2015 IL App (4th) 130818-U

NO. 4-13-0818

FILED
June 8, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RUSSELL C. MILLER, Defendant-Appellant.	) Appeal from) Circuit Court of) Adams County) No. 12CF263)) Honorable) Frank J. McCartney,) Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Turner and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in denying defendant's motion to suppress evidence where the emergency-circumstances exception to the warrant requirement did not justify the warrantless entry into the garage.

¶ 2 In July 2013, a jury convicted defendant, Russell C. Miller, of aggravated unlawful participation in methamphetamine production (720 ILCS 646/15(b)(1)(D) (West 2010)). In September 2013, the trial court sentenced defendant to 19 years' imprisonment.

¶ 3 Defendant appeals, arguing the trial court (1) erred in denying his motion to suppress evidence and (2) abused its discretion in imposing an excessive sentence. We reverse.

¶ 4 I. BACKGROUND

¶ 5 On May 15, 2012, the State charged defendant with aggravated unlawful participation in methamphetamine production (720 ILCS 646/15(b)(1)(F) (West 2010)).

Specifically, the State alleged defendant "knowingly participated in the manufacture [of] less than 15 grams of methamphetamine, and this methamphetamine manufacturing was a contributing cause of a fire, in violation of [section] 15(b)(1)(f)." Just prior to the start of the jury trial, the State amended the charge. According to the State, it realized the charge regarding the fire was incorrect when it was preparing its jury instructions, "but the surveillance system is applicable." According to the amended information, defendant committed the offense of aggravated unlawful participation in methamphetamine production in that he "knowingly participated in the manufacture [of] less than 15 grams of methamphetamine, and [he] did so in a structure protected by a surveillance system, in violation of [section] 15(b)(1)(D)."

¶ 6 A. Motion To Suppress

¶ 7 Prior to trial, on February 19, 2013, defendant filed a motion to suppress evidence, in which he argued, *inter alia*, his fourth-amendment rights were violated when firefighters forcibly entered and searched his garage without a warrant. Specifically, defendant's motion stated the following:

> "1. On May 6, 2012, [defendant] was the lessee of a garage located in the rear of 726 Jackson Street, Quincy, Illinois in Adams County under a rental contract with the owner of said property.
>
> 2. On May 6, 2012, Quincy Fire Department personnel went to a garage in the alley between the 700 and 800 block immediately south of Jackson Street.
>
> 3. In addition, Quincy Police Department personnel responded to that location.

4. The alleged cause of that response was a small amount of smoke coming from a smokestack on the garage.

5. No out-of-control fire or burning was observed and no suspicious circumstances justified the entry of either fire department or police personnel.

6. Despite the lack of a basis to do so, the garage was broken into and a stove was observed.

7. There was no evidence of fire or emergency anywhere inside the garage.

8. [Fire Department] Personnel then opened the stove but did not observe any danger.

9. At some point, police officers sought and received a search warrant for this location.

10. The stove and the inside and outside of the garage were then searched and various items were seized which the [State] will seek to introduce at trial in the above-entitled matter.

11. No legitimate reason for entry into the garage or search thereof existed and the actions of the fire department and the police department therefore constitute an illegal search and seizure.

12. Where the law enforcement officers had no legitimate reason to be at the location of the garage, any and all items recovered must be suppressed."

¶ 8 During the hearing on defendant's motion, Dennis Behl, a lieutenant with the Quincy fire department testified his unit responded to a report of a house fire near 7th Street and Jackson Street in Quincy on May 6, 2012. When they arrived at the location they "didn't see a fire." Two people on the street told Behl the smoke seemed to be coming from a block south of their location. Behl's unit went to that location to investigate, but they "didn't see anything at that time." Behl called off the other two responding fire trucks and continued to investigate.

