STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY FISHER,

Defendant-Appellant.

UNPUBLISHED
December 20, 2005

No. 256027
Wayne Circuit Court
LC No. 04-000969

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

BORRELLO, J. (*dissenting*).

I respectfully dissent because a trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion, see *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987), and the majority has failed to divulge how the trial court abused its discretion by not holding an evidentiary hearing.

I agree with the majority that a court deciding a suppression motion must ordinarily convene its own evidentiary hearing to decide the matter. See *People v Talley*, 410 Mich 378; 301 NW2d 809 (1981). However, when the lawyers agree to have a suppression motion decided on the basis of the preliminary examination transcript and police reports, such process "accords with broader principles regarding the respective roles of defense counsel, the prosecuting attorney, and the court." *People v Kaufman*, 457 Mich 266, 276; 577 NW2d 466 (1998), citing MCR 6.110(D). The defense, having asked the trial court to quash the information or convene an evidentiary hearing, signaled its willingness both to accept a decision from the existing record, and to proceed with an evidentiary hearing. Plaintiff expressed its opposition to the motion, but never protested that a decision was premature for want of an evidentiary hearing. I would hold that plaintiff's waiver of objections constituted an implied stipulation to have the trial court decide the suppression question on the existing record. In this case, the testimonial record before the trial court came not from a preliminary examination, which defendant had waived, but from a police detective's testimony offered in the course of defendant's arraignment. MCR 6.110(D) permits a party to move the trial court to admit or exclude evidence on the basis of any "prior evidentiary hearing." I therefore find no abuse of discretion in the trial court not holding an evidentiary hearing.

I also dissent because the analysis used by the court in its suppression order is sound and need not be disturbed by this Court. It is still the law of this nation that evidence obtained in violation of a suspect's rights under the Fourth Amendment of the United States Constitution is

subject to suppression at trial. *People v Cartwright*, 454 Mich 550, 557-558; 563 NW2d 208 (1997). See also *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961). "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . ." *United States v United States Dist Court*, 407 US 297, 313; 92 S Ct 2125; 32 L Ed 2d 752 (1972). See also Const 1963, art 1, § 11.

Plaintiff argues that the trial court erred in deciding the suppression issue without convening an evidentiary hearing, and, alternatively, that the court erred in failing to appreciate that exigent circumstances justified the warrantless search. I strongly disagree with both contentions.

The emergency-aid exception to the warrant requirement allows the police to enter a building to assist someone in need of immediate aid. *People v Davis*, 442 Mich 1, 25; 497 NW2d 910 (1993); *City of Troy v Ohlinger*, 438 Mich 477, 483-484; 475 NW2d 54 (1991). However, the scope of the entry must be limited to the emergency that justified it. *Ohlinger*, *supra* at 484. The police "may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance." *Davis*, *supra* at 26. Plaintiff cites no authority for the proposition that whenever the police have a basis for supposing that a person has been injured, they are entitled to enter that person's home without a warrant ostensibly to provide aid. Further, there is no indication that the police inquired about defendant's condition, or observed any injury about him. Nor is there any suggestion that the police ever suspected that someone else in the house may have been injured. Moreover, the actions of the police in neither persisting with the search, nor calling for medical assistance, but instead leaving the premises to seek a warrant, were not consistent with actually fearing that they were confronting a serious injury that demanded immediate aid.

For these reasons, I would affirm the trial court's conclusion that the intrusion into defendant's home was unconstitutional, and that evidence obtained as a result was subject to suppression as the fruit of the poisonous tree. See *Mapp*, *supra*. Because the whole gun-pointing incident was entirely a function of the warrantless search, and thus illegally obtained evidence, I would affirm the dismissal of the charges against defendant.

/s/ Stephen L. Borrello