STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ERIC CONRAD HILL,

Defendant-Appellee.

FOR PUBLICATION
February 5, 2013

No. 301564
Oakland Circuit Court
LC No. 2010-009256-AR

Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

MARKEY, J. (*dissenting*).

On March 8, 2010, at about 12:30 A.M., Hazel Park police officer Mike Emmi broke, entered, and searched defendant's home purportedly to perform a "welfare check." Emmi acted after a ten-minute investigation into the compliant of a person of unknown credibility and who admittedly had little to no interaction with defendant, who lived several houses away. When the prosecutor asked if his "concern at that time that there was possibly someone in the house that was in need of assistance," Emmi replied, "[t]he only time—the only thing we go in for is a check on a—for a person." This indicates that Emmi entered the home not on the reasonable belief that someone inside needed his assistance but only to see if, in fact, someone were inside. This was a search without a warrant that was neither reasonable nor justified by any exception to the warrant requirement of the Fourth Amendment and Const 1963, art 1, § 11. Both the district court, which heard Emmi's testimony, and the circuit court that reviewed the district court's decision concluded that that the prosecutor failed to establish any exception to the warrant requirement and that the evidence seized during the unreasonable search and seizure must therefore be suppressed. I agree, and so, I respectfully dissent. I would affirm the trial courts' decisions.

"A court's factual findings at a suppression hearing are reviewed for clear error, but the application of the underlying law—the Fourth Amendment of the United States Constitution and article 1, § 11 of the Michigan Constitution—is reviewed de novo." *People v Slaughter*, 489 Mich 302, 310; 803 NW2d 171 (2011).

The Fourth Amendment of the United States Constitution guarantees to the people that their houses shall remain free from unreasonable intrusion by the government, providing:

> The right of the people *to be secure in their* persons, *houses*, papers, and effects, *against unreasonable searches and seizures*, shall not be violated, and no

> Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [Emphasis added.]

Likewise, Const 1963, art 1, § 11 guarantees the security of people's houses:

> The person, *houses*, papers and possessions of every person *shall be secure from unreasonable searches and seizures*. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer *outside the curtilage of any dwelling house* in this state. [Emphasis added.]

Thus, "[t]he Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). The plain language of both constitutional protections demonstrates that their core value, second only to protecting people, is protecting people's houses from unreasonable governmental intrusion. "The United States Supreme Court has repeatedly stated that the 'physical *entry* of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . .'" *City of Troy v Ohlinger*, 438 Mich 477, 485; 475 NW2d 54 (1991), quoting *United States v United States Dist Court for the Eastern Dist of Michigan*, 407 US 297, 313; 92 S Ct 2125; 32 L Ed 2d 752 (1972). "[T]he privacy of the home stands at the very core of the Fourth Amendment and . . . in no setting is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home." *Slaughter*, 489 Mich at 316 (brackets and quotation marks omitted), quoting *Payton v New York*, 445 US 573, 589-590; 100 S Ct 1371; 63 L Ed 2d 639 (1980).

On the other hand, the Fourth Amendment and Const 1963, art 1, § 11 do not forbid all government searches and seizures, only those that are unreasonable. *Slaughter*, 489 Mich at 311. The two main requirements rendering a police search or seizure constitutionally reasonable are the presence of probable cause and the possession of a warrant. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). "Searches conducted without a warrant are *per se* unreasonable under the Fourth Amendment, 'subject only to a few specifically established and well-delineated exceptions.'" *Id*. (citations omitted). Thus, to show that their conduct was lawful, the police in this case were required to show either that they had a warrant—they did not—"or that their conduct fell under one of the narrow, specific exceptions to the warrant requirement." *Id.*

State and federal courts have recognized several exceptions to the warrant requirement, including "searches of automobiles, searches incident to contemporaneous lawful arrests, inventory searches conducted according to established procedure, searches conducted during exigent circumstances, and searches the police undertake as part of their 'community caretaking' function." *Slaughter*, 489 Mich at 311-312. Providing emergency aid to injured persons is included within the community caretaking function of the police. *Id.*, at 314, n 28.

