suppressing the evidence discovered as a result of the first search warrant because, even if all references to the diary were stricken from the search warrant, the warrant still contained sufficient probable cause to search defendant's home and van, to seize firearms, computers, and evidence related to the arson, the disappearance of defendant's wife, and information pertaining to the criminal sexual conduct with the impaired girl. We agree.

When a search warrant is based partially on tainted evidence and partially on evidence arising from independent sources, the evidence seized under the warrant is admissible if the lawfully obtained information amounts to probable cause and would have justified issuance of the warrant apart from the tainted information. *People v Melotik*, 221 Mich App 190, 201; 561 NW2d 453 (1997). Here, the court suppressed the contents of the computers for lack of a "sufficient factual basis upon which a search warrant could be obtained in regard to the computers." Yet the facts listed in the search warrant included the determination of the fire as arson, the paperwork recovered after a consensual search of defendant's wife's vehicle, conversations with defendant's wife's friends detailing the wife's fear of defendant and her recent purchase of a handgun, and conversations with the impaired girl about defendant's sexual relationship with her. Based on the facts averred in the search warrant, the lower court erred in not finding the information contained therein was sufficient for probable cause and issuance of the warrant.

3. Inevitable Discovery

Next, the prosecution argues that because the warrant still authorized a search of defendant's home, the diary would have been inevitably discovered. We agree. Evidence obtained in violation of the constitution can still be admitted at trial if the prosecution establishes, by a preponderance of the evidence, that the information ultimately or inevitably would have been discovered by lawful means. *People v Brzezinski*, 243 Mich App 431, 435; 622 NW2d 528 (2000). As stated, *supra*, the lower court erred in not determining if the information contained in the search warrant was sufficient for its issuance. If the search warrant was proper, defendant's wife's diary would have been inevitably discovered. Therefore, the court erred in suppressing the diary. Furthermore, the *Clifford* Court found the plain view doctrine applicable in the special circumstances accompanying fire damage. There, the Court stated, "In searching solely to ascertain the cause, firemen customarily must remove rubble or search other areas where the cause of fires is likely to be found. An object that comes into view during such a search may be preserved without a warrant." *Clifford*, *supra* at 295 n 6. We have noted, *supra*, that Drouillard's search of the home was to ascertain the cause and origin of the fire, and the diary was found within the debris removed during the search of the family room. Considering the rule from *Clifford*, and the fact that the diary was recovered during the cause and origin search of the family room, we believe that the diary is admissible as the product of a plain view search.

4. Suppression of Evidence Obtained During Execution of the Second Search Warrant

Next, the prosecution argues that the trial court erred in not giving reasons for finding the second search warrant invalid and improperly suppressing evidence discovered through the search of the computer hard drives. Once again, we agree.

Here, the court suppressed the pictures of defendant sexually penetrating the impaired girl, all of which were obtained through the second search warrant, by stating, "The contents of the computers without the search warrant having sufficient factual basis upon which a search warrant could be obtained in regard to the computers is as well stricken." This fails to explain why the information obtained via the second search warrant should be suppressed. As we noted, *supra*, the search was valid as a cause and origin search. Considering this, it follows that the computers would be discovered during the cause and origin search, and were validly seized as a result of the first search warrant. Thus, the computers were properly searched via the second search warrant. Therefore, the trial court erred in suppressing any evidence found under the second search warrant.

5. Good-faith Exception

Finally, the prosecution argues that the court erred in failing to apply the good-faith exception to the exclusionary rule. We agree.

When a law enforcement officer acts within the scope of, and in objective, good-faith reliance on, a search warrant obtained from a judge, the officer is acting as a reasonable officer would and should act in similar circumstances, thereby negating the deterrent effect of the exclusionary rule. *People v Goldston*, 470 Mich 523, 530-531; 682 NW2d 479 (2004). The good-faith exception to the exclusionary rule will not apply where "the issuing magistrate or judge is misled by information in the affidavit that the affiant either knew was false or would have known was false except for his reckless disregard of the truth," "where the magistrate wholly abandons his judicial role," or "where an officer relies on a warrant based on an affidavit "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."'" *Goldston*, *supra* at 531 (citations omitted).

Here, defendant argues that McCarthy misled the magistrate in describing the impaired girl's statements as a sexual assault, yet, in the opinion and order, the lower court makes no finding that this fact misled the magistrate, or that the affidavit was so lacking in probable cause that belief in its existence was unreasonable, or that the magistrate abandoned his official role. Therefore, the lower court erred in failing to apply the good-faith exception to the exclusionary rule.

III. VOLUNTARINESS OF DEFENDANT'S STATEMENT

Next, the prosecutor argues that the trial court erred in suppressing defendant's statements without making a finding that defendant's freedom was restrained or finding that all of defendant's statements occurred in custodial settings, such that an objective person would have felt restricted or not free to leave. Again, we agree.

A. Standard of Review

"The ultimate question whether a person was 'in custody' for purposes of *Miranda* warnings is a mixed question of fact and law, which must be answered independently by [this Court] after review de novo of the record." *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). This Court will review to the trial court's findings of fact for clear error. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997).

B. Analysis

In Michigan, the police are obligated to give *Miranda* warnings to an accused only when the person is subject to custodial interrogation. *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002). "Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody." *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). Here, the trial court clearly erred in finding the police questioning "confrontational," and therefore, custodial.

Regarding the interview with defendant at his residence, the record shows that the officers were investigating a possible arson. "[A] police officer may ask general on-the-scene questions to investigate the facts surrounding the crime without implicating *Miranda*." *Ish*, *supra* at 118. Defendant remained at his residence voluntarily, choosing to stay in the driveway, porch, or garage areas. When McCarthy first spoke with defendant, it was at defendant's residence at a counter top in the garage. When Grant approached defendant, his purpose was to ascertain what defendant knew about the fire and what occurred before the fire was set. When Grant asked to speak with defendant, he did so without arresting defendant. The conversation took place in the arson van, and defendant began the conversation by asking if anyone knew where the fire started. After the conversation ended, Grant escorted defendant through the premises to collect valuables and defendant left with his daughter.

Regarding the interview that took place at the police department, defendant reported to the station voluntarily. Defendant was brought to the station by his daughter, and defendant was not placed under arrest. Before the interview, McCarthy informed defendant he was free to leave at any time. The interview took place in a room with a door that did not lock, and was completed in about an hour. After the interview, defendant was, again, allowed to leave. Thus, based on the facts surrounding the interviews with defendant, the court clearly erred in finding that the statements were made as the result of a custodial interrogation.

The lower court's order is reversed and the case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Bill Schuette