S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 8, 2011
v BARBARA JEAN HUNTER, Defendant-Appellee.	No. 302247 Ingham Circuit Court LC No. 10-001811-FH

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

In this interlocutory appeal, plaintiff appeals by leave granted from the circuit court's order suppressing evidence seized from defendant's house. We vacate the trial court's order and remand for further proceedings consistent with this opinion.

I. FACTS

A Lansing police officer and an Eaton County deputy were dispatched to defendant's house to investigate a suspected illegal marijuana-growing operation. There the officers observed a van parked in the driveway. The officers approached the vehicle, observed several marijuana plants inside the vehicle, and were told by the vehicle's occupants that there were more marijuana plants in the house. The officers detained the vehicle's occupants, and summoned another police officer to the scene. Thereafter, the officers knocked on the front door of defendant's house and defendant answered the door. After defendant stepped outside, she informed the officers that no one else was inside the house. However, the officers conducted a protective sweep inside defendant's house. Inside the house, the officers observed dozens of marijuana plants. The officers exited the residence, undertook the procedures for obtaining a search warrant, executed the search warrant, and seized the marijuana plants.

In circuit court, defendant filed a motion to suppress the evidence. The circuit court granted defendant's motion to suppress the evidence, stating that there were no exigent circumstances because the police had no reason to fear that the marijuana plants could be easily disposed of or that someone would place the police officers in danger while awaiting a warrant. The circuit court ordered suppression of the challenged evidence.

II. ANALYSIS

Plaintiff argues that exigent circumstances justified the police officers' initial entry into defendant's house, and, alternatively, that if the initial entry was not justified, the execution of the valid search warrant the police officers eventually obtained made discovery of the marijuana plants in the house inevitable, and that that evidence should be admitted for that reason.

To preserve a suppression issue, a party must file a pretrial motion to suppress the challenged evidence. *People v Gentner, Inc*, 262 Mich App 363, 368-369; 686 NW2d 752 (2004). In reviewing a trial court's decision following a suppression hearing, the appellate court reviews the trial court's factual findings for clear error, but its legal conclusions de novo. *People v Marcus Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). The application of the exclusionary rule is a question of law that is reviewed de novo. *People v Custer*, 465 Mich 319, 326; 630 NW2d 870 (2001) on remand 248 Mich App 552 (2001).

We begin our analysis by noting that we are not dealing with whether there has been a violation of the Fourth Amendment, as we are assuming that there were no exigent circumstances allowing the initial warrantless entry. Instead, we decide whether evidence seized through execution of a valid search warrant should be excluded because police officers had previously entered and searched the residence without a warrant.

"The exclusionary rule is not applicable when the government learns of evidence from an independent source, *Segura v United States,* 468 US 796, 805; 104 S Ct 3380; 82 L Ed 2d 599 (1984), or inevitably would have discovered the evidence regardless of the unconstitutional conduct, *People v Kroll,* 179 Mich App 423, 428-429; 446 NW2d 317 (1989)." *People v Potra*, 191 Mich App 503, 508; 479 NW2d 707 (1991). Although there has been some confusion amongst the courts as to when each doctrine applies, see *State v Wagoner*, 130 NM 274, 278; 24 P3d 306 (2001), perhaps because the inevitable discovery doctrine is an extrapolation of the independent source doctrine, *Murray v United States*, 487 US 533, 539; 108 S Ct 2529; 101 L Ed 2d 472 (1988), what is involved here is the independent source doctrine. As explained by the Third Circuit in *United States v Herrold*, 962 F2d 1131, 1139 (CA 3, 1992), the inevitable discovery doctrine does not apply in a situation where police officers *actually obtain* a search warrant after entering a home, and through that warrant *actually discover* the evidence. The speculative nature of the inevitable discovery doctrine does not apply in a case like the instant one, where the evidence was subsequently obtained through a search warrant, as the more applicable doctrine is the independent source doctrine. *Id.*; accord *Wagoner*, 130 NM at 279; *United States v Markling*, 7 F3d 1309, 1318 n 1 (CA 7, 1993); *Herrold*, 962 F2d at 1140 ("The independent source and inevitable discovery doctrines thus differ in that the former focuses on what actually happened and the latter considers what would have happened in the absence of the initial search.").

One of the leading cases exemplifying the applicability of the independent source doctrine to this case is *Murray*. In *Murray* law enforcement officers entered by force and without a warrant a warehouse suspected of containing marijuana, and once inside officers observed numerous burlap bales. *Murray*, 487 US at 535-536. Without searching the bales, officers left and obtained a search warrant, without informing the issuing magistrate that they had entered the building, or that they observed suspicious bales. *Id.* at 536. The defendants moved to suppress the evidence in part on the basis that the warrant was tainted by the prior warrantless entry. The district court denied the motion, and the court of appeals affirmed. *Id.*

In holding that the independent source doctrine likely applied, but a remand was necessary for further fact finding, the court made several important observations. First, the court rejected a dissenting justice's suggestion that the government should have to prove through historical facts that the subsequent warrant was "wholly unaffected by the prior illegal search." *Murray*, 487 at 540 n 2. Second, the court noted that "[s]o long as a later, lawful seizure is genuinely independent of an earlier, tainted one (which may well be difficult to establish where the seized goods are kept in the police's possession) there is no reason why the independent source doctrine should not apply." *Id*. at 542. Third, in deciding whether the doctrine applies, the court stated that:

> [t]he ultimate question, therefore, is 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. [*Id*. at 542 (footnote omitted).]

Courts applying *Murray* have made it clear that evidence is not subject to suppression through the exclusionary rule despite an initial illegal entry when a subsequent warrant is issued that was supported by probable cause independent of information obtained from the initial entry. For example, in *United States v Jenkins*, 396 F3d 751, 753-754 (CA 6, 2005), the police had been conducting surveillance of a motel room where suspicious drug activity appeared to be taking place. Eventually officers determined the need to secure the motel room, for fear of destruction of evidence and for officer safety. *Id*. at 754. After entering the room, officers viewed three bags of luggage, one of which was open, with the open one containing "brick-type items" wrapped in cellophane. *Id*. at 755. At that point officers went to obtain a search warrant, putting down in writing all of the surveillance activity and orally informing the magistrate of what was seen inside the room. *Id*. at 755-756. The warrant was issued, and located in the room was, *inter alia*, 73 kilos of cocaine. *Id*. at 756. Defendant moved to suppress the evidence found in the room, and the district court granted the motion. *Id*. at 757.

On appeal, the Sixth Circuit reversed. Recognizing that a warrantless search of the room had occurred, and that both "tainted" and "non-tainted" information had been supplied to the issuing magistrate, the court nevertheless held that under *Murray's* reasoning and subsequent case law, the evidence should not have been suppressed. *Jenkins*, 396 F3d at 758. Instead, the *Jenkins* court held that under *Herrold* and other cases:

> 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. *See, e.g., United States v. Markling,* 7 F.3d 1309, 1315-16 (7th Cir. 1993) (considering whether probable cause remained after purging

> tainted information from a warrant and noting that '[t]his is the approach federal courts...typically take' in applying *Murray*); *United States v. Restrepo,* 966 F.2d 964, 968-70 (5th Cir. 1992) (interpreting *Murray* to mean that 'evidence obtained in an illegal search is first excised from the warrant affidavit, after which the expurgated version is evaluated for probable cause'); *United States v. Halliman,* 923 F.2d 873, 880-81 (D.C.Cir. 1991) (finding that despite the inclusion of tainted information in a warrant application, 'there [were] overwhelming independent grounds for probable cause' in the application); *United States v. Gillenwaters,* 890 F.2d 679, 681-82 (4th Cir. 1989) (setting aside facts illegally obtained from the rest of the information in an affidavit and then examining the affidavit for probable cause); *United States v. Veillette,* 778 F2d 899, 903-04 (1st Cir. 1985) (same). [*Id.* at 758.]

After analyzing prior Sixth Circuit opinions that had utilized the same rationale, see *Jenkins*, 396 F3d at 759-760, the court summarized the case law as supporting "an interpretation of the independent source rule that incorporates consideration of the sufficiency of the untainted affidavit to see if probable cause exists without the tainted information." *Id.* at 760. Therefore, in applying the independent source doctrine as recognized in *Murray* and applied by the federal circuit courts of appeal, we must decide whether (1) the untainted information in the search warrant affidavit provided probable cause sufficient to issue a search warrant, without consideration of the tainted information, and if so, (2) whether the officers decision to seek the warrant was prompted by what was seen in the house, or would they have sought one anyway with what they found prior to the entry. *Murray*, 487 US at 542; *People v Smith,* 191 Mich App 644, 649-650; 478 NW2d 741 (1991); *United States v Jadlowe*, 628 F3d 1, 9 (CA 1, 2010).

A search warrant shall not issue unless probable cause exists to justify the search. US Const, Am IV; Const 1963 art 1, § 11; MCL 780.651; *People v Gillam*, 479 Mich 253, 260; 734 NW2d 585 (2007). "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000), citing *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). "'The magistrate's findings of reasonable or probable cause shall be based on all the facts related within the affidavit made before him or her.'" *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001), quoting MCL 780.653. If illegally obtained facts are part of the affidavit, this Court may sever the invalid portions and "the validity of the resultant warrant may be tested by the information remaining in the affidavit." *Id.* at 510. Again, in applying the first test under the independent source doctrine, the court must also eliminate the tainted information in the affidavit and determine probable cause from the remaining untainted parts. *Jenkins*, 396 F3d at 760.

Here, the trial court made no findings regarding either the first or the second part of the applicable test, i.e., whether (1) the affidavit without the offending paragraph 12 would otherwise support issuance of a search warrant, and (2) whether the officers would have sought out the warrant even without knowing what they saw inside the house. We believe the trial court is in the best position to make the findings in the first instance, and so remand for it to do so. See *Murray*, 487 US at 543-544; *Markling*, 7 F3d at 1317-1318; *State v Lieberg*, 553 NW2d 51, 55 (Minn App, 1996); *United States v Pena*, 924 F Supp 1239, 1253-1256 (D Mass, 1996).

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray