NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 KA 0610

STATE OF LOUISIANA

VERSUS

BOBBY L. BROCK

Judgment Rendered: NOV 06 2015

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On Appeal from the
22nd Judicial District Court
In and for the Parish of Washington
State of Louisiana
Trial Court No. 14 CR8 125748

The Honorable Scott Gardner, Judge Presiding

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BEFORE: WHIPPLE, C.J., WELCH, AND DRAKE, JJ.

Welch J. concurs in part and dissents in part, assigns reasons.

DRAKE, J.

The defendant, Bobby Lavon Brock, was charged by an amended bill of information with obtaining controlled dangerous substances, specifically Oxycodone (Schedule II) and Alprazolam (Schedule IV)[1], by doctor shopping, a violation of La. R.S. 40:971(B)(1)(i). At arraignment, the defendant entered a plea of not guilty. He later filed a pre-trial motion to suppress, arguing that his pharmacy records were illegally obtained, in violation of his federal and state constitutional protections. Following a hearing, the trial court denied the motion. Subsequently, the defendant withdrew his previously entered not guilty plea and, pursuant to a plea agreement, entered a **Crosby**[2] guilty plea, specifically reserving his right to challenge the trial court's denial of the motion to suppress. Following a **Boykin**[3] examination, the trial court accepted the defendant's guilty plea. He was sentenced to imprisonment for five years at hard labor, with the trial court then suspending the sentence, and placing the defendant on supervised probation for five years. The defendant now appeals, assigning error to the trial court's denial of his motion to suppress. For the following reasons, we reverse the trial court's denial of the defendant's motion to suppress, and remand for a reopened evidentiary hearing on the motion.

STATEMENT OF FACTS

The defendant pled guilty to the instant offense; thus, there was no trial to fully develop the facts. However, in connection with the motion to suppress hearing, the State's discovery file, excluding the defendant's criminal history, was introduced by the defense. In the file, it is noted that on October 22, 2013,

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[1] The amended bill of information incorrectly listed Alprazolam as a Schedule II controlled dangerous substance.

[2] **State v. Crosby**, 338 So.2d 584 (La. 1976).

[3] **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Louisiana State Police Investigator Randy Fandal received information from Sumerall's Pharmacy in Angie, Lousiana, that the defendant presented a prescription for Oxycodone and Xanax. As this was the defendant's first use of the pharmacy, the employee became suspicious, and requested a records check from the Louisiana Prescription Monitoring Program. The information received suggested that the defendant was obtaining the same prescriptions from several different physicians over the same time period.

One day later, on October 23, 2013, Investigator Fandal requested his own report to corroborate the employee's tip which, when received on November 4, 2013, verified that the defendant had obtained Alprazolam, Carisoprodol, Oxycodone, and Hydrocodone from four separate physicians and from eight pharmacies located in St. Tammany, Washington, St. Bernard, and Orleans Parishes. Using this information, Investigator Fandal obtained search warrants to secure the defendant's patient profile and prescription history from five different pharmacies located in Washington and St. Tammany Parishes. Investigator Fandal spoke with representatives of three of the four prescribing physicians, who informed him they did treat the defendant for his complaints, and did issue the prescriptions, but they were not told by the defendant that he was seeking treatment by other physicians or obtaining other prescriptions for controlled dangerous substances. Investigator Fandal discovered the defendant had actually obtained sixteen overlapping prescriptions for controlled dangerous substances. The defendant was later arrested and transported to the Bogalusa Police Department, where, after being read his **Miranda**[4] rights, he admitted to being addicted to pain medication.

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

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant contends that the trial court erred in denying his motion to suppress the evidence. Relying on **State v. Skinner**, 2008-2522 (La. 5/5/09), 10 So.3d 1212, and **State v. Pounds**, 2014-1063 (La. App. 1st Cir. 3/9/15), 166 So.3d 1037, the defendant argues that "[t]he evidence obtained from [t]he Louisiana Pharmacy Board was obtained illegally, without a proper search warrant in violation of [his] state and federal constitutional rights. This illegally seized information was used to obtain search warrants. The evidence from the Louisiana Pharmacy Board and the evidence seized from the search warrants should be suppressed." As such, he concludes that the trial court's ruling on the motion to suppress should be reversed, and the matter remanded to allow him an opportunity to withdraw his guilty plea.

The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and Article I, § 5 of the Louisiana Constitution, protect persons against unreasonable searches and seizures. See **Mapp v. Ohio**, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961). A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally obtained. La. Code Crim. P. art. 703(A). Federal and state constitutional protections against unreasonable searches exist only when an individual has an actual expectation of privacy that society is prepared to recognize as reasonable. **Katz v. United States**, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J. concurring); **State v. Ragsdale**, 381 So.2d 492, 497 (La. 1980).

A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the court had the opportunity to observe the witnesses and weigh the credibility of their testimony. **State v. Jones**, 2001-0908 (La. App. 1st Cir. 11/8/02), 835 So.2d 703, 706, writ denied, 2002-2989 (La. 4/21/03), 841 So.2d

791. Likewise, when a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not adequately supported by reliable evidence. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589 (La. 12/1/09), 25 So.3d 746, 751.

The defendant contends that the Louisiana Supreme Court's holding in **Skinner** supports the reversal of the denial of his motion to suppress. In **Skinner**, the district attorney received a tip from a pharmacist that the defendant was obtaining medication with multiple overlapping prescriptions. Based on that tip, the district attorney filed motions for production of prescription and medical records in the district court. The district court issued an order requiring eight pharmacies to produce the defendant's records. **Skinner**, 10 So.3d at 1213-14. The district attorney then prosecuted the defendant based on information derived from those records. On appeal, the Louisiana Supreme Court held that, absent one of the narrowly drawn exceptions, the defendant's prescription records were protected from warrantless search and seizure as part of a criminal investigation.[5] Because the district attorney failed to obtain a search warrant, the Louisiana Supreme Court concluded that the information obtained from the pharmacies should have been suppressed. **Skinner**, 10 So.3d at 1218.

Pounds also involved a situation in which an investigation began based on a report by a physician of suspicious activity regarding a defendant presenting false prescriptions. Specifically, following a physician complaint, a state police trooper obtained the defendant's prescription history through the Louisiana Pharmacy

[5] The Louisiana Supreme Court in **Skinner** also rejected the reasoning that no warrant was needed because the attempted subpoenas were directed to third-party business entities that were not under investigation for a crime, noting, "the attempted subpoenas sought the prescription and medical records of the defendant, who had a reasonable expectation of privacy in these records. Because we have determined the defendant had a right of privacy in these records, they could only be searched and seized pursuant to a warrant." See **Skinner**, 10 So.3d at 1218-19.

Board and then verified the information received using Drug Enforcement Agency administrative inspection forms. **Pounds**, 166 So.3d at 1038-39. The defendant filed a motion to suppress this information, which was subsequently denied by the trial court. On appeal, and after discussing **Skinner**, this Court held the trial court erred in denying the defendant's motion to suppress, noting that a right to privacy in one's medical and prescription records is an expectation of privacy that society is prepared to recognize as reasonable. **Pounds**, 166 So.3d at 1041.

However, despite the pronouncement in **Skinner** and **Pounds**, the information seized by Investigator Fandal in the instant case may be admissible under the "inevitable discovery" and "independent source" doctrines. The United States Supreme Court has held that unconstitutionally obtained evidence may be admitted at trial if it would inevitably have been seized by the police in a constitutional manner. **Nix v. Williams**, 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984). The inevitable discovery doctrine "is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." **Murray v. United States**, 487 U.S. 533, 539, 108 S.Ct. 2529, 2534, 101 L.Ed.2d 472 (1988) (emphasis in original). Pursuant to the independent source doctrine, "information which is received through an illegal source is considered to be cleanly obtained when it arrives through an independent source." **Id.** at 538-39. The United States Supreme Court further affirmed that, under the "independent source" doctrine, if the police have an "independent source" for the discovery of the evidence, the exclusionary rule has no applicability. See **Segura v. U.S.**, 468 U.S. 796, 805, 104 S.Ct. 3380, 3385, 82 L.Ed.2d 599 (1984).

A functional similarity exists between the independent source and inevitable discovery doctrines because both seek to avoid excluding evidence the police

"would have obtained...if no misconduct had taken place." The State therefore bears the burden of providing by a preponderance of the evidence that "the information ultimately or inevitably would have been discovered by lawful means..." **Nix**, 467 U.S. at 444, 104 S.Ct. at 2509; **State v. Vigne**, 2001-2940 (La. 6/21/02), 820 So.2d 533, 539. Application of the inevitable discovery doctrine thus "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment...." **Nix**, 467 U.S. at 444 n.5, 104 S.Ct. at 2509 n.5; **Vigne**, 820 So.2d at 539.

Integral to the proper application of the inevitable discovery doctrine is a finding that law enforcement *would* have inevitably secured the evidence by lawful means, not simply that they *could* have. Thus, a mere showing that the police had probable cause for a search and could have secured a warrant from a neutral magistrate does not satisfy the doctrine, because it would effectively obviate the Fourth Amendment preference for warrants and reduce the exclusionary rule to cases in which the police lack probable cause. **State v. Lee**, 2005-2098 (La. 1/16/08), 976 So.2d 109, 127, cert. denied, 555 U.S. 824, 129 S.Ct. 143, 172 L.Ed.2d 39 (2008) *citing* **United States v. Elder**, 466 F.3d 1090, 1091 (7th Cir. 2006) ("The usual understanding of that doctrine is that the exclusionary rule should not be applied when all the steps required to obtain a valid warrant have been taken before the premature search occurs.").

We find that the independent source and the inevitable discovery doctrines might be applicable in the instant case, as Investigator Fandal initially received the defendant's pharmacy and prescription history from the Sumerall's Pharmacy employee. As such, obtaining the defendant's prescription history without a search warrant would be an exception under these doctrines. However, an insufficient record was established at the motion to suppress hearing to determine whether the information Investigator Fandal initially received from the pharmacy employee

was the same as he later obtained from his own request to the Louisiana Prescription Monitoring Program. Therefore, we reverse the trial court's denial of the defendant's motion to suppress, and remand for a reopened evidentiary hearing to determine the applicability of the independent source and inevitable discovery doctrines. See **State v. Cabanas**, 552 So.2d 1040, 1047 (La. App. 1st Cir. 1989), writ denied, 556 So.2d 41 (La. 1990).

REVERSED AS TO DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS AND REMANDED FOR A REOPENED EVIDENTIARY HEARING ON THE MOTION.

STATE OF LOUISIANA

VERSUS

BOBBY L. BROCK

NUMBER 2015 KA 0610

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Welch, J., dissents.

I respectfully dissent. Clearly, the police investigators' request for a report from the Prescription Monitoring Program to corroborate the information received from the pharmacy employee failed to comply with the requirements of La. R.S. 40:1007(F)[1], **State v. Skinner**, 2008-2522 (La. 5/5/09), 10 So.3d 1212 and **State v. Pounds**, 2014-1063 (La. App. 1st Cir. 3/9/15), 166 So.3d 1037. Therefore, any information derived as a result of the PMP report was unconstitutionally obtained. Hence, the "fruit of the poisonous tree" doctrine applies and the pharmacy and medical records obtained, which resulted in the defendant being charged must be

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[1] La. R.S. 40:1007(F) provides as follows:

> The board may provide a report containing prescription monitoring information upon application of local, state, out-of-state, and federal law enforcement or prosecutorial officials engaged in the administration, investigation, or enforcement of the laws governing controlled substances or other drugs of concern in compliance with and as limited by the relevant requirements of any of the following:
> (1) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer.
> (2) A grand jury subpoena.
> (3) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided by law enforcement to the board, and further, provided all of the following:
> (a) The information sought is relevant and material to a legitimate law enforcement inquiry.
> (b) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought.
> (c) De-identified information, or limited information that does not identify or could not reasonably lead to the identification of an individual patient, could not reasonably be used.

The investigators herein obtained the Prescription Monitoring Program report contained in the record by submitting a request under La. R.S. 40:1007(F)(3), which allows administrative requests. However, the investigators' request did not comply with La. R.S. 40:1007(F)(3)(c), which prohibits the provision of an administrative request containing information that could lead to the identification of the patient. This is of grave concern because the administrative form promulgated by the Department of Public Safety and Corrections to administratively obtain the PMP information pursuant to an investigation calls for the identification of the individual in contravention of La. R.S. 40:1007(F)(3)(c).

suppressed. See **Brown v. Illinois**, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); **Wong Sun v. United States**, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963).

Pounds involved a similar fact situation in which investigators requested and received a PMP report to corroborate a tip from a prescriber. Utilizing the information contained in the PMP report, investigators then used Drug Enforcement Agency administrative inspection forms to verify defendant's patient profile from each pharmacy listed in the PMP report. **State v. Pounds**, 166 So.3d at 1039. After identifying the prescribing physicians from the pharmacy information, the investigators then obtained records from all, but one, of the prescribing physicians without obtaining a search warrant. *Id.* The defendant moved to suppress the evidence regarding his personal prescription and medical records obtained through administrative tools. The defendant argued that the administrative tools were used to circumvent the warrant requirements applicable to compiling evidence to support a criminal investigation. *Id.* The defendant's motion to suppress was denied by the trial court. This court, relying upon the holding in **Skinner**, reversed the trial court's denial finding that the warrantless disclosure of the defendant's pharmacy and medical records was a constitutional violation. This court also remanded the case to allow the defendant an opportunity to withdraw his guilty pleas.

Although a search warrant was ultimately ordered in this case, it was based on the pharmacy employee's tip and the information contained in the PMP report. The holdings of **Skinner** and **Pounds** are controlling in this case. Accordingly, I would reverse the trial court and grant the defendant's motion to suppress and remand this matter to the trial court to grant the defendant an opportunity to withdraw his guilty plea.

Thus, I respectfully dissent.