STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED September 27, 2011
v	No. 298921 Oakland Circuit Court
MICHAEL SHAWN MCEWEN, Defendant-Appellee.	LC No. 2010-231522-FH

Before: SERVITTO, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's dismissal of a charge of manufacture of marijuana, MCL 333.7401(2)(d)(*iii*). The dismissal followed the trial court's order granting defendant's motion to suppress evidence. Because the trial court erred in suppressing the evidence and in dismissing the charges against defendant, we reverse and remand.

In the early morning hours of January 23, 2010, Birmingham Police Department Officer Phillip Webb responded to a dispatch to a home regarding a medical emergency. Upon arriving at the scene, Webb saw that the fire department had already arrived. He then approached the house, knocked, and let himself in. Immediately inside the door, Webb saw defendant lying on his back and being tended to by fire department personnel. Webb stayed with defendant for approximately five to ten minutes until an ambulance arrived. Defendant was then transported to the hospital.

Webb testified that after defendant had been transported and fire and ambulance personnel had left the scene, he went about securing the home, which he stated was regular police practice. Webb testified that when he initially entered the home, he noticed small children's shoes inside the doorway, and that there were lights on upstairs and in the basement, though he did not hear anyone else inside the house and did not recall whether he asked anyone if there were any children in the home. Webb testified that he walked throughout the house, checking to make sure all lights were off, all doors and windows were locked, and that there were no small children still inside the house. Webb testified that he noticed lights on in the basement, a television playing, and a stroller at the bottom of the stairs surrounded by children's toys. Webb testified that when he went down to the basement to make sure the area was clear, he immediately noticed four marijuana plants under a fluorescent light next to the television.

Webb then secured the area and called his supervisor. Shortly thereafter, the marijuana plants were photographed by police personnel and seized.

Following the preliminary examination, defense counsel filed a motion to suppress the marijuana plants as evidence. Defendant argued that no exception to the requirement for a search warrant applied in this case, while the prosecution argued that the emergency aid, community caregiver, and plain view exceptions all applied to various aspects of Webb's actions. At the close of the second day of the hearing, the trial court held as follows:

> An option to eschew a warrant request and to search pursuant to a warrant exception does not preclude an invocation of a warrant request in this court's legal opinion. I adopt the reasons stated by the defense other than the after the fact discovery and I grant the motion to dismiss and that will be the order of the court.

An order of dismissal was thereafter filed. The prosecution argues that the court erred and requests that we reverse the trial court's orders suppressing the evidence seized and dismissing the case.

This Court reviews de novo a trial court's ruling on a motion to suppress. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). The trial court's factual findings are reviewed for clear error. *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009), and the underlying constitutional issues (including whether a Fourth Amendment violation occurred) are reviewed de novo. *People v Gillam*, 479 Mich 253, 260; 734 NW2d 585 (2007).

The right against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11; *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). The lawfulness of a search or seizure depends upon its reasonableness and, in a criminal case, a search or seizure conducted without a warrant is generally considered to be unreasonable unless both probable cause and circumstances establishing an exception to the warrant requirement exist. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993); *People v Orlando*, 305 Mich 686, 690; 9 NW2d 893 (1943). Evidence illegally seized during a warrantless search is subject to exclusion. *Terry v Ohio*, 392 US 1, 12-13; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Goldston*, 470 Mich 523, 528, 529; 682 NW2d 479 (2004).

Under the emergency aid exception to the warrant requirement, officers may enter a dwelling without a warrant under circumstances that establish a reasonable basis, based on specific, articulable facts, to conclude that some person within is in need of immediate aid. *Davis*, 442 Mich at 25-26. However, the entry must be limited to the justification for it, and the officer may not do more than is reasonably necessary to determine whether someone is in need of assistance, and to provide that assistance. *Id*. at 26.

Here, Webb clearly had a reasonable basis based upon specific, articulable facts to believe that someone inside the home was in need of immediate assistance. He was specifically dispatched to the home on a call for a need of medical assistance. Furthermore, when he entered the front door and consulted with fire department personnel, he was acting well within the

limitations of the exception. The fact that fire department personnel were on the scene did not relieve Webb of his responsibility to check on the emergency and, at the very least, determine whether assistance was in fact being provided and whether additional assistance was required. As such, Webb justifiably entered the home under the emergency aid exception.

However, Webb conducted his walk through of the house after defendant had already been removed and taken to the hospital. The walk through, then, was not necessary to determine whether defendant was in need of assistance or to provide him with assistance and was thus not justified under the emergency aid exception. We conclude that Webb's conduct is, however, justified under the "community caretaking" exception to the warrant requirement.

In *Davis*, our Supreme Court held that under the community caretaking exception, police personnel may enter into protected areas while performing caretaking functions, though those functions must be unrelated to criminal investigation duties. *Id*. at 11-12, 22.

> [C]ourts must consider the reasons that officers are undertaking their community caretaking functions, as well as "the level[ ] of intrusion the police make while performing these functions," when determining whether a particular intrusion to perform a community caretaking function is reasonable. For instance, "a police inventory of a car is much less intrusive than a police entry into a dwelling." This is because the privacy of the home stands "'[a]t the very core'"of the Fourth Amendment and because "[i]n [no setting] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home . . . ." Thus, the threshold of reasonableness is at its apex when police enter a dwelling pursuant to their community caretaking functions. [*People v Slaughter*, 498 Mich 302, 316; ___ NW2d ___ (2011) (citations omitted; alterations in original).]

In this case, Webb found himself alone in a home after the person appearing to be the owner of that home had been taken to the hospital under emergency circumstances. Lights and appliances were on in different levels of the home, there was evidence that small children lived in the home, and given the circumstances surrounding defendant's exit from the home, there was ample reason to believe that he had not been able to secure the premises before being taken to the hospital. Given these facts, Webb made a walkthrough of the home for the purposes of turning off lights and appliances, locking doors and windows, and verifying that no children were left unattended. Such actions are entirely reasonable expressions of a police officer's duties as a community caretaker. Webb was not walking through the home in order to investigate or solve crimes. In fact, given that the dispatch was for a medical emergency, there is nothing in the record to suggest that he had reason to suspect that any criminal activity had taken place or was taking place at the time of his walkthrough.

Defendant alleges that because he informed fire department and ambulance personnel that there were no children in the home, Webb's decision to search the home for unattended children was unreasonable. It is true that, under *Davis*, "when the police are investigating a situation in which they reasonably believe someone is in need of immediate aid, their actions should be governed by the emergency aid doctrine, regardless of whether these actions can also be classified as community caretaking activities." *Davis*, 442 Mich at 25. But there is no such

conflict of exceptions with regard to Webb's walkthrough of the home. Webb entered the home under the emergency aid exception. He later walked through the home to make sure it was secure and that no children were left behind, not because he believed there was anyone in need of immediate assistance, but because securing the house and checking for unattended children was part and parcel of his duties as a community caretaker.

Furthermore, the fact that defendant informed other emergency personnel that no children were in the home does not make Webb's actions unreasonable. First, such statements do nothing to eliminate Webb's responsibility to secure the home prior to leaving the scene. More importantly, there was no clear evidence that Webb heard any of these statements.

The trial court based its suppression of the evidence, in part, on the ground that Webb's actions were not the least intrusive means of carrying out his duties, and that he should have sought a search warrant or called the Department of Human Services rather than performing a warrantless search of the home. This analysis is mistaken. "The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois v Lafayette*, 462 US 640, 647-648; 103 S Ct 2605; 77 L Ed 2d 65 (1983). Additionally, it is questionable how Webb could have carried out his duties by acquiring a search warrant. Under MCL 780.652, a search warrant can be secured to search for evidence of a crime or as part of a criminal investigation. Securing a home after a medical emergency that does not appear to be the result of criminal activity and checking for unattended children is not part of a criminal investigation, nor is it meant to find evidence of a crime.

Under the plain view exception to the warrant requirement, objects falling within the plain view of an officer may be seized as evidence without a warrant so long as two conditions are satisfied. First, the officer must lawfully be in a position from which he views the item. That condition has been established here. Second, the evidence must be obviously incriminatory or contraband. *People v Wilkens*, 267 Mich App 728, 733; 705 NW2d 728 (2005). In this case, there is no question that the marijuana plants were contraband, and both Webb and defendant testified that the marijuana plants were in plain view of anyone who happened to be in the basement.

Because Webb was justified in entering the home under the emergency aid exception, justified in making a walkthrough of the house under the community caretaker exception, and justified in seizing the marijuana plants under the plain view exception, the trial court erred in suppressing the marijuana plants and dismissing the controlled substance charge.

Reversed and remanded for reinstatement of the criminal charge. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly