STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 7, 2014
v	No. 315483 Oakland Circuit Court
DATRIUS LAMON MCKINNEY, Defendant-Appellee.	LC No. 2012-240403-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v	No. 315484 Oakland Circuit Court
AUBREY LEA TILLIS, Defendant-Appellee.	LC No. 2012-241225-FH

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

In these consolidated appeals, the prosecutor appeals the trial court's order dismissing the charges against defendants Datrius Lamon McKinney and Aubrey Lea Tillis. Because we conclude there were no errors warranting relief, we affirm.

I. BASIC FACTS

In January 2012, Deputies Bryan Wood, Scott McDonald, Daniel Main, and Jason Teelander were searching for a shooting suspect in the area around 29 North Anderson in Pontiac, Michigan. Wood and McDonald walked onto the property located at 25 North Anderson, which neighbors 29 North Anderson. McKinney parked across the street and, in no uncertain terms, ordered Wood and McDonald to leave his property. Tillis emerged from the home and told the officers, "don't worry about my nephew, he doesn't mean any harm." McKinney entered the home and the officers continued their search elsewhere.

Wood and McDonald continued to watch 29 North Anderson from approximately one block away, while Main and Teelander stood watch at a nearby grocery store. Wood saw Tillis leave and return to 25 North Anderson three or four times in the span of half an hour, each time driving a silver Mercury Mountaineer. Upon his return, Tillis entered the home without knocking. Main and Teelander observed a white Kia parked in the grocery store parking lot, and the driver of the Kia, Harry Smith, stayed in the vehicle. A silver Mountaineer pulled into the parking lot and parked next to the Kia. Smith got out of his car and got into the passenger side of the Mountaineer. Main and Teelander suspected that Smith was involved in a drug transaction and approached the Mountaineer.

Main and Teelander spoke with Tillis, who was driving the Mountaineer, and Smith. They searched Smith and found heroin. They found another bag of heroin on the floor of the passenger side of the Mountaineer. They searched Tillis as well, but found only cash and personal items. Wood and McDonald arrived at the parking lot and told Main and Teelander what they had seen at 25 North Anderson.

At this point, the officers' version of events differed substantially from Tillis' version. According to Teelander, he asked Tillis "if he would mind if we went to his—his home at 25 North Anderson and looked around." Tillis, he stated, "said we could." Teelander asked Tillis "if he had a key, and he said that the key was on his keychain—on his—the keychain to the truck." Teelander obtained the key, but could not remember exactly where he got it from. Teelander thought "it was in his—in the truck, still in the ignition." Teelander believed that Tillis had the authority to consent to a search of 25 North Anderson because Tillis stated that he lived there, and because Wood and McDonald had seen Tillis coming and going from the residence over the past half-hour.

Tillis testified that the officers approached him at the store and just arrested him without discussing the residence on North Anderson:

> Okay. When they—when I was in the vehicle at the store, he pulled up in front of me, the passenger also got out first, he just walked up there to the driver's side, opened the door, grabbed my arm and pulled me out. He never said a word. Put me in handcuffs. Started searching me. Took everything out of my pocket. Took my wallet out of my pocket, took my social security money that I had in my wallet for my life insurance payment, took that out, it was $272.00. He escorted me to the back of the truck—then his partner got out and went back to the truck and pulled out Mr. Smith. Meanwhile—and what I left out was in the process of him taking me out of the vehicle, I had the keys in my hand. He said to me I'll take them. I—I dropped them in the cup handler—holder. He reached over and picked them up and had the keys—he took the keys from me. Never once did I give him the keys. So that is how he got—got the keys.

Tillis stated that he never told officers that he resided at 25 North Anderson or had an ownership interest in it with McKinney. Tillis also claimed the officers never asked him for permission to search 25 North Anderson, and he did not give any officer permission to search the home. According to Tillis, the only conversation he had with the officers regarding a search of 25 North Anderson was when "one of the deputies told me that they were going back to see if the Jamison boys was hiding in the basement there."[1]

Tillis explained that he refers to McKinney as his nephew from time to time, but there is no biological relationship between them. According to Tillis, McKinney employed him as a handyman. Tillis had been visiting the home each week from the time McKinney purchased it in 2007 or 2008. Tillis would spend "anywhere between four to maybe seven hours in there, either putting tile down, patching holes; I just did all kind of odd jobs[.]" Tillis did not sleep at the home; he rented his own home at 341 South Marshall. In total, Tillis estimated that he would spend the equivalent of one week per month working at the home. On the day in question, Tillis used McKinney's Mountaineer five or six times to get paint, primer, and other supplies. When he returned to the home, Tillis would enter the home using the "key on the truck key ring." Tillis had previously driven the Mountaineer four or five times.