¶ 9 Behl testified he and the other two firefighters in his unit searched through an alley running behind Jackson Street. They eventually found smoke coming from a smokestack or chimney on a garage roof. The garage was detached from the adjoining residence. Behl testified there was not a large amount of smoke coming out of the chimney. According to Behl, however, they still "had to investigate what the fire was." The garage was locked and Behl could not see inside through the windows. When Behl walked around the garage he could not see any smoke coming from the windows, doors, eves, or any place other than from the chimney.

¶ 10 Behl then knocked on the door to the residence associated with the detached garage to find out if anyone had a key because he "was trying not to do any damage to the garage to get into it." However, no one was able to provide Behl with a key. Behl explained the City of Quincy has an ordinance against unattended fires and burning garbage. According to Behl, the smoke had a "trash smell" to it and he suspected the owner of the garage was in violation of those ordinances. Behl testified he tried to locate the owner of the garage because "in a sense it was a trash fire" and "there wasn't a reason to have a fire in the stove in the middle of May." After Behl failed to locate a key to the garage, he forced open the door with a pry bar to check on

the source of the fire. Behl admitted on cross-examination there was not an active fire, just smoke from wood and paper products smoldering in a wood stove.

¶ 11 Once inside the garage, Behl observed an enclosed "wood-burning type stove" with a door. The door of the stove was closed and a "small amount" of smoke was venting though the chimney. No smoke was leaking from the sides of the stove. Behl testified he nonetheless opened the stove "to see what was generating the smoke." Inside the stove, Behl found wood, some paper, and a single "blister pack of pills." Behl, who testified he had taken training classes involving "meth material," removed the blister pack and burned paper and placed it on the side of the stove along with the wood he had removed. He then informed the police officers who were also on the scene he had found a blister pack. Behl explained the police respond to every fire call in Quincy. While Behl removed the wood from the stove, he did not extinguish the fire because it "wasn't an active fire that required water to be put out."

¶ 12 On cross-examination, Behl clarified he only found smoldering wood in the stove and not a fire. When asked whether there is anything unusual about smoke coming from a chimney or smokestack, Behl responded, "No. Smoke comes from a smokestack." The following exchange then took place:

> "Q. *** [W]hen you first arrived at the garage, you examined the outside of it?
>
> A. Yes.
>
> Q. *** I believe you testified you had three other firefighters with you?
>
> A. Two others with me, yes.

Q. Were both involved in that examination?

A. As far as the initial walk around, yes.

Q. Is that what you did, just walked around?

A. Yes.

Q. And at that point you could see there was no danger?

A. There was no fire outside the building, yes.

Q. And the only evidence of fire that you could see was coming from the smoke and the smokestack?

A. Yes.

Q. That's the way that smoke is supposed to be diverted, isn't it?

A. Yes, it is."

¶ 13 When asked to describe the stove, Behl responded it was an enclosed wood-type stove with a smokestack attached to it. Behl admitted there were no burning coals or smoldering material around the outside of the stove. Behl testified "[t]here was nothing leaking around the outside of it" and the smoke was properly venting up the stack. Behl explained he removed the items from the stove to "eliminate the smoke and eliminate the trash smell." He placed the smoldering wood in the alley but never applied water to any of it.

¶ 14 On re-cross-examination, the following colloquy took place:

"Q. *** [Y]ou put in your report that there was a small amount of smoke coming out of the smokestack?

A. Yes.

Q. And that was true, a small amount?

A. It was not the heavy puff, no. I guess what was funny is for the amount of smoke we were called for, we didn't find that when we got there. These people were pretty convinced it was a full-blown house fire, and it wasn't."

¶ 15 Quincy police officer Bryan Martin testified he did not arrive at the garage with the fire department but was called by two other officers who arrived at the scene with the fire department. Martin testified he believed the firefighters had already left the scene by the time he arrived. According to Martin's testimony, he observed several burnt blister packs inside the garage. On cross-examination, Martin conceded Behl's report of just one blister pack was possibly more accurate than his own recollection of multiple packs. Martin explained, "a lot of the time meth manufacturers will burn their meth waste and blister packs[, which are used] to hold pseudoephedrine." Martin also observed a "peeled" lithium battery casing and stated, "[l]ithium is used in the meth-manufacturing process." Martin testified he also observed a "snort tube," which could be used to ingest methamphetamine. Martin saw an active video-surveillance system, which he stated is "used commonly in drug-related houses when either they are selling drugs, manufacturing drugs[,] or breaking illegal narcotics down." Based on these observations, police obtained a search warrant for the garage.

¶ 16 During oral argument on defendant's motion, defendant argued no exigent circumstances existed to justify the fire department's warrantless entry into the garage and search of the stove. Defendant maintained there was no emergency situation justifying the initial entry as Behl observed only smoke coming from a smokestack and not a fire. According to defendant,

smoke coming out of a smokestack was "reasonable, no danger, [and] no problem." Defendant noted the State "will probably rely on some type of ordinance violation, and that certainly doesn't constitute a grievous offense nor a danger to anyone, and the firefighter could have just put the ticket on the door and left." For its part, the State argued as follows:

> "Your Honor, [defendant] assumes [Behl] knows what's going on in the garage. The fact is he doesn't. He sees smoke coming out of a smokestack, yes, but he doesn't know if that's coming out for whatever reason. He testified as to why he felt it was unusual for that smoke to be coming out on a warm day. That's his testimony. His testimony was also that he smelled trash, was concerned about that, and his testimony was that no one was there, and that is a violation of the local ordinance for unattended burning.
>
> I think there was a basis for him to make the decision on a community caretaking basis or just to—you know, they were called to the scene. It's not a case of the police wanting them to come and invent some reason to go in there. They were called to the scene by a citizen. They go there, they look at that, and they open it up.
>
> Once they get in, they open up the fire thing, and they see the fire is still smoldering, and they see the blister packs. The officers are there because they go to every fire where firemen are dispatched. They see it. They immediately go and get a warrant.

So I think it is a very legitimate function of the fire department to make entry given the circumstances of this case. I do think the circumstances are important. I think the court has the discretion to look at those circumstances. I think one of the main things is that it was a firefighter with no—a lieutenant, a commander of that fire truck that made the determination. No police action was done.

There wasn't any situation where they were just trying to deal with an investigation and go by any means to get into that garage. And after they get in the garage, see what they see, they do make an application for a search warrant. I think it is a justified entry that was made, and based on a search warrant that was issued because the officers had the right to be inside and see what they saw."

¶ 17 Following argument, the trial court denied defendant's motion to suppress, finding the fire department was "performing their duties as firefighters" and had an obligation to investigate the chimney smoke. Specifically, the court found the following:

"[The fire department] was called for a reason, [which] had nothing to do with law enforcement. They couldn't have gotten a warrant, I understand that. They had smoke coming out of a chimney they wanted to check out, and I think it was their obligation, in fact, to check out why that was happening.

> There was no—they went to the door to get somebody to come in—because it was a garage. It was not an attached house. They went to find somebody. Somebody was not there. They, I'm pretty sure felt, in their opinion, and I think that's what the key is, their opinion, they needed to make sure that there was nothing else going on as far as the fire goes, only the fire. That's the only thing they were interested in.
>
> I don't—I, honestly, have no problem with that."

¶ 18 The trial court concluded defendant's rights were not violated "by the actions of the firefighters in performing their duties as firefighters."

¶ 19 B. Defendant's Trial

¶ 20 During defendant's jury trial, Behl testified his unit responded to a report of a fire on May 6, 2012. They proceeded to the reported location with their lights and sirens on "[w]ith the intention of it being a house fire." When they got to the location they did not find anything. Behl cancelled the other units responding to the call. The firefighters then "proceeded just to check the alleys to try to find if there was a smoke source somewhere." They eventually located smoke "coming from a chimney" on a garage at a different location from the one to which they had been dispatched. Behl testified he thought this was unusual because it was a warm day and the smoke itself had a trash odor to it. Behl knocked on the door but no one answered. The doors and windows were locked. Behl then went to the apartment building next door to see if he could get into the garage without having to break in. After several unsuccessful attempts to gain entry, firefighters eventually pried open the door.

¶ 21 Behl testified, after opening the door, "we found a wood-burner-type stove, so I opened the door of the stove, to see what was actually making the smoke that was creating the trash odor, and had found the, the pieces of wood, and then the blister packs that were laying on top of the wood." Behl explained he had taken several classes dealing with "meth-making materials" and knew blister packs can indicate methamphetamine manufacturing. He then notified the police officer on the scene he had found the blister packs.

¶ 22 Officer Craig Russell testified at some point Behl requested the police enter the garage. When Russell entered, the firefighters showed him the blister packs they had pulled out of the fire. Based on his training, Russell knew "meth manufacturers will burn their trash to conceal or hide it from law enforcement." Russell then contacted Quincy police officer Bryan Martin, who Russell knew to have worked on the narcotics task force.

¶ 23 Martin testified after he arrived on the scene and entered the garage, he observed charred blister packs next to the stove. According to Martin's testimony, when people making methamphetamine are finished cooking it, they will frequently try to get rid of the evidence by burning it. Martin noticed a five-gallon bucket containing a "snort tube," which he explained is a straw or pen casing used to ingest methamphetamine. Martin also observed a "peeled lithium battery case." Martin consulted with the other officers on the scene and recommended they attempt to obtain a search warrant.

¶ 24 After obtaining the warrant, Martin and the other officers searched the garage and surrounding premises. Martin testified a television monitor was set up to display a view of the alley and roadway leading up to the garage. Several items piqued his interest with regard to his methamphetamine training. Martin observed "[c]ompressed ice, Coleman fuel cans, liquid, ***

peeled lithium batteries, burnt pseudoephedrine blister packs, battery ribbons, filters, things of that nature." Photographs depicting the various items were introduced into evidence.

¶ 25 Officer Paul Hodges testified during his search he found "a bottle of Prestone starting fluid, a bottle of crystal drain opener, as well as cold compresses, like the instant ice packs," inside the garage. Hodges also found a soda bottle containing a small amount of white residue in the bed of a truck parked outside the garage. Police determined the truck belonged to defendant. Hodges testified, "it's not uncommon to find soda bottles that have this white kind of powdery substance in the bottom of them" when collecting methamphetamine waste. (It appears from the record this powdery substance was not specifically identified.)

¶ 26 Robert Cook, a special agent with the Illinois State Police, testified all of the items collected from the scene could be used in the methamphetamine-production process. Specifically, Cook testified the items recovered from the scene would be used in the "shake and bake method" of making methamphetamine.

¶ 27 Illinois State Police master sergeant Patrick Frazier testified about how one could manufacture methamphetamine using the shake and bake method. According to Frazier's testimony, common household items used to make methamphetamine include pseudoephedrine pills, lithium batteries, household lye, cold packs containing ammonium nitrate, and plastic bottles. Pseudoephedrine commonly comes in blister packs. Frazier explained a "[b]lister pack is the packaging that you would find inside of a cardboard box. It is like a little tray with a piece of foil over the top that contains the pills and keeps them separated." Frazier testified pseudoephedrine is the main item needed to make methamphetamine. Frazier then testified in detail regarding the methamphetamine-manufacturing process.

¶ 28 Scott Waldhaus, the son of the owner of the garage, testified defendant was renting the property for $125 per month. Waldhaus testified defendant asked permission to replace the garage door because the existing one was old, wooden, and not very secure. Waldhaus did not have a key to the garage after defendant replaced the door. Waldhaus did not believe his father had a key, either. He also gave defendant permission to install "a vent pipe in the roof." According to Waldhaus, defendant wanted to "put a heater in there or a stove."

¶ 29 George Straube, defendant's friend, testified he helped defendant install the garage door and surveillance camera. According to Straube, defendant stored valuables in the garage and was concerned about security because of prior break-ins.

¶ 30 Brandy Mefford, defendant's fiancee, testified she never observed any drug production in the garage. According to Mefford, defendant used the garage to store his motorcycle and tools. Defendant also kept supplies to clean his motorcycle in the garage. Mefford testified defendant had the surveillance system installed because a break-in had occurred.

¶ 31 During closing argument, the State argued, *inter alia*, the following:

> "What does it mean to participate in the manufacture of methamphetamine? You don't have to speculate to that. The Judge will give you an instruction that talks about participation. I will submit to you when you read that instruction you will learn that some of the things that are participation in meth production is taking the pseudoephedrine pills out of the blister packs. It's taking the lithium

out of the lithium batteries. It's separating items. You have seen so much evidence with regard to participation in meth production. Aggravated, what makes it aggravated? Having a surveillance system. By all accounts this TV and those cameras are a surveillance system. You've heard testimony with regard to that, and it's clear that there was a surveillance system in play.

* * *

*** [C]ommon sense tells you what's going on in this garage. Common sense. You have all these items. Yeah, there's legitimate uses for some of the items, but you have all these items coming together, which just happens to be the shake-and-bake method.

Common sense. There is absolutely no reason in this world to separate the lithium from batteries unless you're intending to make methamphetamine. There's no reason to burn blister packs unless you want to get rid of the evidence. There's no reasons for these things to be in combination the way they are and use a surveillance system to hide."

¶ 32 Following its deliberations, the jury convicted defendant of aggravated unlawful participation in methamphetamine production.

¶ 33 C. Defendant's Sentence

¶ 34 During the sentencing hearing, defendant, then 48 years old, admitted he had a drug problem but had been sober for 13 years before losing his job and falling back into drug use. Defendant had prior felonies for burglary (1982), unlawful possession of a controlled substance (1995), and unlawful possession of methamphetamine (2002). The State requested a 22-year sentence. The trial court, citing defendant's prior convictions, sentenced him to 19 years' imprisonment.

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 On appeal, defendant argues the trial court erred in denying his motion to suppress where no exigent circumstances existed to support the fire department's warrantless entry into the garage and search of the wood stove.

¶ 38 We note the State argues defendant has forfeited review of this issue by failing to raise it in his posttrial motion. The attorney representing defendant during the hearing on the motion to suppress withdrew his representation after the trial court denied the motion. Defendant's new counsel, who represented him during the remainder of the proceedings, did not file a posttrial motion. Generally, to preserve an issue for review, a defendant must both object at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293, 609 N.E.2d 252, 260 (1992).

¶ 39 However, recently the supreme court, in *People v. Cregan*, 2014 IL 113600, ¶ 16, 10 N.E.3d 1196 (citing *Enoch*, 122 Ill. 2d at 190, 522 N.E.2d at 1132), clarified constitutional

issues previously raised at trial which could be raised later in a postconviction petition are not subject to forfeiture on direct appeal under *Enoch*. According to the supreme court:

> "If a defendant were precluded from raising a constitutional issue previously raised at trial on direct appeal, merely because he failed to raise it in a posttrial motion, the defendant could simply allege the issue in a later postconviction petition. Accordingly, the interests in judicial economy favor addressing the issue on direct appeal rather than requiring defendant to raise it in a separate postconviction petition." *Cregan*, 2014 IL 113600, ¶ 18, 10 N.E.3d 1196.

¶ 40 Thus, we will review defendant's claim the trial court erred in denying his motion to suppress evidence where he alleged the search violated his fourth-amendment rights.

¶ 41 In reviewing an order denying a motion to suppress, we use a two-part standard of review. *People v. Miller*, 2014 IL App (2d) 120873, ¶ 25, 9 N.E.3d 1210. "The trial court's findings of fact are upheld unless they are against the manifest weight of the evidence." *Miller*, 2014 IL App (2d) 120873, ¶ 25, 9 N.E.3d 1210. Findings are against the manifest weight of the evidence if they are unreasonable, arbitrary, or not based on the evidence, or if the opposite conclusion is clearly evident. *Miller*, 2014 IL App (2d) 120873, ¶ 25, 9 N.E.3d 1210. The ultimate issue of whether to suppress is a legal one and therefore subject to *de novo* review. *Miller*, 2014 IL App (2d) 120873, ¶ 25, 9 N.E.3d 1210.

¶ 42 "Both the fourth amendment and the Illinois Constitution of 1970 guarantee the right of individuals to be free from unreasonable searches and seizures." *People v. Colyar*, 2013 IL 111835, ¶ 31, 996 N.E.2d 575 (citing U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6).

" '[T]he "essential purpose" of the fourth amendment is to impose a standard of reasonableness upon the exercise of discretion by law enforcement officers to safeguard the privacy and security of individuals against arbitrary invasions.' " *Colyar*, 2013 IL 111835, ¶ 31, 996 N.E.2d 575 (quoting *People v. McDonough*, 239 Ill. 2d 260, 266, 940 N.E.2d 1100, 1106 (2010), quoting *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979)).

¶ 43 It is undisputed defendant had a legitimate expectation of privacy in the garage. Defendant was renting the garage and had taken steps to secure it by putting in a new door. Testimony indicated the landlord did not have a key and it was likely the owner also did not have one. See *People v. Johnson*, 237 Ill. 2d 81, 90, 927 N.E.2d 1179, 1185 (2010) ("Factors relevant in determining whether a legitimate expectation of privacy exists include the individual's ownership or possessory interest in the property; prior use of the property; ability to control or exclude others' use of the property; and subjective expectation of privacy."). In addition, the parties appear to agree defendant's expectation of privacy extended to the wood stove, which he installed himself, inside the garage. See *People v. Payton*, 317 Ill. App. 3d 909, 914, 741 N.E.2d 302, 306 (2000) (finding a fourth-amendment violation where an officer discovered cocaine and cannabis after lifting the lid of a barbecue grill located on the front porch).

¶ 44 The parties also agree it is well-established the fourth amendment applies to searches by firefighters, who are treated as state actors for fourth-amendment purposes. *Michigan v. Tyler*, 436 U.S. 499, 504 (1978) (the fourth amendment protects individuals from unreasonable searches and seizures by government officials). This protection extends beyond law-enforcement officers. *Tyler*, 436 U.S. at 504 ("[government] officials may be health, fire, or building inspectors").

¶ 45 The State does not dispute Behl entered the garage without defendant's permission or a warrant. A warrantless intrusion is *per se* unreasonable unless an exception to the warrant requirement is determined to be applicable. *People v. Abt*, 269 Ill. App. 3d 831, 836, 646 N.E.2d 1341, 1345 (1995). When a defendant makes a *prima facie* case evidence was obtained by means of an illegal search or seizure, the State bears the burden of establishing the search was lawful. *People v. Gipson*, 203 Ill. 2d 298, 306-07, 786 N.E.2d 540, 545 (2003).

¶ 46 Illinois courts have recognized "an 'emergency' exception to the search warrant requirement whereby police may make a warrantless entry into private premises if they reasonably believe an emergency exists which dictates the need for immediate action for the purpose of providing aid to persons or property in need thereof." *People v. Koniecki*, 135 Ill. App. 3d 394, 398-99, 481 N.E.2d 973, 977 (1985). "The purpose, to offer assistance to a citizen possibly imperiled, not to obtain evidence of a crime, justifies a search." *Koniecki*, 135 Ill. App. 3d at 399, 481 N.E.2d at 978. "Under the 'emergency' exception to the warrant requirement, the reasonableness of the belief that an emergency, a situation requiring immediate action, exists is determined by the entirety of all the circumstances known to the police at the time of the entry." *Koniecki*, 135 Ill. App. 3d at 399, 481 N.E.2d at 978. "The burden of demonstrating exigent need for a warrantless search or arrest is on the State." *People v. Foskey*, 136 Ill. 2d 66, 75, 554 N.E.2d 192, 197 (1990).

