STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED February 12, 2009
v	No. 279574 Wayne Circuit Court
RUFUS CORNELL THOMAS, Defendant-Appellee.	LC No. 07-007938-01

Before: Gleicher, P.J., and K.F. Kelly and Murray, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, the police search of the Rufus Records premises violated the Fourth Amendment. Therefore, I would affirm the circuit court's order suppressing the firearms evidence discovered during the search.

I. Factual Background

Detroit police officer Isam Qasem testified at a suppression hearing that while on routine patrol during the evening of April 7, 2007, he noticed several "young juveniles" entering and exiting a commercial building. The building bore an awning identifying the business as "Rufus Records." Officer Qasem heard loud music, and concluded "[t]hat there was a party going on." A Detroit ordinance prohibits minors aged 15 and under from being "on the public streets" or "other unsupervised places" after 10:00 p.m. during Daylight Savings Time. Detroit Ordinances, § 33-3-1.

Rather than initiating an investigatory stop to determine whether the "young juveniles" actually qualified as unsupervised minors aged 15 or younger, Officer Qasem's partner called Sergeant Ron Gibson "so he [could] make a determination whether we should go inside" the Rufus Records building. Sergeant Gibson invoked a Detroit ordinance allowing administrative inspection of rental halls, Detroit Ordinances, § 46-1-2, to authorize a police search of the building. The Detroit ordinances define a "rental hall" as "any enclosed hall, building or portion of any building *regularly available for rental, lease or loan for the purpose of public assembly*, banquets, luncheons, entertainments or sports events, whether or not such public assemblies are public or private or an admission fee is charged." Detroit Ordinances, § 46-1-1 (emphasis supplied). The ordinance further provides,

> Each licensee under this chapter shall, upon demand, open all portions of the licensed premises for inspection by the department of police or other city departments for the purpose of enforcing any of the provisions of this chapter or other provisions of this Code or other ordinances relating to the health, safety and welfare of the public. [Detroit Ordinances, § 46-1-2].

No evidence exists that Gibson believed that Rufus Records constituted a "building regularly available for rental, lease or loan for the purpose of public assembly, banquets, luncheons, entertainments or sports events." Gibson possessed no actual evidence of felonious conduct within the building or any other possible crime, other than a civil ordinance infraction involving the minors. Rather, according to Sergeant Gibson, the Rufus Records building "fit the general scenario of other businesses or quasi businesses that had lead [sic] to shooting incidence [sic]." Gibson explained that he had "[s]een a correlation between shooting incidence [sic] and these club locations where young minors were present and unlicensed and the like, alcohol, leading to the shooting. So this was a proactive step that had been instituted on the eastside that I was supervising."

The officers knocked on the building's locked door and announced, "we're police, we're here for business inspection, what's going on." The officers then searched the premises and questioned its occupants. Sergeant Gibson recounted at the preliminary examination that defendant had identified himself as the building's owner; Gibson also testified at the suppression hearing that defendant denied that he possessed a rental hall license. The officers entered defendant's office and found a firearm. They discovered a second firearm in a location Sergeant Gibson described at the preliminary examination as "the hall proper partly concealed inside of like; perhaps a vent housing or wooden housing that ran along the wall."

II. Analysis of the Building Search

The majority holds that "the police properly searched the premises and seized defendant's firearm[s] pursuant to Detroit city ordinances permitting the inspection of licensed public dance and rental halls." *Ante* at 3. In my view, the police conducted an illegal, warrantless search of defendant's building solely to gather evidence of criminal activity, and not pursuant to a municipal inspection program. The majority opinion concludes, "The prosecution also argued that the 'pervasively regulated industry' exception permits admission of the assault rifle. In light of our conclusion that the search and seizure was lawfully conducted, we find resolution of this issue to be unnecessary." *Ante* at 7. But because the "pervasively regulated industry" exception to the Fourth Amendment's warrant requirement serves as the prosecution's sole proffered justification for the search, the majority cannot avoid this issue merely by demurring. Furthermore, a determination that the search passed constitutional muster intrinsically implicates the pervasively regulated industry exception to the warrant requirement, because a search conducted pursuant to a municipal inspection ordinance *is* a search conducted under the "pervasively regulated industry exception" to the Fourth Amendment's warrant requirements.[1]

[1] In *Tallman v Dep't of Natural Resources*, 421 Mich 585, 601; 365 NW2d 724 (1984), our Supreme Court referred to the "different standards in the area of administrative searches" as the (continued…)

In *New York v Burger*, 482 US 691, 699; 107 S Ct 2636; 96 L Ed 2d 601 (1987), the United States Supreme Court acknowledged the long-established principle that "the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes." A business owner enjoys an expectation of privacy in commercial property, "which society is prepared to consider to be reasonable." *Id*. This expectation of privacy "exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes." *Id*. at 699-700. Business owners cannot be "required to surrender their constitutionally protected rights in exchange for the privilege of doing business." *Tallman v Dep't of Natural Resources*, 421 Mich 585, 629; 365 NW2d 724 (1984).

Furthermore, the administrative inspection doctrine does not automatically negate the Fourth Amendment's warrant requirement. In *Marshall v Barlow's Inc*, 436 US 307, 322-323; 98 S Ct 1816; 56 L Ed 2d 305 (1978), the United States Supreme Court struck down a federal inspection scheme, and observed,

> The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed.

Thus, even in the context of a closely regulated industry, the government does not enjoy carte blanche authority to conduct warrantless searches.

In *Burger*, *supra*, the United States Supreme Court established three necessary criteria for a reasonable warrantless inspection of a pervasively regulated business: (1) "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) the warrantless inspection must be "necessary to further (the) regulatory scheme"; and (3) the inspection program, "in terms of the certainty and regularity of its application, (must) provid(e) a constitutionally adequate substitute for a warrant." *Id*. at 702-703. In my view, these constitutional requirements signify that a purportedly administrative search lacking a regulatory purpose transgresses the Fourth Amendment.

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"'pervasively regulated industry' doctrine." In *New York v Burger*, 482 US 691, 712; 107 S Ct 2636; 96 L Ed 2d 601 (1987), the United States Supreme Court held that a search conducted pursuant to a New York law allowing administrative inspections of vehicle dismantling businesses "clearly falls within the well-established exception to the warrant requirement for administrative inspections of 'closely regulated' businesses." Despite the majority's effort to avoid constitutional analysis under the pervasively regulated industry doctrine, the principles articulated in *Tallman*, *Burger*, and their progeny must govern the outcome of this case.

Although "[t]he discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal," *Burger*, *supra* at 716, "[i]f the primary object of the search is to gather evidence of criminal activity, a criminal search warrant [must] be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched." *Michigan v Clifford*, 464 US 287, 294; 104 S Ct 641; 78 L Ed 2d 477 (1984). The United States Supreme Court has repeatedly explained that the "pervasively regulated industry" exception to the warrant requirement does not automatically endow police officers with authority to ignore the Fourth Amendment where "the primary purpose [of the administrative search] was to detect evidence of ordinary criminal wrongdoing." *Indianapolis v Edmond*, 531 US 32, 38; 121 S Ct 447; 148 L Ed 2d 333 (2000).

The Supreme Court underscored this principle in *Ferguson v City of Charleston*, 532 US 67; 121 S Ct 1281; 149 L Ed 2d 205 (2001). In *Ferguson*, the Supreme Court analyzed the constitutionality of a state hospital's policy to perform nonconsensual drug testing on pregnant women suspected of cocaine abuse. *Id*. at 69-70. In striking down the hospital's program, the Supreme Court distinguished *Burger*, noting that in that case,

> the Court relied on the "plain administrative purposes" of the scheme to reject the contention that the statute was in fact "designed to gather evidence to enable convictions under the penal laws . . . ." The discovery of evidence of other violations would have been merely incidental to the purposes of the administrative search. In contrast, in this case, the policy was specifically designed to gather evidence of violations of penal laws. [*Ferguson*, *supra* at 83 n 21 (citations omitted).]

The Supreme Court observed that the "ultimate goal" of the hospital's program, i.e., substance abuse treatment, may have been salutary, but "the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal." *Id*. at 82-83 (emphasis in original, footnotes omitted). Although the hospital intended that the threat of prosecution would curtail drug use, the "direct and primary purpose" of the scheme was to assist the police. The Supreme Court emphasized,

> [T]his distinction is critical. Because law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine[2] by defining the search solely in terms of its ultimate, rather than immediate, purpose. [*Id*. at 84.]

[2] The "special needs doctrine" "is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing," *Edmond*, *supra* at 54 (C.J. Rehnquist, dissenting). As so defined, administrative searches fall within the reach of the "special needs doctrine." See also *Burger*, *supra* at 702.

Our Supreme Court has similarly observed that a "meaningful distinction" exists between administrative searches "and those conducted for the purpose of discovering the fruits or instrumentalities of crime." *Tallman, supra* at 618.[3]

In my view, the police entry into Rufus Records bore no resemblance to an inspection conducted "as part of a pre-planned and dispassionate administrative procedure." *S & S Pawn Shop, Inc v Delaware City*, 947 F2d 432, 441 (CA 10, 1991). Rather, the building search occurred during a criminal raid executed without evidence of felonious wrongdoing on the premises, or even any *reasonable* suspicion of a rental hall ordinance violation. Furthermore, administrative inspections are not accomplished by police officers holding drawn weapons, as occurred in this case.

Here, the administrative inspection ordinance served as a pretext to justify a search intended solely as a mechanism for criminal law enforcement. Sergeant Gibson's admissions that he suspected the presence of alcohol, and feared a shooting, establish that he entered Rufus Records to search for evidence of crime. Under the circumstances presented, I doubt that the police could have procured a warrant to search the premises.

A search warrant may issue only on a showing of probable cause. *People v Barr*, 156 Mich App 450, 457; 402 NW2d 489 (1986), citing US Const, Am IV; Const 1963, art I, § 11. "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). A sworn statement that an affiant "has cause to suspect and does believe" that contraband will be found in a building does not suffice to establish probable cause. *Illinois v Gates*, 462 US 213, 239; 103 S Ct 2317; 76 L Ed 2d 527 (1983) (internal quotation omitted). Nor do "mere conclusory statement[s] that give[] the magistrate virtually no basis at all for making a judgment regarding probable cause." *Id*. Here, the police knew nothing more than that some possibly underage youths were possibly violating Detroit's curfew ordinance. Despite Sergeant Gibson's fears of violence based on his experience in other cases, he lacked a *reasonable, articulable* suspicion that the Rufus Records building harbored weapons or drugs, or that criminal activity was afoot within. At most, the violations he observed outside the building amounted to civil infractions, and the police could have ticketed the involved offenders without entering the building. Because the police lacked evidence supporting the commission of any actual crime within the building, a magistrate could not have concluded that probable cause for a search existed.[4]

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[3] In *Whren v United States*, 517 US 806, 811-812; 116 S Ct 1769; 135 L Ed 2d 89 (1996), the United States Supreme Court specifically distinguished administrative searches from the usual rule that an officer's ulterior motives cannot invalidate a search. "[W]e never held, *outside the context of inventory search or administrative inspection ...* , that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment ...." *Id*. at 812 (emphasis supplied).

[4] I also disagree with the majority's conclusion that defendant enjoyed no expectation of privacy at Rufus Records, a business that he acknowledged owning according to Sergeant Gibson's preliminary examination testimony. The majority's determinations that defendant "had no

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Simply put, the entry and search of Rufus Records lacked a genuine regulatory purpose. That is not to say that the Fourth Amendment prevented the police from investigating whether the "young juveniles" were actually underage minors violating the curfew ordinance, or from questioning them about what was actually going on inside the building. Despite Sergeant Gibson's expressed concerns regarding the possible eruption of violence, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *Edmond*, *supra* at 42-43. Justice Frankfurter observed almost fifty years ago that "[t]he deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts." *Abel v United States*, 362 US 217, 226; 80 S Ct 683; 4 L Ed 2d 668 (1960). A warrantless entry of business premises utterly lacking in administrative purpose should meet the same fate.

Because I believe that the trial court correctly suppressed the fruits of the search, I would affirm.

/s/ Elizabeth L. Gleicher

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reasonable expectation of privacy" in his own building, or his office within that building, are simply and unequivocally incorrect, and merit no further discussion. *Ante* at 6.