After Smith and Tillis were arrested, Wood and Main conducted a warrantless search of 25 North Anderson. Wood discovered a coffee grinder containing cocaine residue, Mannitol, a cutting agent, plastic baggies, lottery tickets cut to form envelopes, "tally sheets," razor blades, syringes, and three half-gram packages of heroin, along with paperwork addressed to McKinney. Main found a six-ton press containing residue that tested positive for cocaine and a loaded shotgun. No people were at the house. At this point, Main decided to seek a search warrant. He obtained the warrant and returned to the home. Main continued the search, and discovered filtration masks, latex gloves, plastic baggies, shotgun ammunition, a second loaded shotgun, and other personal effects belonging to McKinney.

McKinney and Tillis were each charged with possession with the intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm in the commission of a felony (felony-firearm), second offense, MCL 750.227b. McKinney and Tillis filed separate motions to suppress the evidence obtained from the warrantless search. The trial court held an evidentiary hearing and later issued separate written opinions and orders suppressing the evidence and dismissing the charges in each case. In relevant part, the trial court concluded that Tillis had standing to challenge the search, found that Tillis did not consent to the search, and determined that the inevitable discovery exception to the exclusionary rule did not apply.

The prosecutor now appeals.

[1] Tillis said the Jamison boys "were the two young men who went into the skating rink a while back and shot up the skating rink and they gone on the run and stuff, and they lived right next door to Mr. McKinney's home."

II. STANDING

The prosecutor first argues that the trial court erred when it determined that Tillis had standing to challenge the search of 25 North Anderson. This Court reviews de novo whether a party has standing. *People v Gadomski*, 274 Mich App 174, 178; 731 NW2d 466 (2007).

As this Court has explained, the right to be free from unreasonable searches and seizures is personal and may not be invoked by third parties. *People v Brown*, 279 Mich App 116, 130; 755 NW2d 664 (2008). "For an individual to assert standing to challenge a search, the individual must have had a legitimate expectation of privacy in the place or location searched, which expectation society recognizes as reasonable." *Id.* Whether Tillis had standing must be determined under the totality of the circumstances. *Id.* The court should examine such factors as, "ownership, possession and/or control of the area searched," the "historical use of the property", the person's "ability to regulate access", "the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of the expectation of privacy considering the specific facts of the case." *Id.* (quotation marks and citation omitted). Overnight guests at a residence have a reasonable expectation of privacy, but mere visitors do not. See *Minnesota v Carter*, 525 US 83, 89-90; 119 S Ct 469; 142 L Ed 2d 373 (1998); *People v Parker*, 230 Mich App 337, 340-341; 584 NW2d 336 (1998). In addition, a person may have a reasonable expectation of privacy in a workplace. *Carter*, 525 US at 90-91. However, whether a person has a reasonable expectation of privacy in a workplace also depends on the totality of the circumstances. See *People v Powell*, 235 Mich App 557, 563-565; 599 NW2d 499 (1999).

We agree that Tillis has standing to challenge the search of McKinney's home. Tillis admitted that he had no ownership interest in the residence. He also stated that he had never stayed in the home overnight, and as such, Tillis cannot claim a reasonable expectation of privacy as an overnight guest. See *Carter*, 525 US at 89-90; *Parker*, 230 Mich App at 340-341. However, these facts do not automatically lead to a conclusion that Tillis lacked standing. See *Brown*, 279 Mich App at 130. Here, although he did not own or otherwise have a possessory interest in 25 North Anderson, Tillis was more than a mere visitor. Tillis and McKinney had a close relationship, as evidenced by Tillis's use of the word "nephew" to describe McKinney, despite not being blood relatives. Tillis also exhibited substantial control over the home. Tillis had McKinney's key to the home, giving Tillis the ability to regulate access to it. Indeed, when officers first came into contact with Tillis, Tillis was inside the home, and McKinney was not. According to Tillis, the home was his workplace. Tillis testified that he had been working as a handyman in the home for an amount of time equal to one full week per month for a number of years. Tillis stated that he would, on average, spend four to seven hours a day at the home when he was there. Officers testified that they believed that Tillis was a resident and had the authority to consent to a search of the home. Considering the totality of the circumstances, Tillis has standing to challenge the warrantless search of 25 North Anderson.

The prosecutor asserts that the trial court erred by considering the fact that the evidence seized from the home would be used to charge Tillis, because this fact does not confer automatic standing. Our Supreme Court has rejected the concept of automatic standing. See *People v Smith*, 420 Mich 1, 14-18; 360 NW2d 841 (1984). But the trial court did not decide that Tillis was entitled to automatic standing; rather, the trial court clearly made its decision on the totality of the circumstances, as it was required to do.

The prosecutor also argues that Tillis was no more than a mere visitor to 25 North Anderson. However, as discussed, Tillis's testimony demonstrates that he was much more than a mere visitor, as Tillis worked in the home, had unfettered access to the home, and spent a substantial amount of time in the home on a daily, weekly, and yearly basis. The totality of the circumstances demonstrates that Tillis has standing to challenge the search.