¶ 47 Ordinarily, a burning building creates an exigency which justifies a warrantless entry by fire officials to fight the blaze. See *Michigan v. Clifford*, 464 U.S. 287, 293 (1984). However, in this case, Behl's forcible entry into the garage to check on the source of the smoke was unreasonable for fourth-amendment purposes based on the totality of the circumstances.

Behl's unit was not responding to the report of a fire at the garage. Instead, the firefighters were dispatched to a different location. Upon failing to locate a fire at that location, they drove around looking for smoke. They eventually observed smoke coming out of the smokestack of defendant's garage.

¶ 48 Instead of immediately prying open the door to the garage, they walked around the garage, spoke to residents living next door, and attempted to locate a key. Behl explained he was trying to avoid any damage to the garage. Unable to obtain a key, they eventually pried open the door. However, doing so was unjustified as the evidence did not demonstrate a reasonable belief on Behl's part a serious emergency was occurring. The events depicted by Behl's own testimony fall short of painting the picture of an emergency situation sufficient to justify a warrantless entry into the garage. Behl testified there was no indication there was a structural fire occurring inside the garage. The following colloquy tool place during Behl's cross-examination:

> "Q. There was no smoke coming from any windows?
>
> A. No.
>
> Q. There was no smoke coming from under any doors?
>
> A. No, and that's why we took the time to try to find out who actually owned [the garage], to try to minimize the damage."

¶ 49 According to Behl's testimony, all he observed was smoke coming out of a smokestack, an indication the stove was working properly. Behl testified there was not a large amount of smoke coming from the chimney. The State failed to present sufficient evidence to justify the warrantless entry based on emergency circumstances.

¶ 50 Even assuming, *arguendo*, the warrantless entry was permissible because of an emergency caused by the smoke, once Behl observed a properly working wood stove venting smoke through the chimney, any concerns of an emergency should have ended. At that point, no further investigation was warranted. Indeed, the State does not argue the search of the stove was justified by the exigent-circumstances exception to the warrant requirement. Instead, the State contends Behl's search of the stove was appropriate as a community-caretaking function. See *McDonough*, 239 Ill. 2d at 272, 940 N.E.2d at 1109 (community caretaking can function to permit a valid warrantless search). Specifically, the State, referencing the City of Quincy's ordinance against burning trash, argues "Behl was exercising a *bona fide* community caretaker function when he opened the stove to remove what was generating the smoke [to] 'eliminate the trash smell.' " According to the State, the ordinance "demonstrates the great importance that the City of Quincy attaches to its citizens' interest in maintaining neighborhoods free of the smoke and odors caused by burning trash." The State concludes, "the public interest served by Behl's immediate opening of the stove and removal of its contents outweighed the invasion of defendant's privacy."

¶ 51 However, two general criteria must exist before finding the community-caretaker exception applies. First, the government actor must be performing some function other than the investigation of a crime. Second, the search must have been undertaken to protect the safety of the general public. *People v. Luedemann*, 222 Ill. 2d 530, 545-46, 857 N.E.2d 187, 197 (2006).

¶ 52 Here, Behl testified he searched the stove as part of his investigation into potential ordinance violations regarding the unattended burning of trash. Further, Behl's testimony demonstrates his act of opening the stove was more closely connected to nuisance abatement

than motivated by a concern for public safety. Behl's testimony shows he removed the items from the stove not to put out a dangerous unattended fire, but rather, to eliminate the "trash smell." Given Behl's testimony, his search of the stove cannot reasonably be construed to have been undertaken to protect the safety of the general public. As such, the State's argument concerning the community-caretaking exception fails.

¶ 53 In sum, the trial court erred in denying defendant's motion to suppress where (1) the exigent-circumstances exception did not justify the warrantless entry into the garage, and (2) the community-caretaker exception did not apply to the subsequent search of the stove.

¶ 54 Defendant next argues all of the State's evidence should be excluded and his conviction reversed because all of the evidence presented against him was seized from the garage or from the immediate vicinity after the garage door was opened and the stove searched.

¶ 55 "Under the exclusionary rule, courts are precluded from admitting evidence that is gathered by the police in violation of the fourth amendment." *People v. Bernard*, 2015 IL App (2d) 140451, ¶ 12, 28 N.E.3d 205. "The fruit-of-the-poisonous-tree doctrine is an outgrowth of the exclusionary rule." *Bernard*, 2015 IL App (2d) 140451, ¶ 12, 28 N.E.3d 205 (citing *People v. Henderson*, 2013 IL 114040, ¶ 33, 989 N.E.2d 192). "Under that doctrine, a fourth-amendment violation is deemed the poisonous tree, and any evidence obtained by exploiting that violation will be suppressed as fruit of that tree." *Bernard*, 2015 IL App (2d) 140451, ¶ 12, 28 N.E.3d 205 (citing *Henderson*, 2013 IL 114040, ¶ 33, 989 N.E.2d 192).

¶ 56 In this case, the record shows all of the evidence presented by the State came as a result of the search of the garage and stove. The State does not argue otherwise. As stated, those searches ran afoul of the fourth amendment. Because all of the evidence used to convict

defendant stemmed entirely from the improper search, we have no choice but to reverse defendant's conviction and sentence outright. See *People v. Brown*, 2013 IL App (1st) 083158, ¶ 28, 990 N.E.2d 712; *People v. Smith*, 315 Ill App. 3d 772, 779, 734 N.E.2d 1039, 1044 (2000) ("Because the State cannot prevail on remand without the evidence that we have held should have been suppressed, we also reverse her conviction and sentence outright."). As a result, we need not address defendant's excessive-sentence claim.

¶ 57 Finally, defendant argues, because the State cannot prove its case against him without the excluded evidence, a retrial is barred by double jeopardy. *People v. Morris*, 135 Ill. 2d 540, 550-51, 554 N.E.2d 150, 155 (1990); *People v. Taylor*, 76 Ill. 2d 289, 309, 391 N.E.2d 366, 375 (1979). The double-jeopardy clause of the United States Constitution prohibits a retrial for the purpose of allowing the State a second opportunity to present evidence it failed to present in the first trial. *People v. Lopez*, 229 Ill. 2d 322, 367, 892 N.E.2d 1047, 1073 (2008). "The State cannot retry a defendant once it has been determined that the evidence introduced at trial was insufficient to sustain a conviction." *Lopez*, 229 Ill. 2d at 367, 892 N.E.2d at 1073.

¶ 58 In determining whether double jeopardy applies to this case, "[t]he relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Lopez*, 229 Ill. 2d at 367, 892 N.E.2d at 1073. As stated, defendant's conviction was based entirely upon evidence seized following the warrantless entry of the garage and search of the wood stove. We note the State does not argue any of the evidence would have been inevitably discovered. See *People v. Alvarado*, 268 Ill. App. 3d 459, 470, 644 N.E.2d 783, 790-91 (1994) (inevitable-discovery doctrine allows admission of evidence if the State can establish

it ultimately would have been discovered by lawful means). Because our review of the record reveals the State cannot prevail on remand without that evidence, we find double jeopardy precludes a retrial of defendant. *Smith*, 315 Ill. App. 3d at 779, 734 N.E.2d at 1044 (citing *People Sweborg*, 293 Ill. App. 3d 298, 305, 688 N.E.2d 144, 149 (1997)).

¶ 59 III. CONCLUSION

¶ 60 For the reasons stated, we reverse defendant's conviction and sentence.

¶ 61 Reversed.