IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CHRISTIAN SEAN GARZA,
Appellant.

No. 2 CA-CR 2012-0394
Filed December 6, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20103792002
The Honorable Richard E. Gordon, Judge
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART;
VACATED AND REMANDED IN PART

COUNSEL

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 After a jury trial, appellant Christian Garza was convicted of attempted production of marijuana and possession of drug paraphernalia. On appeal, he argues the trial court erred by denying his motions to suppress, his motion to dismiss for preindictment delay, and in failing to declare a mistrial. Because we conclude exigent circumstances did not exist, we vacate the ruling on the motion to suppress and remand for a limited suppression hearing.

Factual and Procedural Background

¶2 "In reviewing the denial of a motion to suppress evidence, we consider only the evidence that was presented at the suppression hearing, which we view in the light most favorable to sustaining the trial court's ruling." *State v. Kinney*, 225 Ariz. 550, ¶ 2, 241 P.3d 914, 917 (App. 2010). In October 2008, two police officers went to a residence looking for a fugitive. The door to the residence was secured by an outer screen door and an inner door. When they knocked, Jeremiah Garza answered the door. As he did so, officers smelled the "overwhelming" odor of fresh marijuana. Jeremiah admitted he had marijuana in the residence, and the officers discovered he had a warrant out for his arrest. The officers placed him under arrest and then went back to the door and asked to enter. Christian shut the door on the officers and told them to "get off his curtilage." The officers continued to knock on the door and demand entry. Several times, Christian returned and opened the inner door, again told the officers to leave, that he was contacting his attorney,

and closed the inner door. From the outside, the officers observed Christian walking around and heard banging noises, as though he was slamming doors.

¶3 After fifteen minutes, the officers removed the outer screen door, detained Christian as he opened the inner door, and forced entry into the residence. They conducted a "protective sweep," which included removing the doorknob from a locked bedroom door and determining there were no other occupants of the residence. Inside the locked bedroom the police discovered a large number of marijuana plants. They then sought and obtained a warrant and conducted a more thorough search of the premises.

¶4 Christian was charged and convicted of attempted production of marijuana and possession of drug paraphernalia and sentenced to probation for two years. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Warrantless Search

¶5 Christian first argues the trial court erred by denying his motion to suppress evidence obtained from the warrantless search of his residence, claiming no exigent circumstances justified the search.[1] He reasons that the officers had no basis to believe he was destroying evidence or that anyone else was in the residence and therefore no exigency existed. "We review the denial of a motion to suppress for an abuse of discretion." *State v. Perez*, 233 Ariz. 38, ¶ 25, 308 P.3d 1189, 1195 (App. 2013). But we review de novo whether exigent circumstances existed because that determination involves a mixed question of law and fact. *See State v. Soto*, 195 Ariz. 429, ¶ 7, 990 P.2d 23, 24 (App. 1999).

[1] Although Christian appears to argue that no exigency supported the entry, he concedes that it was only after "Jeremiah and Christian were detained" that it was "no longer reasonable for the officers to believe that Christian could destroy any evidence." We therefore consider only whether the search of the residence after entry was permissible.

¶6 The Arizona Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Ariz. Const. art. II, § 8. This constitutional provision is both more explicit and more protective than its federal counterpart in "preserving the sanctity of homes and in creating a right of privacy." *See State v. Bolt*, 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984). Absent certain exceptions, police may not conduct warrantless searches of a home. *State v. Ault*, 150 Ariz. 459, 463, 724 P.2d 545, 549 (1986). One such exception is the protective sweep, which allows officers to search "adjoining areas [of the residence] where persons posing a danger might be found." *State v. Fisher*, 226 Ariz. 563, ¶¶ 8-9, 11, 250 P.3d 1192, 1194-95 (2011). But "specific facts, and not mere conjecture, are required to justify a protective sweep of a residence based on concerns for officer safety." *Id.* ¶ 16. The state bears the burden of proof to show an articulable concern for officer safety existed. *Id.* ¶ 13.

¶7 Another exception is when the police believe there is a probability of the destruction of evidence.[2] *Ault*, 150 Ariz. at 463, 724 P.2d at 549. When claiming a warrantless search was justified due to the probable destruction of evidence, the state must show it had an objectively reasonable fear that evidence was actually in danger of imminent destruction before a warrant could issue, not just that narcotics evidence might easily be destroyed. *See State v. Hendrix*, 165 Ariz. 580, 582-83, 799 P.2d 1354, 1356-57 (App. 1990); *see also State v. Martin*, 139 Ariz. 466, 474-75, 679 P.2d 489, 497-98 (1984) (no exigency where police have only tenuous inferences of possibility of destruction of narcotics evidence). For example, courts have found the probability of the destruction of evidence exception applicable in cases where the police have smelled burning marijuana, *State v. Decker*, 119 Ariz. 195, 198, 580 P.2d 333, 336 (1978), and where police knew only a small amount of contraband was present and the

[2]Although Garza claims no "general 'imminent destruction of evidence'" exception exists, our supreme court specifically recognized the exception in *Ault*, 150 Ariz. at 463, 724 P.2d at 549. *See also Kentucky v. King*, ___ U.S. ___, ___, 131 S. Ct. 1849, 1853-54 (2011).

defendant might be alerted to police monitoring occurring inside his home, *State v. Stein*, 153 Ariz. 235, 237-38, 735 P.2d 845, 847-48 (App. 1987).