III. CONSENT

Next, the prosecutor argues that the trial court clearly erred when it determined that Tillis did not consent to the search. This Court reviews a trial court's findings at a suppression hearing for clear error. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Lanzo Const Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

The prosecutor's argument relies entirely on the notion that Wood and Teelander were more credible than Tillis. This Court, however, will not lightly disregard the trial court's credibility determinations; indeed, we must defer to the trial court's superior ability to judge credibility. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). At the suppression hearing, Tillis directly contradicted the officers' version of events: he stated that he was not asked about and did not provide consent to the search of 25 North Anderson. The trial court resolved that dispute in Tillis' favor and we will not second-guess that resolution on appeal.

The prosecutor also argues that the trial court had to provide reasons why it found Tillis credible, which was "especially problematic because [Teelander]'s testimony was completely inconsistent with Tillis'[s] testimony, and the trial court never found that Teelander was not credible." The prosecutor provides no authority in support of that proposition. Further, as the prosecutor recognizes, "Tillis' testimony and Teelander's testimony cannot be reconciled. Either Tillis was lying or Teelander was lying." By finding that Tillis was credible, the trial court necessarily determined that Teelander's version was not credible. That the trial court did not affirmatively state this obvious conclusion does not render the trial court's credibility determination clearly erroneous.

The prosecutor relies upon *People v Heikkinen*, 250 Mich App 322; 646 NW2d 190 (2002), for the proposition that the trial court should have viewed Tillis's testimony with caution "because he was charge[d] as an accomplice." However, the issue presented in *Heikkinen* was "the propriety of giving a cautionary accomplice instruction over a defendant's objection when an accomplice testifies favorably on behalf of the defendant, rather than for the prosecution . . . ." *Id*. at 328. The Court in *Heikkinen* did not discuss suppression hearings or the trial court's ability to make credibility determinations at a suppression hearing. *Id*. at 327-337. Therefore, that decision provides no support for the prosecutor's argument.

The prosecutor also discusses the fact that the trial court refused to allow the prosecutor to cross-examine Tillis regarding his alleged heroin addiction. The prosecutor states that "[t]he trial court failed to recognize that questions regarding [Tillis'] alleged heroin addiction were being offered at an evidentiary hearing, not at trial. MRE 104 provides that preliminary

questions concerning the admissibility of evidence shall be determined by the court and the court is not bound by the Rules of Evidence except those with respect to privileges." The prosecutor did not preserve this issue by raising it in the trial court; rather, the prosecutor only argued that the question was relevant to the issue of Tillis' credibility. See *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Even in the context of a suppression hearing, this Court has stated that "[a] trial court is given wide discretion in determining the scope of cross-examination. The exercise of that discretion is not subject to review unless a clear abuse is shown." *People v Lucas*, 188 Mich App 554, 572; 470 NW2d 460 (1991). Here, the trial court determined that the prosecutor's question regarding Tillis's alleged heroin use was irrelevant, absent "a whole bunch more proof[.]" Regardless of whether the rules of evidence applied at the evidentiary hearing, the trial court acted within its discretion when it limited the scope of cross-examination. See *Lucas*, 188 Mich App at 567. Accordingly, the prosecutor's argument lacks merit.

IV. INDEPENDENT SOURCE DOCTRINE

Finally, the prosecutor argues that the trial court erred when it determined that the exclusionary rule required suppression of the evidence in light of the independent source doctrine. The application of the exclusionary rule is a question of law, reviewed de novo on appeal. *People v Custer*, 465 Mich 319, 326; 630 NW2d 870 (2001).

Here, in responding to the motions, the prosecutor raised four arguments: Tillis lacked standing, the search was a valid consent search, the search was valid under the exigent circumstances exception, and, in any case, the inevitable discovery exception applied. The prosecutor did not, however, argue that the independent source exception allowed admission of the evidence. Thus, the issue is unpreserved. *People v Heft*, 299 Mich App 69, 78; 829 NW2d 266 (2012).

"This Court disfavors consideration of unpreserved claims of error." *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999). Our Supreme Court has found that a prosecutor forfeited an issue by failing to raise that issue in earlier proceedings. See *People v Frazier*, 478 Mich 231, 240-241; 733 NW2d 713 (2007). However, this Court may consider a constitutional issue for the first time on appeal if the alleged error could be decisive of the outcome. See *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Indeed, this Court has previously reversed and remanded a suppression order after determining that an exception to the exclusionary rule might apply, even though that exception was not raised in or decided by the trial court. See *People v Brzezinski*, 243 Mich App 431, 437; 622 NW2d 528 (2001). As the issue is constitutional and potentially outcome-determinative, we will review it. *Grant*, 445 Mich at 547.

