STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DEAN REDMAN,

Defendant-Appellant.

UNPUBLISHED
June 23, 1998

No. 196712
Clinton Circuit Court
LC No. 95-005935 FH

Before: Jansen, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of manufacturing less than five grams, or fewer than twenty plants, of marijuana. MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii). The trial court sentenced defendant to a jail term of 180 days. We affirm.

Defendant first contends that the trial court erred by denying defendant's motion to suppress evidence seized by police pursuant to a search warrant. We disagree. A volunteer firefighter called to a fire on defendant's premises spotted a number of plants that appeared to be marijuana on the second floor of defendant's garage. The firefighter reported this to his superior, who in turn informed members of the Bath Township Police Department. After the fire was extinguished, two police officers entered the garage without a warrant and verified what the firefighters had reported. The police then incorporated the volunteer firefighter's observations in an affidavit supporting a search warrant. They obtained a warrant, and pursuant to it seized five plants suspected of being marijuana from defendant's garage.

Individuals are constitutionally protected against unreasonable searches and seizures conducted by the government. US Const, Am IV; Const 1963, art 1, § 11; *People v Nelson*, 443 Mich 626, 631 n 8; 505 NW2d 266 (1993). In order for a search or seizure to be reasonable, it must either be conducted pursuant to a valid warrant supported by a showing of probable cause, issued by a neutral and detached magistrate, or it must fall within one of several narrowly drawn exceptions to the warrant requirement. *People v Houstina*, 216 Mich App 70, 74; 549 NW2d 11 (1996). Probable cause for a valid warrant requires the police to show that "certain identifiable objects are probably to be found at

the present time in a certain identifiable place." *People v Dowdy*, 211 Mich App 562, 568; 536 NW2d 794 (1995).

Although evidence seized in contravention of these principles may not be used against an accused, "an illegal entry by police officers upon private premises [does] not require suppression of evidence subsequently discovered at those premises pursuant to a search warrant that had been obtained on the basis of information wholly unconnected with the initial entry." *People v Smith*, 191 Mich App 644, 648; 478 NW2d 741 (1991), citing *Segura v United States*, 468 US 796, 805; 104 S Ct 3380; 82 L Ed 2d 599 (1984). Under this "independent source" doctrine, if police can show the information used to establish probable cause for a search warrant was obtained from a source wholly independent of an illegal search, that illegal search does not invalidate a warrant authorizing a subsequent search. *Id.* at 648-650.

Although there were no exigent circumstances to justify the warrantless search in the instant case, nothing in the record indicates that the affidavit supporting the warrant was tainted by information the police obtained during that warrantless search. At defendant's suppression hearing, the firefighter who discovered the marijuana stated that he did so while extinguishing a fire, and that he was not on the premises at the behest of the police. The police officer who executed the affidavit for the warrant had not himself entered defendant's garage but relied on the firefighter's statements, as well as those defendant made to police while the fire was being extinguished, to show probable cause. Accordingly, the information contained in the affidavit was obtained from a source independent of and unrelated to the warrantless police search.

Next, defendant contends that the trial court abused its discretion by allowing the seized plants to be admitted into evidence, maintaining that the police destroyed parts of the plants that would have proved defendant's innocence. We disagree. To show that a defendant was denied due process by the state's failure to preserve evidence properly, the defendant must show that the police acted in bad faith. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). Here, there was testimony explaining that the plants' dried and fragile condition resulted from exposure to the fire at defendant's premises, and from being sealed inside an evidence bag since being uprooted. Because defendant offered no evidence indicating that the police intentionally destroyed evidence, defendant has no basis other than bald presumption that police acted in bad faith in handling the evidence in question. Defendant further alleges that plants destroyed while in police custody, presumably in the course of testing, deprived defendant of exculpatory evidence. However, defendant was convicted on the basis of plants in evidence identified as marijuana; that defendant may have had other plants alongside the marijuana plants has no bearing on defendant's culpability for cultivating the marijuana plants. For these reasons, defendant arguments relating to police custodianship of the seized plants must fail.

Defendant next argues that the trial court abused its discretion in excluding evidence of the warrantless search, maintaining that that improper police conduct was relevant to the officers' credibility. We disagree. That a police officer has conducted an improper search has no bearing on that officer's truthfulness at trial. See *People v DeLisle*, 202 Mich App 658, 670-671; 509 NW2d 885 (1993) (trial court in a criminal case did not err in excluding for impeachment purposes evidence that a police officer had submitted a false affidavit in an unrelated civil lawsuit). Evidence of the illegal police search

would not have made the existence of the material fact — whether defendant was growing marijuana — more or less probable, and therefore was properly excluded as irrelevant. MRE 401.

Defendant next asserts that double jeopardy attached when the trial court declared a mistrial at an earlier attempt to prosecute defendant under the charges at issue here. We disagree. The right not to be placed more than once in jeopardy for a single criminal offense, US Const, Am V; Const 1963, art 1, § 15, generally attaches in a jury trial when the jury is sworn and impaneled. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). However, a criminal defendant's request for, or consent to, a mistrial that was not caused by any prosecutorial misconduct waives any challenge to retrial on double jeopardy grounds. *People v Tracey*, 221 Mich App 321, 325-326; 561 NW2d 133 (1997). At the commencement of his first trial, defendant made several motions in limine, arguing that the prosecutor, by refusing to provide defendant with a witness list and a copy of the fire report, engaged in a pattern of denying defense discovery requests. The record, however, reveals that a list of prosecution witnesses was included with the information under which defendant was charged, and that a copy of the fire report had not been produced because the police were unaware of the report. Further, the trial court noted that defense counsel had made no effort to alert the trial court to these alleged discovery violations before trial. Thus, there was no prosecutorial misconduct. Additionally, defendant consented to the declaration of a mistrial. For these reasons, defendant's retrial did not violate constitutional double jeopardy principles.

Finally, defendant alleges that an ex parte communication between the original trial judge, who disqualified himself, and a member of the jury in the courthouse parking lot before the jury began deliberations prejudiced defendant and warranted a mistrial. We disagree. A trial court must "take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court." MCR 6.414(A). An ex parte communication between the trial judge and a deliberating jury warrants reversal if it can be shown that the communication resulted in "any reasonable possibility of prejudice." *People v France*, 436 Mich 138, 142; 461 NW2d 621 (1990). In support of his motion for a hearing regarding juror deliberations, defendant filed a summary of an interview conducted with the juror in question. The juror described the incident as a chance encounter, and the summary strongly suggested that the conversation did not involve any discussion of defendant's case. Despite this, defendant alleges that without further investigation it cannot be shown whether this conversation resulted in a reasonable possibility of prejudice. However, given that there is no indication that the judge and juror discussed defendant's case, let alone that the judge disclosed any prejudicial information in that happenstantial meeting, there was no evidence tending to show a reasonable possibility of prejudice. Thus the trial court properly denied defendant's motion.

Affirmed.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Peter D. O'Connell