

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT LEE GRUBB,

Defendant-Appellant.

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UNPUBLISHED

April 21, 2000

No. 213121

Leelanau Circuit Court

LC No. 97-000934-FH

Before: Meter, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction of manufacture of marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii). The sole issue on appeal is whether the trial court erred by denying defendant's motion to suppress the marijuana plants seized from his premises. We conclude that the evidence should have been suppressed as the result of an unconstitutional search, and we therefore reverse.

**I. Facts and Procedural History**

As part of operation HEMP (Help Eliminate Marijuana Planting), a nationwide marijuana eradication project used throughout Michigan, police officers assigned to the Traverse Narcotics Team targeted defendant's premises for investigation. Defendant's premises were included on a list of locations that would be observed by helicopter, because police received a tip that defendant was growing marijuana. Helicopters were available from the Michigan State Police only two or three times a year, so the officers would compile a list of suspected marijuana locations to observe when a helicopter became available.

On August 14, 1997, Traverse Narcotics Team officers flew over defendant's premises in a helicopter, looking for marijuana plants. Lieutenant Steven Wendry acted as the spotter, having been trained to recognize marijuana plants from the air. The pilot was flying the helicopter at about 700 to 800 feet above defendant's premises when Lt. Wendry observed what he believed to be marijuana plants. The pilot dropped the helicopter to about 200 to 300 feet, in order for Lt. Wendry to confirm that what he saw was, indeed, marijuana. Lt. Wendry remained convinced that he saw marijuana plants

growing behind defendant's home, and he then notified officers on the ground to enter the premises and seize the plants.

Detectives Mark Stevens and David Tucker were assigned to the Traverse Narcotics Team and acted as ground support for operations on August 14, 1997. The detectives were in radio contact with the helicopter crew and were in the area near defendant's premises when Lt. Wendry informed them that he observed marijuana plants behind the home. The detectives pulled into defendant's driveway, entered his premises, and seized eight small marijuana plants growing in the back yard. While the officers were seizing the plants, the helicopter continued to circle overhead, making much noise. After the officers seized the plants, they encountered defendant's neighbor, who had come outside to investigate the noise being made by the helicopter. Defendant was not home, and he was arrested when he returned home later that day.

The marijuana plants were not observable from the front of defendant's home. There was some confusion regarding whether the detectives knocked on the front door before going around to the back yard. At the hearing on defendant's motion to suppress, Detective Stevens testified that either himself or Detective Tucker knocked on the front door before they went to the back yard. However, during trial, Detective Stevens testified that he did not knock at the front door, nor did he observe Detective Tucker knocking at the front door, although Detective Tucker did approach the front of the home. In any event, Detective Stevens stated that they went to the back yard in an attempt to find and talk to defendant. They did not find defendant, however, and proceeded to seize the marijuana plants.

Defendant moved to suppress the evidence, arguing that the warrantless entry onto his premises and seizure of the plants violated his constitutional right to be free from unreasonable searches and seizures. The prosecutor argued that the observation of marijuana plants from the helicopter provided the police with probable cause to believe that evidence of a crime would be found on defendant's premises, and that exigent circumstances justified entering the premises and seizing the evidence without a warrant. The prosecutor argued that the presence of the low-flying helicopter, hovering over defendant's premises making a lot of noise, created an immediate danger that attention would be drawn to the premises and defendant or someone else would destroy the evidence. Defendant insisted that the entry and seizure was improper because the only exigency—the noise from the helicopter—was created by the police. The trial court denied defendant's motion, holding that the commotion created by the helicopter justified the police in believing that an immediate danger existed that the evidence would be destroyed. The court also denied defendant's motion for reconsideration.

## II. Standard of Review

We review for clear error the trial court's factual findings on a motion to suppress evidence. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). Clear error exists where we are left with the definite and firm conviction that a mistake has been made. *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998). However, the trial court's application of constitutional standards to the facts is not afforded such deference. *People v Stevens*, 460 Mich 626, 631; 597 NW2d 53 (1999); *People v Howard*, 233 Mich App 52, 54; 595 NW2d 497 (1998). Therefore, we review de novo the trial court's ultimate decision on a motion to suppress evidence. *Echavarria*, *supra*

at 366; *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997); *People v Goforth*, 222 Mich App 306, 310; 564 NW2d 526 (1997).

### III. Analysis

Both the United States and Michigan Constitutions protect citizens against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *In re Forfeiture of \$176,598*, 443 Mich 261, 264-265; 505 NW2d 201 (1993).<sup>1</sup> Absent compelling reasons, the Michigan Constitution provides no greater protection than its federal counterpart. *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999); *People v Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991).<sup>2</sup> Specifically, in cases involving the seizure of drugs, the state constitutional guarantee is no greater than that of the federal constitution. *People v Toohey*, 438 Mich 265, 271; 475 NW2d 16 (1991); *People v Nash*, 418 Mich 196, 213; 341 NW2d 439 (1983) (Brickley, J.); *People v Moore*, 391 Mich 426, 435; 216 NW2d 770 (1974).<sup>3</sup>

Evidence obtained as a result of an unreasonable search is inadmissible in a criminal proceeding. *Mapp v Ohio*, 367 US 643, 655; 81 S Ct 1684; 6 L Ed 2d 1081 (1961); *People v Cartwright*, 454 Mich 550, 558; 563 NW2d 208 (1997). Generally, a search without a warrant is unreasonable; however, this rule is subject to specifically established exceptions. *People v Borchard-Ruhland*, 460 Mich 278, 293; 597 NW2d 1 (1999). Although the exceptions allow a warrantless search, the search must still be reasonable and based on probable cause. *In re Forfeiture*, *supra* at 266. One of these exceptions is the exigent-circumstances exception. *Cartwright*, *supra* at 558.

The exigent-circumstances exception to the warrant requirement allows the police to enter and search the premises, without a warrant, where probable cause exists to believe that a crime was recently committed on the premises and that evidence or perpetrators of the crime are contained on the premises. *In re Forfeiture*, *supra* at 271; *People v Davis*, 442 Mich 1, 24; 497 NW2d 910 (1993). However, “[t]he police must further establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect.” *In re Forfeiture*, *supra* at 271.

In this case, the trial court held that the police were justified in entering defendant’s premises to seize the marijuana plants without a warrant because immediate action was necessary to prevent the imminent destruction of evidence.<sup>4</sup> Clearly, the observation of marijuana plants from the helicopter provided the officers with probable cause to believe that evidence of a crime would be found on the premises—namely, the marijuana plants. However, in order to enter the premises to seize the plants without a warrant, the officers must have reasonably believed, based on specific and objective facts, that immediate action was needed to prevent the imminent destruction of evidence. See *Graham v Connor*, 490 US 386, 396-397; 109 S Ct 1865; 104 L Ed 2d 443 (1989) (officers’ actions must be objectively reasonable in light of all the facts confronting officers on the scene); *Cartwright*, *supra* at 559 (validity of search without a warrant depends on reasonableness, as perceived by police); *People v Little*, 78 Mich App 164, 173; 259 NW2d 409 (1977) (must look to officers’ state of mind at the time

of entry, taking totality of circumstances into account, to determine whether warrantless entry was reasonable).

We conclude that the trial court clearly erred by finding that an actual emergency justified the entry and seizure without a warrant. The record does not demonstrate specific and objective facts showing that immediate action was necessary to prevent the imminent destruction of evidence. The police officers had no reason to believe that defendant was home, and in fact, one of the officers approached the front of the home and ascertained that no one was home. The officers did not observe anyone on or near defendant's premises before they entered, and they did not encounter defendant's neighbor until after they had seized the plants. Generally, the police must believe that the premises are occupied in order to justify an entry based on exigent circumstances. *United States v Gaitan-Acevedo*, 148 F3d 577, 585 (CA 6, 1998).

The only asserted basis for believing that the plants would be destroyed was that the mere presence of the helicopter, flying low and creating noise, would alert someone to police detection of the criminal activity, leading someone to destroy the plants. However, this suspicion was not based on any specific or objective facts other than the presence of the helicopter, which the police had sent in the first place. To justify an entry and seizure based on exigent circumstances, the police must show more than a mere possibility that the evidence will be destroyed. *People v Blasius*, 435 Mich 573, 595; 459 NW2d 906 (1990). This was not a situation where the police were faced with an actual emergency necessitating immediate action;<sup>5</sup> rather, this case involved a planned entry without a warrant. The spotter in the helicopter contacted officers on the ground, nearby defendant's premises, and told them that he saw marijuana plants. He instructed them to enter the premises and seize the plants. He did not observe anyone near defendant's premises, nor did he communicate anything to the officers on the ground that would demonstrate that an exigency existed. Still, none of the officers contemplated obtaining a warrant.

Under these circumstances, the trial court clearly erred in finding that exigent circumstances existed to justify the entry and seizure without a warrant. Accordingly, defendant's motion to suppress should have been granted, and the evidence suppressed. Because the evidence in question was crucial, we must also reverse defendant's conviction.

Reversed.

/s/ Patrick M. Meter

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

<sup>1</sup> US Const, Am IV provides:

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.

Const 1963, art 1, § 11 provides:

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.

<sup>2</sup> The Fourth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Mapp v Ohio*, 367 US 643, 655; 81 S Ct 1684; 6 L Ed 2d 1081 (1961); *People v Faucett*, 442 Mich 153, 158; 499 NW2d 764 (1993).

<sup>3</sup> Because the trial court correctly concluded that the area where the marijuana plants were seized was within the curtilage of defendant's home, *United States v Dunn*, 480 US 294, 301; 107 S Ct 1134; 94 L Ed 2d 326 (1987); *United States v Jenkins*, 124 F3d 768, 772-773 (CA 6, 1997), the Michigan constitutional protection does apply. Had the plants been seized outside the curtilage of defendant's home, Const 1963, art 1, § 11 would not protect him from the admission of that evidence. In any event, as noted above, the Michigan Constitution does not afford greater protection than the United States Constitution in this case.

<sup>4</sup> We note that the visual observation of defendant's premises from a helicopter did not constitute a search under the Fourth Amendment. *Florida v Riley*, 488 US 445, 450-452; 109 S Ct 693; 102 L Ed 2d 835 (1989); *California v Ciraolo*, 476 US 207, 213-214; 106 S Ct 1809; 90 L Ed 2d 210 (1986); *People v Smola*, 174 Mich App 220, 223-224; 435 NW2d 8 (1988); *United States v Eight Firearms*, 881 F Supp 1074, 1078 (SD WV, 1995), aff'd 95 F3d 42 (CA 4, 1996). Defendant challenges not the observation by helicopter itself, but rather, the subsequent entry onto his premises to seize the marijuana plants.

<sup>5</sup> For example, in *Cartwright*, *supra*, a case also involving helicopter observation of marijuana plants, the spotter saw a man on the premises, gesturing obscenely at the helicopter, who was carrying an object that the spotter believed might be a long gun. Under these circumstances, police officers entered the premises and conducted a protective sweep of the house. The officers then obtained a warrant before seizing any evidence from the house. In that case, the officers had reason to believe that an armed man was aware of police detection of criminal activity.