The premise of the prosecutor's argument is that the trial court erred by applying the incorrect legal framework. The prosecutor argues that it is the independent source rule, not the inevitable discovery rule, which applies to the case at hand. Error warranting reversal "cannot be error to which the aggrieved party contributed by plan or negligence," because such conduct results in waiver of the issue. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003) (quotation marks and citation omitted). It was the prosecutor who asked the trial court to consider the inevitable discovery exception. Thus, any error in applying the incorrect legal

framework was caused by the prosecutor and the prosecutor cannot now argue that the trial court erred in this regard. See *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010).

Further, on the merits, the prosecutor is not entitled to relief. When applying the independent source doctrine to a case such as this, the question becomes:

> . . . whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant. [*Murray v US*, 487 US 533, 542; 108 S Ct 2529; 101 L Ed 2d 472 (1988).]

The Sixth Circuit Court of Appeals further explained the independent source doctrine in *US v Jenkins*, 396 F3d 751, 758 (CA 6, 2005):

> All courts of appeals to have considered the matter, however, have interpreted *Murray* to mean that, in these situations, for evidence to be inadmissible due to the government's failure to collect it via an independent source, the tainted information presented to the judge must affect the judge's decision in a *substantive*, meaningful way. See, e.g., *United States v Herrold*, 962 F2d 1131, 1141 (3d Cir 1992). Under this interpretation of *Murray*, the simple fact that an application for a warrant contains information obtained from an illegal search does not by itself signify that the independent source doctrine does not apply. *Id.* If the application for a warrant "contains probable cause apart from the improper information, then the warrant is lawful and the independent source doctrine applies, providing that the officers were not prompted to obtain the warrant by what they observed during the initial entry." *Id.* at 1141-42. Other circuits have joined the Third Circuit and interpreted *Murray* in the same way, and no circuit has taken a contrary approach.

Thus, to avoid strict application of the exclusionary rule through the independent source doctrine, this Court must decide that (1) the untainted information in the warrant affidavit supports a finding of probable cause, and (2) the decision to seek the warrant was not prompted by what was seen during the warrantless search. *Id.*; see also *Murray*, 487 US at 542; *People v Smith*, 191 Mich App 644, 650; 478 NW2d 741 (1991) ("Thus, 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.").

On appeal, both Tillis and the prosecutor agree that the trial court determined that, after removing any tainted information, the warrant affidavit demonstrates probable cause. However, the trial court did not in fact make this finding. The trial court stated: "[t]he deputies' observations of the car coming and going from the home, along with [Tillis'] meeting in the party store parking lot and the large amount of cash on his person, *arguably* were enough to establish probable cause for a search warrant." (Emphasis supplied.) In other words, the trial court only recognized that there was an argument to be made regarding probable cause; it did not

resolve that argument. Thus, a determination of whether the warrant affidavit is sufficient is still required. As this decision is best left to the trial court, see *Murray*, 487 US at 543-544, and following past practice of this Court, see *Brzezinski*, 243 Mich App at 437, a remand would ordinarily be necessary to allow the trial court to make this determination.

The trial court made no determination regarding the second element, that being whether the decision to seek the warrant was prompted by what was seen during the illegal search. Thus, a remand would generally be required to allow the trial court to make this determination as well. See *Murray*, 487 US at 543-544; *Brzezinski*, 243 Mich App at 437. However, a remand is not necessary in this case. During Tillis's preliminary examination, Main explained what prompted him to seek the warrant:

> *Q.* Okay; you indicated that you decided to get a search warrant in this case; after you entered the home?
>
> *A.* Yes.
>
> *Q.* Why?
>
> *A.* I didn't want anybody making a false claim later; that they'd taken away consent to search; which would make it stop. I had plenty of—*once I went in there and saw what was in there; I had more than enough*—
>
> *Q.* But you—
>
> *A.* —*evidence to get a warrant.* So, it was—it was more sound and safer than [sic] to get the warrant; *based on what I saw*. [emphasis added.][2]

As Main testified, it was after the warrantless search had taken place that he believed he had enough evidence to demonstrate probable cause, and his decision to obtain a warrant was "based on what [he] saw" during the warrantless search. Because Main's decision to seek the warrant was prompted by what he saw during the warrantless search, the independent source doctrine does not apply here. *Murray*, 487 US at 542; *Smith*, 191 Mich App at 650.

There were no errors warranting relief.

Affirmed.

/s/ Pat M. Donofrio
/s/ Michael J. Kelly

[2] This testimony was provided at Tillis's preliminary examination, not at the suppression hearing. However, "a ruling on a motion to exclude evidence may be premised on the record of a prior evidentiary hearing." *People v Kaufman*, 457 Mich 266, 275; 577 NW2d 466 (1998).