The emergency aid exception allows the police to enter a protected area without a warrant "under circumstances where they believe some person is in need of assistance or to prevent serious harm to someone." *Davis*, 442 Mich at 12. Under the emergency aid exception,

> [the] police may enter a dwelling without a warrant when they reasonably believe that a person within is in need of immediate aid. They must possess specific and articulable facts that lead them to this conclusion. In addition, the entry must be limited to the justification therefor, and the officer may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance. [*Id.* at 25-26.]

Cases in which the emergency aid exception have been held to apply include: (1) *Ohlinger*, 438 Mich at 480-483—the police investigating a citizen report of a possible accident in which a man drove away while holding his head as if injured, went to the driver's house where they saw through a window a man bleeding and apparently unconscious inside; (2) *People v Brzezinski*, 243 Mich App 431, 432, 434-435; 622 NW2d 528 (2000)—a citizen reported seeing a man who seemed to be disoriented and injured leaving the scene of a suspicious fire, and the police found a person who matched the description of the disoriented man, passed out in the back of a car parked nearby; (3) *People v Beuschlein*, 245 Mich App 744, 756; 630 NW2d 921 (2001)—the police responded to a 911 call of a domestic disturbance that possibly involved the use of weapons and heard scuffling inside while waiting for someone to come to the door; and (4) *People v Tierney*, 266 Mich App 687, 691, 704-705; 703 NW2d 204 (2005)—the police went to the home of a murder suspect and through a window in the door saw the man with a rifle and ammunition close at hand sitting slumped over with his head on the table as if he had shot himself, and he did not respond or react when the officers knocked on the door.

Under the circumstances of this case, the warrantless entry and search cannot be justified by the emergency aid exception. Officer Emmi responded after midnight to speak to the complainant,[1] who lived a few houses down the street from defendant. She had called the police at some unknown point in time because she had not seen defendant or his vehicle move for a few days. The complainant did not testify at the hearing in district court, but Emmi testified she knew defendant only because they lived in the same neighborhood. Thus, Emmi had information that one neighbor had not seen defendant for a few days. Emmi did not speak with neighbors to defendant's immediate left or right or across the street regarding their knowledge of defendant's whereabouts. Emmi found there were lights on in the home, but no one responded to knocking, a telephone call, or shouts. The house was secure except for one unlocked window, and curtains or drapes blocked Emmi's view of the inside of the house. A couple of days of mail was in the small box attached to the house, and a telephone book and some "junk mail" were on the porch. A car registered to defendant that had not been recently driven was in the driveway. There were no signs of forced entry or foul play or any other evidence to indicate that someone inside required assistance. Although the complainant had reported that defendant's cats would look out

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[1] Emmi admitted to having had prior contacts with the complainant, as did narcotics officer Paul Holka, who when asked about the complainant, testified that, "Yes, I have heard that name."

windows, Emmi testified the cats did not appear unfed or uncared for and "were just at the window." Emmi also testified that he could hear a humming noise from inside the house that he thought might be a humidifier or heater. Based on his ten-minute investigation, Emmi testified that from "what we got from the neighbor, not seeing him in a while, lights on inside, cats trying to get out, we tried to do a welfare check and see if the person was inside." Emmi entered the house through the unlocked window. While searching the home, he found marijuana plants growing in a bedroom closet. Emmi indicated he searched the closet because it was big enough to accommodate a person. Officer Emmi had no specific and articulable facts to support a conclusion that (1) someone was in the home and (2) in need of immediate assistance.

At the conclusion of the testimony, the district court requested that the parties brief the search and seizure issues presented. Subsequently, the district court ruled that the prosecution had failed to present sufficient credible evidence to support a reasonable belief that someone was inside defendant's home *and* in need of emergency assistance. The court concluded that "it doesn't appear as though there's enough information to determine whether or not there was a person within [the house]." The district court found wanting the credibility of the information the complainant provided, as well as the police investigation, stating:

> In this case, there was testimony from a neighbor.[2] And I'm not sure it was even established a proximity of that neighbor to the home in question. She said it was very unusual for his behavior. Well, what's the foundation for that statement? How long as [sic] he known the neighbor? Or how long as [sic] she known the neighbor? To what degree does she have any interaction with this person? The neighbor said that she hadn't seen the person in days; usually he comes and goes daily. It had been a few days up to a week. There was no close relationship between this witness and the neighbor. And when the police officer arrived, he sought to contact the neighbor to the right. There was no one home. Neighbor to the left, there was no one home. No inquiry as to the neighbor across the street.
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> So I don't think in this case we've established enough information. I mean, even if . . . we can argue that Officer Emmi corroborated it, I don't even think there's enough information to corroborate to determine whether or not someone was actually in that home. I mean, there's a plausible explanation. I left for Mackinaw [sic] Island, I asked my wife did you get someone to pick up our mail? No. So, we left on a Thursday, didn't get back on a [sic] Monday. We leave a light on, of course, to be sure that people think we're home. We lock our doors. I just don't think the set of circumstances in this case meet the threshold requirements to enter the home without a warrant pursuant to the community caretaking function. And, therefore, the Court will dismiss the case.

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[2] The complainant did not testify in the district court proceedings; her information was only provided through the hearsay testimony of Emmi.

On the prosecution's appeal, the circuit court summarized the facts and the district court's ruling that under *Davis*, 442 Mich at 25-26, the evidence did not support a reasonable belief that someone was inside defendant's home that needed immediate aid; rather, the evidence "simply supported that the homeowner may be out of town for a weekend trip." The circuit court concluded that the district court did not clearly err in its factual findings nor make an error of law in suppressing the evidence and dismissing the case.

I agree with the district court and the circuit court. The police possessed no credible, specific and articulable facts that anyone was inside defendant's home that might need immediate aid. Defendant's neighbor indicated that she had not seen defendant for a few days, but she did not provide any information on the requisite requirements that he was at home and that he might be injured or in need of immediate assistance. The police conducted a patently cursory investigation: they did not question defendant's immediate neighbors to find out if they knew whether anyone was in the house; they made no effort to locate any of defendant's friends, relatives or co-workers; and they did not see or hear anything from within or without the house giving rise to a concern that required immediate action to protect life or property. As noted from the excerpts of Emmi's testimony, he simply did not know whether anyone was in the house, much less that there was someone there that needed immediate aid.

Indeed the facts of this case or no different from what officers everywhere would find day in and day out while people were away from their homes for any variety of reasons, reasons that provide no support of an objective reasonable belief that someone is in immediate need of the assistance contemplated by the caretaking exception. Indeed, the facts as presented here, if accepted as an appropriate invocation of the caretaking exception, are frighteningly amenable to flagrant violations of the 4th Amendment. Under the pretense of concern for someone's well-being, officers could easily iterate mundane "facts" to support the warrantless entry of citizen's home. I conclude, therefore, that the district court did not clearly err in its findings of fact, nor err in its conclusions of law that the warrantless search here was unreasonable under the Fourth Amendment and Const 1963, art 1, § 11. Consequently, the district court properly applied the exclusionary rule,[3] and dismissed the case. The circuit court properly and correctly upheld its dismissal.

The prosecution also argues and the majority agrees that the entry and search in this case were justified under the community caretaking exception as applied in *Slaughter*, 489 Mich 302. Again, I disagree. In *Slaughter*, our Supreme Court held that the community caretaking exception applied when a fireman, "responding to an emergency call involving a threat to life or property, reasonably enters a private residence in order to abate what is reasonably believed to be an imminent threat of fire inside." *Id*. at 316-317. *Slaughter* is clearly distinguishable from the instant case because *Slaughter* involved a situation in which firemen were "responding to an

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[3] In general, "evidence obtained in violation of the Fourth Amendment is inadmissible as substantive evidence in criminal proceedings." *In re Forfeiture of $176,598*, 443 Mich 261, 265; 505 NW2d 201 (1993). The "exclusionary rule" "is a cornerstone of American jurisprudence that affords individuals the most basic protection against arbitrary police conduct." *Id*.

emergency call involving a threat to life or property" and needed to enter the house to address "an imminent threat of fire inside." Here, there simply was no emergency call and no emergency. Rather, a neighbor of unknown credibility provided information that she had not seen defendant or his car moved for a few days. But there was no evidence to suggest that anyone was in defendant's house or that anyone in the house was in danger; there simply is no evidence to support a reasonable belief that an imminent threat to life or property justified an exception to the warrant and probable cause requirement of the Fourth Amendment and Const 1963, art 1, § 11.

Because the warrantless entry and search of defendant's house was not authorized under the emergency aid or community caretaking exceptions to the warrant requirement, the district court did not err in granting defendant's motion to suppress, and the circuit court did not err in affirming that decision.

Finally, I must strongly and respectfully disagree that this case presents a situation where the application of the exclusionary rule may be excused because the police acted in good faith, and the application of the exclusionary rule would serve no deterrent purpose. I agree that the purpose of applying the exclusionary rule in this case is to "deter future Fourth Amendment violations." *Davis v United States*, 564 US __; 131 S Ct 2419, 2426; 180 L Ed 2d 285 (2011). Indeed, "'the exclusionary rule is 'a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of constitutional rights . . . .'" *People v Frazier*, 478 Mich 231, 235, 247-251; 733 NW2d 713 (2007) (brackets and citations omitted). But this case is unlike *Davis* where the police acted in objectively reasonable reliance on then binding judicial precedent.[4] *Davis*, 131 S Ct at 2428. Nor is the present case like *Frazier*. There the issue was the admissibility of the testimony of witnesses located as a result of the defendant's statement, which was later suppressed because a court determined that it was obtained as the result of ineffective assistance of counsel. *Frazier*, 478 Mich at 234-238. Thus, in *Frazier* there was "*no* police misconduct whatsoever," and the witnesses "identities were not obtained as a result of any police misconduct." *Id*. at 250-251.

The majority cannot cite a single appellate case that has upheld the warrantless midnight entry and search of a residence on the basis of the say-so of a neighbor, virtually a stranger to the home's occupant, who has simply not seen the occupant for a few days and wherein the police conduct a cursory ten-minute investigation disclosing no evidence—or even hint-- of imminent threat to life or property. In other words, no case law on similar facts exists which provides support of the proposition that the police could have been acting in good-faith reliance. Nor do I view the police conduct here as lacking culpability. A certified police officer in this state must be presumed to have a rudimentary understanding of the Fourth Amendment and its rules of

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[4] Specifically, the police acted in reliance on *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981), overruled in part *Arizona v Gant*, 556 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009), as interpreted by the Eleventh Circuit Court of Appeals in *United States v Gonzalez*, 71 F3d 819 (CA 11, 1996). "The search incident to Davis's arrest in this case followed the Eleventh Circuit's *Gonzalez* precedent to the letter." *Davis*, 131 S Ct at 2428.

thumb requiring probable cause and a warrant or consent before an entry may be made into a person's home. I conclude that the police conduct in this case was at a minimum sloppy to negligent. The police in this case violated the Fourth Amendment and Const 1963, art 1, § 11. Their conduct fully warrants applying the exclusionary rule to deter future police misconduct and to protect the constitutional rights guaranteed by the Fourth Amendment and Const 1963, art 1, § 11.

I would affirm.

/s/ Jane E. Markey