STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2009
v	No. 284829 Macomb Circuit Court
IOANNIS DAOUD DAOUD, Defendant-Appellant.	LC No. 07-005300-FH

Before: Fort Hood, P.J.,and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession of marijuana, MCL 333.7403(2)(d).[1] Because the trial court properly admitted the challenged evidence at trial, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole argument on appeal is that the trial court improperly admitted evidence consisting of marijuana and one-and-a-half Vicodin pills. Specifically, defendant argues that the warrantless search by police violated the sanctity of his home, the search was not justified solely on the odor of marijuana smoke because Michigan does not recognize a "plain smell" exception to the warrant requirement,[2] and, the officers should have used a "knock and talk" procedure before detaining him.[3] As a consequence, defendant contends the police seized the items in violation of the Fourth Amendment right against unreasonable search and seizure.

We review findings of fact at a motion to suppress for clear error but whether a violation of the federal constitutional prohibition against unreasonable searches and seizures requires exclusion of the evidence is a question of law which we review de novo on appeal. *People v*

[1] The jury acquitted defendant of the charge of possession of a controlled substance analogue, MCL 333.7403.

[2] In support, defendant cites *People v Taylor*, 454 Mich 580; 564 NW2d 24 (1990), which was overruled in *People v Kazmierczak*, 461 Mich 411, 425-426; 605 NW2d 667 (2000).

[3] "Knock and talk" is a law enforcement procedure in which the police officer approaches a suspect's residence, identifies himself, and requests consent to search. *People v Frohriep*, 247 Mich App 692, 697; 637 NW2d 562 (2001).

Wilson, 257 Mich App 337, 351; 668 NW2d 371 (2003), vacated in part on other grounds 469 Mich 1018 (2004). A finding is clearly erroneous if an appellate court is left with a definite and firm conviction that a mistake has been made. *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). Substantial deference must be given to the trial court's factual findings regarding the credibility of witnesses. MCR 2.613(C); *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). "Accordingly, we may not substitute our judgment for that of the trial court and make independent findings." *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003).

In the instant case, the search was predicated on an officer's assertion that as he was standing outside the apartment's open sliding glass door, he saw pills he recognized as Vicodin in a plastic baggie on a sofa and "marijuana butts" in an ashtray approximately six to eight feet inside defendant's apartment. At an evidentiary hearing, the trial court accepted the officer's statement that he saw the contraband before searching the apartment:

> I have no reason to disbelieve the police officer who testified he smelled the marijuana. He testified he observed what appeared to him, from his experience, bills [sic: pills] that could possibly be Vicodin, and they looked like Vicodin. He saw butts—marijuana butts in the ashtray. That was sufficient for him to enter the home and conduct the search. The Court will deny your motion to dismiss based on a legal [sic: illegal] search and seizure.

There is nothing in the record indicating the trial court clearly erred. While defendant argues the officers detained him without seeing contraband, but rather based solely on the smell of marijuana smoke, the record evidence does not support his claim.

Further, under the facts established at trial, we conclude the search and seizure was justified under the plain view exception to the Fourth Amendment warrant requirement. Both the United States and Michigan Constitutions guarantee a defendant's right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. Whether a search is reasonable depends on the totality of the circumstances, but a search conducted without a search warrant is presumed to be unreasonable subject to several well-defined exceptions. *Brigham City v Stuart*, 547 US 398, 403; 126 S Ct 1943; 164 L Ed 2d 650 (2006); *People v Borchard-Ruhland*, 460 Mich 278, 293; 597 NW2d 1 (1999). One of these is the "plain view" exception.

The plain-view exception to the warrant requirement allows seizure of objects within the view of an officer who has a right to be at that vantage point. *Harris v United States*, 390 US 234, 236; 88 S Ct 992; 19 L Ed 2d 1067 (1968); *People v Tisi*, 384 Mich 214, 218; 180 NW2d 801 (1970). Three conditions must be satisfied: (1) the officer must lawfully be in the position from which the observations are made; (2) the object or objects must be in plain view; and (3) the incriminating nature of the object or objects must be readily apparent. *Horton v California*, 496 US 128, 136; 110 S Ct 2301; 110 L Ed 2d 112 (1990); *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996).

The first condition requires the officer to have made observations from a lawful vantage point. In this case, the officers approached defendant, who was standing outside his open apartment sliding glass door, because they could smell the distinctive odor of marijuana apparently coming from inside the apartment. This is reasonable because the facts show that

defendant was the only person in sight at 3:15 a.m. and the marijuana smell emanated from defendant's apartment. The officers therefore articulated a reasonable basis for confronting defendant. See *Terry v Ohio*, 392 US 1, 21; 88 S Ct 1868; 20 L Ed 2d 889 (1968) ("the police officer must be able to point to specific and articulable facts which . . . reasonably warrant [an] intrusion"). Also, the officer who viewed the contraband did so from a lawful vantage point, i.e., outside defendant's apartment through the open sliding glass door.