¶8 But a belief that evidence of a crime and an individual are inside a residence, without more, does not create an exigency. *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971). "Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband . . . the police may not enter and make a warrantless seizure." *Id.*; *see also Johnson v. United States*, 333 U.S. 10, 12, 15 (1948) (smell of opium and shuffling noise behind door insufficient to support exigency exception to warrant requirement).

¶9 Here, the police were in verbal communication with Christian while they decided whether to force entry. They had sight of him for most of the fifteen minutes they waited before entering. Although at some points they heard what sounded like slamming doors, the police never heard or saw anything they associated specifically with destruction of evidence, such as the odor of burning marijuana or threats to destroy evidence. And they had already waited fifteen minutes before entering. Neither of the known occupants of the residence stated anyone else was in the home and the officers had not observed anyone else. Neither Christian nor Jeremiah had displayed any weapons nor did the officers observe any. Thus, because the officers could not articulate specific facts that anyone besides Christian was in the home who could pose a danger or destroy evidence, once he was detained the police had only "mere conjecture" that someone else was inside the home, which did not "justify a protective sweep of [the] residence." *Fisher*, 226 Ariz. 563, ¶ 16, 250 P.3d at 1196.

¶10 Absent an exception to the warrant requirement, any evidence that is the "direct and primary result of a violation" of article II, § 8 must ordinarily be suppressed. *Ault, supp. op.*, 150 Ariz. at 470, 724 P.2d at 556. The state argues, however, that we need not reverse because under either the inevitable discovery or the independent source doctrines, any evidence the police obtained would be admissible. But under Arizona law, the inevitable

discovery doctrine does not apply to cases in which the state has made an unlawful search of the defendant's home. *Id.* That doctrine therefore does not support their position.

¶11 Under the independent source doctrine, however, evidence subsequently seized pursuant to a search warrant may be admissible, despite the initial unlawful search, where the subsequently obtained warrant was based on legally obtained information from an independent source. *State v. Gulbrandson*, 184 Ariz. 46, 58, 906 P.2d 579, 591 (1995); *Martin*, 139 Ariz. at 477, 679 P.2d at 500. In both *Gulbrandson* and *Martin*, like here, the police made warrantless entries into the defendants' homes and conducted protective sweeps. *Gulbrandson*, 184 Ariz. at 58, 906 P.2d at 591. The police then obtained search warrants, and did not seize anything until the search warrant was issued. *Id.* To determine whether the evidence seized is admissible under this doctrine, the court in *Gulbrandson* established a two-step test: (1) after excising any illegally obtained information from the affidavit in support of the warrant, probable cause must still exist; and (2) the state must demonstrate any illegally obtained information did not impact the officer's decision to seek a warrant, or the issuing magistrate's decision to grant one. *Id.*

¶12 Our record does not contain the affidavit in support of the search warrant. We are therefore unable to determine on what basis the police sought the warrant or whether the warrants were supported by probable cause after excising any unlawfully obtained information. And because the trial court found exigent circumstances, it had no reason to decide whether the evidence would have been admissible under the independent source doctrine. We therefore remand to the trial court to hold a limited hearing to determine, under the independent source doctrine, whether the evidence seized pursuant to the warrant should have been suppressed. *See State v. Peterson*, 228 Ariz. 405, ¶ 19, 267 P.3d 1197, 1203 (App. 2011). If the court concludes the evidence should be suppressed, the trial court must order a new trial; if not, then Christian's conviction will stand and he may again seek appellate relief based on that denial. *See id.*

Preindictment Delay[3]

¶13 Christian next argues the trial court erred by not dismissing the charges against him due to the state's delay in bringing the charges. He argues he was prejudiced by the inability to seek a "wrap plea" deal that would have resolved all the pending cases against him, along with this one.

¶14 "For preindictment delay to violate due process, defendant must show (1) that the delay was intended to gain a tactical advantage or to harass him and (2) that the delay actually and substantially prejudiced him." *State v. Williams*, 183 Ariz. 368, 379, 904 P.2d 437, 448 (1995). Christian's claim fails on the first part of the test. The record contains no evidence of an intentional delay to gain a tactical advantage, and Christian identifies none, stating only that the "hearing showed a cumulative set of circumstances that do not occur absent some degree of planning on the part of a prosecutor." He asks us to remand so that evidence of that intent can be determined, but he already had an opportunity to explore this issue at the evidentiary hearing held on his motion in the trial court.

¶15 Moreover, Christian cannot show prejudice. For a defendant to satisfy the prejudice element of the preindictment delay test, he must show "prejudice above and beyond that which is inherent in the workings of a clogged judicial system." *State v. Broughton*, 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988). The defendant "'must present concrete evidence showing material harm,'" that actually "would have affected the outcome" of his case. *State v. Dunlap*, 187 Ariz. 441, 450-51, 930 P.2d 518, 527-28 (App. 1996), *quoting United States v. Anagnostou*, 974 F.2d 939, 942 (7th Cir. 1992), *abrogated on other grounds as recognized by United States v. Canoy*, 38 F.3d 893, 902 (7th Cir. 1994). Christian argues that absent the delay, he might have obtained a plea bargain resolving all pending criminal actions against him, but a defendant has no right to a plea

[3]Because his remaining claims, if meritorious, would require we dismiss the charges or vacate the verdicts, we address them rather than staying the remainder of the appeal.

bargain. *State v. Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d 1193, 1200 (App. 2000). Thus, any prejudice resulting from a potential plea he did not enter due to the timing of the indictment is merely speculative, not actual. The trial court did not err in refusing to dismiss the charges.

Inculpatory Statements

¶16 Christian next argues the trial court erred in refusing to suppress inculpatory statements he made to police immediately following their forced entry. We review a trial court's ruling on a motion to suppress for an abuse of discretion. *Perez*, 233 Ariz. 38, ¶ 25, 308 P.3d at 1195.

¶17 Christian first claims that his statements were involuntary because he had taken pain medication and was required to watch the police conduct a search of his home. A statement is involuntary if, under the totality of the circumstances, the defendant's will was overborne by impermissible police conduct. *Id.* ¶ 26; *see also Colorado v. Connelly*, 479 U.S. 157, 164 (1986) ("[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor" has coerced the challenged confession). To determine if the defendant's will was overborne by coercive police tactics, we consider four factors: (1) the environment of the interrogation; (2) whether warnings were given pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), (3) the length of the interrogation; and (4) the existence of impermissible police questioning. *State v. Blakely*, 204 Ariz. 429, ¶ 27, 65 P.3d 77, 84 (2003). Confessions are presumed involuntary and the state bears the burden of proving voluntariness by a preponderance of the evidence. *State v. Hall*, 120 Ariz. 454, 456, 586 P.2d 1266, 1268 (1978). But "[a] prima facie case for admission of a confession is made when the officer testifies that the confession was obtained without threat, coercion or promises of immunity or a lesser penalty." *State v. Jerousek*, 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979).

¶18 Here, although no direct testimony was offered, the parties stipulated that the police did not ask Christian any questions and the trial court found his statements were spontaneous, a finding he does not challenge on appeal. Christian did not testify or offer contradictory evidence. In the absence of any interrogation, there is

no basis to conclude his will was overborne by impermissible police conduct; thus, his claim fails. *See Blakely*, 204 Ariz. 429, ¶ 27, 65 P.3d at 84.

¶19 Christian instead contends that the absence of *Miranda* warnings and the fact that a search of his home was ongoing at the time he made the statements rendered them involuntary. Because we conclude below *Miranda* warnings were unnecessary, their absence has no impact on voluntariness. Finally, Christian points to nothing specific about this search that made it coercive, apparently contending that a search by itself is coercive enough to evoke a confession. Absent some more specific allegation of coercion by the police, we decline to find a search, without more, sufficient to render spontaneous statements involuntary. *See Connelly*, 479 U.S. at 164. Accordingly, the court did not abuse its discretion in refusing to suppress Christian's statements.

¶20 He next claims that his statements were given in violation of his rights pursuant to *Miranda*. *Miranda* requires the suppression of statements that are the product of custodial interrogation where the defendant was not first advised of certain constitutional rights. *State v. Zamora*, 220 Ariz. 63, ¶ 10, 202 P.3d 528, 532-33 (App. 2009). But again, the parties stipulated that the police did not ask Christian any questions. His voluntary, spontaneous statements were therefore not made in violation of *Miranda*. *See State v. Carter*, 145 Ariz. 101, 106, 700 P.2d 488, 493 (1985) ("[A]dmission of an accused's spontaneous, voluntary statement that is not made in response to police interrogation does not violate the defendant's *Miranda* rights."). The court did not err in refusing to suppress his statements. *See id.*

Prejudicial Testimony

¶21 Christian last argues the trial court erred in denying his motion for a mistrial based on the testimony of an officer that he claims was irrelevant and prejudicial. However, he withdrew his motion before the court could rule on it. Accordingly, the issue is not properly before this court. *See State v. Eastlack*, 180 Ariz. 243, 255, 883 P.2d 999, 1011 (1994) (withdrawal of motion waives objection); *see also State v. Henderson*, 210 Ariz. 561, ¶¶ 19-21, 115 P.3d 601,

607-08 (2005) (unobjected to error reviewed only for fundamental, prejudicial error). Christian does not argue that the court fundamentally erred by failing to spontaneously declare a mistrial, and he has therefore waived this argument on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

Disposition

¶22 For the foregoing reasons, we vacate the trial court's ruling on the motion to suppress and remand for limited proceedings consistent with this decision. Christian's convictions and sentences are affirmed, subject to the trial court's decision concerning the motion to suppress based on the warrantless search.