STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2008
v	No. 279203 Jackson Circuit Court
MARCUS TYRANA ADAMS, Defendant-Appellant.	LC No. 05-001345-FH

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Defendant pleaded guilty to possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant's plea was conditional, preserving his right to appeal the trial court's denial of his motion to suppress the evidence in the case. Defendant was ultimately sentenced to 7 months' imprisonment for the marijuana possession conviction, with credit for time served, and to two years' consecutive imprisonment on the felony-firearm conviction. Defendant filed a delayed application for leave to appeal to this Court, which was granted. For the reasons set forth in this opinion, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At the November 22, 2005, motion hearing, in lieu of presenting testimony, the prosecutor submitted its affidavit in support of the search warrant. The affidavit stated that while investigating a complaint of the odor of marijuana in an apartment complex, the affiant detected an odor he recognized as marijuana. The affiant also indicated that he heard people inside but that they did not answer the door, despite his repeated knocking over the course of several minutes and after he identified himself as a police officer. The affiant further noted that the voices from inside the apartment stopped and that he heard people moving inside. Finally, the affidavit stated that the affiant secured entry with a key supplied by the apartment personnel for the express purpose of securing the apartment until a warrant could be obtained.

According to the affidavit, the police requested a search warrant to search defendant's apartment, outbuildings and vehicles to seize any "controlled substances including but not limited to cocaine. . . ." The police obtained a search warrant and searched the premises. Pursuant to that search, they located a large sum of cash in defendant's apartment, approximately three pounds of marijuana, and a gun.

Testifying for defendant, Ashley Bernhardt stated that she was in defendant's apartment on July 8, 2005. She and defendant, along with another woman, were watching television and smoking cigars in the apartment. Bernhardt stated that after being there for about 15 minutes, they heard a knock on the door. Soon thereafter, she became aware that the knocking was the police. Bernhardt stated that because "we didn't know what they wanted we didn't let them in." Soon after the knocking ended, the police entered the apartment. By the time the police officer entered, Bernhardt had moved from the living room, where the occupants of the apartment had been watching television, to the bedroom and that all of their tones "were a lot lower."

Bernhardt stated that the police were "rude" to defendant and that they told defendant they were in the house because they smelled marijuana. Two police officers entered initially and were later joined by one more. The police officers were "going through things," including the closet, after they entered. The officer told her that they were searching for other people. The officers did not look in her purse. About one hour later, the police returned with a warrant.

Bernhardt denied that anyone had been smoking marijuana in the apartment. She claimed the police officers did not state that they found a gun or marijuana until after the search warrant arrived.

Defendant confirmed that he resided in the apartment at issue at the time of the search and he reiterated much of Bernhardt's testimony about watching television and smoking cigars. Defendant stated that the police put him in handcuffs as soon as they entered. Defendant recalled seeing the police look in the closet in the bedroom but that the officer was "not in there long" and "came right back out." Defendant acknowledged that the police officers did not remove anything from his apartment before the warrant arrived.

The police report indicated that, in addition to a gun and $27,000, the police found marijuana in the apartment. However, defendant stated that he was unaware of the existence of money, drugs, or a gun in his apartment.

After the defense's testimony, the prosecutor argued that the warrant and subsequent search could stand on its own through the independent source doctrine, even if the initial entry had been illegal. The prosecutor expanded, stating: "The officers entered the apartment and secured it, they did not take anything from the apartment at that time and wait[ed] until the search warrant was delivered. . . . And then the items were seized after the search warrant was received."

Defense counsel argued that the smell of marijuana was not sufficient to permit an entry into a person's home. He further emphasized that there was no evidence of drug sales or any history of complaints or suspicious activity and that, at most, the prosecutor had evidence of the misdemeanor of smoking marijuana.

The trial court denied the motion to suppress, finding that the "distinctive smell of marijuana" gave the police the right to investigate and that, as indicated in the affidavit, "it might indicate only the use of marijuana or it might indicate more than the use of it." The trial court also found that the police had exigent circumstances to enter the apartment when they heard the people move to the back of the apartment and become quiet. Finally, the trial court found there

was nothing to indicate that the police, after initially entering, performed any form of search that would have revealed marijuana or a firearm until the search warrant was presented.

Defendant asserts that an initial warrantless, nonconsensual entry by the police into his apartment was not supported by probable cause or justified by exigent circumstances and that the evidence discovered in this illegal search was used by the police to support the subsequent search warrant. As such, there was no independent basis or probable cause for the issuance of the search warrant, making it invalid. Accordingly, defendant argues the trial court erred by denying his motion to suppress the evidence that resulted from the initial entry into and subsequent search of his apartment.

We review a trial court's findings of fact on a motion to suppress evidence for clear error, but review de novo the ultimate decision. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003).

Defendant's specific claim is that the validity of the search and seizure conducted under the authority of the search warrant was tainted by the initial entry into his apartment, which he maintains was illegal. Such an argument ignores clear precedent to the contrary. In *People v Smith*, 191 Mich App 644, 648-649; 478 NW2d 741 (1991), this Court stated:

> In *Segura v United States*, 468 US 796, 805; 104 S Ct 3380; 82 L Ed 2d 599 (1984), the United States Supreme Court held that an illegal entry by police officers upon private premises did 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. In so holding, the Court described what has become known as the independent source doctrine:
>
> It has been well established for more than 60 years that evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is "so attenuated as to dissipate the taint," *Nardone v United States* [308 US 338, 341; 60 S Ct 266; 84 L Ed 307 (1939)]. It is not to be excluded, for example, if police had an "independent source" for discovery of the evidence:
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> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. *If knowledge of them is gained from an independent source they may be proved like any others*." *Silverthorne Lumber Co v United States* [251 US 385, 392; 40 S Ct 182; 64 L Ed 319; 24 ALR 1426 (1920)] (emphasis added.)

Thus, "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 [was] obtained on the basis of information wholly unconnected with the initial entry." *Smith* at 648. Hence, under the "independent source" doctrine, "if nothing seen by the officers upon their

initial entry either prompted the officers to seek a warrant or was presented to the magistrate and affected the decision to issue the warrant, the evidence need not be suppressed." *Id* at 650.

The affidavit for the search warrant in this case established that the police were dispatched to investigate the odor of marijuana at an apartment complex. Upon arriving at the complex, the officers detected the unmistakable odor of marijuana emanating from defendant's apartment. Despite prolonged knocking by the police, the occupants of the apartment failed to open the door. When the voices inside the apartment stopped, the officer determined that people were moving around inside. Based on these factors, the officers entered the apartment and secured defendant and two women inside to prevent the possible destruction of evidence.[1] An officer then left to obtain a search warrant for the apartment. All of the information contained in the affidavit underlying the search warrant, was known to the officer before the police entered the apartment. The officer made no reference to seeing drugs or any other illegal items while in the apartment. Furthermore, there is no evidence that the apartment had been searched or that any evidence was discovered until after the search warrant arrived.

On these facts, it is clear that nothing seen by the police during their initial entry prompted the warrant. Rather, the magistrate issued the warrant based on information regarding the police officers' observations before entering the apartment. Because the information contained in the affidavit was obtained from a source independent of and unrelated to the warrantless police entry, the trial court properly denied defendant's motion to suppress.

Defendant further alleges that the observations made prior to the police officers' entry did not constitute probable cause to issue the warrant. However, the United States Supreme Court decisions in *Taylor v United States*, 286 US 1; 52 S Ct 466; 76 L Ed 951 (1932), and *Johnson v United States*, 333 US 10, 13; 68 S Ct 367; 92 L Ed 436 (1948), suggest that when a qualified person smells an odor sufficiently distinctive to identify contraband, the odor alone may provide probable cause to believe that contraband is present. See also *People v Kazmierczak*, 461 Mich 411; 605 NW2d 667 (2000). However, we note that officers did not obtain a warrant based solely on the smell of marijuana, rather, they also recited the irregular behavior by the occupants prior to the entry. Thus when viewing the totality of the circumstances presented to the issuing magistrate, we hold that the information contained in the documents could have caused a reasonably cautious person to conclude there was a substantial basis for determining that probable cause existed to believe that the evidence sought might be found in a specific location. *People v Russo*, 439 Mich 584, 603-604, 487 NW2d 698 (1992). Because the search warrant was based on probable cause, the resulting seizure of the evidence used to prosecute this case did not violate defendant's Fourth Amendment rights.[2]

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[1] We note that in *Smith*, *supra*, we held that the officers did not possess exigent circumstances justifying their initial entry. Thus, the issue of whether the officers possessed exigent circumstances such as to justify their initial entry need not be addressed in this case as we hold that even if the initial entry was illegal, the independent source rule applies.

[2] Even if the search warrant affidavit were defective, suppression of the evidence and dismissal of the prosecution would not have been appropriate. When the police act in reasonable and good

(continued…)

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis

(…continued)

faith reliance on a search warrant, the items seized need not be suppressed if the warrant is later declared invalid. *People v Goldston*, 470 Mich 523, 526; 682 NW2d 479 (2004).