The second condition requires that the object or objects be in plain view. *Horton, supra* at 136. In this case, it is uncontested that the marijuana "roaches" were in plain view in an ashtray on top of a coffee table and that the Vicodin pills were in plain view in a baggie on top of the sofa. Defendant argued that the police officer could not have reasonably concluded that the objects he saw were marijuana butts instead of hand-rolled cigarette butts, but he did not claim someone could not plainly see the butts—whether they were marijuana or cigarette remains—from immediately outside the apartment sliding glass door. Similarly, defendant suggested that the officer could not be certain that the pills he observed were Vicodin instead of some over-the-counter medication, but he did not claim that the officer was not in a position to observe the pills.[4]

The third condition of the plain view exception requires that the police officer immediately recognize that the item is contraband. The contraband nature of an object is immediately apparent if probable cause to seize the item exists without conducting a search. *Champion, supra*, at 102-103. Probable cause to search requires the showing of "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). This Court evaluates a police officer's determination of the existence of probable cause "in light of [the officer's] experience and training, not in a vacuum or from a hypertechnical perspective." *People v Levine*, 461 Mich 172, 185; 600 NW2d 622 (1999), citing 1 LaFave, Search & Seizure (2d ed), § 3.2(c), p 571. Further, a sufficiently distinctive odor detected by a qualified person may alone establish probable cause to believe that contraband is present. *Kazmierczak, supra* at 421-422.

The officer who viewed the contraband testified that he had substantial experience with marijuana. He was therefore entitled to draw inferences from the facts in light of his experience. *Levine, supra* at 185. Once spotted, the contraband nature of the items was readily apparent. Defendant argues the marijuana butts could have been tobacco, and the Vicodin pills could have been lawfully prescribed. However, an officer need not be positive an item is contraband to satisfy this element. Probable cause to believe the item is contraband is sufficient. *Champion, supra* at 102-103. The facts that the marijuana smell emanated from the apartment, and, that the pills were in a baggie rather than a prescription pill bottle, suggest illegality. Under the

[4] Defense counsel argued at trial that the police officer could not have seen anything in the apartment because defendant was standing in the doorway, so the policeman would not have been able to see through him. However, counsel did not dispute that the items themselves were in plain site within the apartment. Therefore, if the trial court believed the officer's testimony—as it clearly did—the officer would have been able to see these items by looking past defendant into the apartment.

circumstances, it was reasonable for the officer to believe the butts were marijuana and that defendant illegally possessed the pills. The evidence, in light of the officer's experience, justified the identification of the items as contraband. Therefore, all three conditions of the plain view exception are satisfied.

However, to permit the warrantless entry into defendant's home, probable cause to believe that evidence of a crime would be found inside is not enough. The warrantless entry must be justified by exigent circumstances, such as the "hot pursuit" of a fleeing suspect, the need to respond to an emergency situation inside the house (such as a fire or an injured occupant), or the need to prevent the imminent destruction of evidence. *Brigham City*, *supra* at 403. The instant situation typifies the third example of the "exigent circumstances" exception, which provides that when police have probable cause to believe specific evidence of a crime is in danger of being destroyed, there is no need for a warrant. *In re Forfeiture of $176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993); *People v Snider*, 239 Mich App 393, 408; 608 NW2d 502 (2000). The police must evaluate the danger of imminent destruction on the basis of specific and objective facts. *In re Forfeiture*, *supra*; *Snider*, *supra*.

Here, the evidence suggested the contraband inside the apartment was in danger of being destroyed. Defendant knew he was under police suspicion because police questioned him about marijuana. He had an incentive to destroy the evidence. When questioned about the marijuana, he immediately attempted to retreat into his apartment and shut the sliding door, likely intending to destroy the evidence. If the officers left to obtain a search warrant, defendant would have had ample time to dispose of the Vicodin pills and marijuana. Even had one of the officers remained at the scene, his inability to enter the apartment without a warrant meant that he could not have prevented the destruction of the evidence. Additionally, there was an unidentified person inside the apartment, and defendant indicated his wife and children were also inside. Despite the police detention of defendant, absent the ability to enter the apartment and secure the contraband, others inside the apartment could still have destroyed those items. The facts known to the officers before entering the apartment established probable cause to believe the evidence could have been discarded or destroyed while a warrant was obtained. Therefore, the warrantless entry was lawful. *In re Forfeiture*, *supra*.

The facts established at the evidentiary hearing demonstrate that the officer lawfully saw the contraband in plain sight, and exigent circumstances existed to permit the police to enter the apartment without a warrant to seize the contraband. This was sufficient to except the warrant requirement. The trial court properly ruled the evidence was admissible at trial.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio