2014 IL App (5th) 130097-U

NO. 5-13-0097

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 11-CF-523
	)	
STEPHEN KOPECKY,	)	Honorable
	)	Kimberly L. Dahlen,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Spomer concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in denying the defendant's motion to suppress evidence and arrest where the defendant made a *prima facie* showing that evidence was obtained as the result of an illegal search, requiring this cause to be remanded for a presentation of the State's evidence on the motion.

¶ 2 On September 27, 2011, the defendant, Stephen Kopecky, was charged with the offenses of possession with intent to deliver 2000 but less than 5000 grams of cannabis (720 ILCS 550/5(f) (West 2010)) and production of cannabis (720 ILCS 550/8(d) (West 2010)). Following a stipulated bench trial, he was convicted and sentenced to 24 months' probation and ordered to pay $6,860 in fines and fees. On appeal, the defendant contends that the trial court erred in denying his motion to suppress evidence and arrest, his motion

to reconsider the denial, and his motion for a new trial. For the following reasons, we vacate and remand for proceedings not inconsistent with this order.

¶ 3 The record contains a copy of a search warrant. The warrant stated as follows:

> "On 9/26/2011, at approximately 3:30 p.m., Complainant, and other agents of the Illinois State Police, Southern Illinois Drug Task Force (ISP/SIDTF) approached the residence located at 443 Murphy Street in Murphysboro, Jackson County, Illinois to engage the occupants in conversation. Complainant knocked on the door located on the west side of the residence. Complainant was greeted by Stephen J. Kopekcy [*sic*]. Complainant and other agents identified themselves to Kopecky. Kopecky agreed to speak with agents. Kopecky claimed to be the only occupant of the residence. Kopecky stepped outside the residence and left the door partially opened. Through the partially opened door, Complainant detected a strong odor of raw cannabis coming from inside the residence. Complainant asked Kopecky if Kopecky was growing cannabis plants inside his residence. Complainant asked Kopecky if he was growing in excess of five hundred canabis [*sic*] plants inside his residence. Kopecky stated he was not. Complainant asked Kopecky if he was growing twenty cannabis plants inside his residence. Kopecky stated: 'I am not saying'. Complainant required consent to search the residence from Kopecky. Kopecky denied agents consent to search his residence."

¶ 4 On October 14, 2011, a preliminary hearing on the charges was held before the Honorable E. Dan Kimmel. The State called Special Agent Jonathan Edwards as a witness. Edwards stated that at approximately 3:30 p.m. on September 26, 2011, he

approached the defendant's residence, accompanied by Special Agent Michael Halliday and Inspector Harbison, none of whom were uniformed. Edwards noted that upon his arrival, he observed the defendant's basement windows were boarded shut, which in his experience as a Southern Illinois Drug Task Force member suggests the possibility of an indoor cannabis growing operation. Edwards stated that they were at the defendant's house because they had received information that the defendant was in possession of cannabis-growing equipment inside his residence; a subsequent criminal history check had revealed that the defendant had been charged but not convicted with the manufacture and delivery of cannabis in 2005 in Sangamon County. Edwards opened the storm door outward in order to knock on the interior door.[1] Edwards testified that upon knocking on the interior door, it opened approximately two inches. At that point, he smelled what he believed to be the odor of raw cannabis. Edwards stated that he then yelled "Stephen" into the house, and the defendant came to the door and stepped outside the residence. Edwards maintained that the door to the residence was left open. After the defendant exited the residence, Edwards identified the men as agents with the task force and inquired if he was growing cannabis inside his residence. The defendant did not respond to this inquiry. Edwards then testified that he subsequently asked the defendant if he was growing 500 plants, to which the defendant replied that he was not; when asked if he was

[1]Though Agent Edwards did not testify specifically about opening a storm door in order to reach the interior residence door (this was adduced from the defendant's hearing on his motion to suppress statements and evidence), neither party disputes its veracity.

growing 20 plants, the defendant responded, "I'm not saying." Edwards noted that the defendant appeared very nervous. Edwards stated that he then sought consent to search the residence, which the defendant denied. When asked whether he remembered the defendant requesting legal counsel, Edwards believed that the defendant said "maybe [he] should talk to an attorney before giving us consent," and that Agent Halliday offered the defendant the use of his cell phone. Edwards stated that he told the defendant that he was free to leave at any time, but that he could not reenter the residence. Edwards then left to apply for a search warrant while the other officers waited with the defendant. While Edwards was gone, Trooper Bundren, a uniformed officer, arrived at the residence. Edwards stated that everyone was still standing outside the residence upon his return with the warrant. A search of the home revealed packaged cannabis, loose cannabis, U.S. currency, a manual scale, a face mask respirator, and a three-stage growing operation of cannabis plants in the basement. After Edwards' testimony, neither party had any further evidence to present. At the conclusion of the preliminary hearing, the court found probable cause as to the charges.

¶ 5 On January 23, 2012, the defendant filed a motion to suppress evidence and arrest, arguing that his rights had been violated under the fourth, fifth, sixth, and fourteenth amendments to the United States Constitution and article I, sections 2, 6, and 10, of the Constitution of the State of Illinois. The defendant argued that the agents' initial opening of his interior door constituted an illegal search, resulting in evidence that should be excluded as fruits of an illegal search; that the subsequently obtained search warrant was defective where its vague and conclusory complaint did not establish probable cause,

resulting in an illegal arrest and detention of the defendant's person; and that his statements made subsequent to these illegalities should be suppressed because they were the product of unconstitutional conduct on the part of the law enforcement authorities.

¶ 6 On June 7, 2012, a hearing was held on the defendant's motion to suppress before Judge Kimmel. The defendant testified that he was home alone on the date of the incident. Through his window, he saw three individuals exit a white SUV and begin to head towards his home. The defendant testified that he heard knocking on the door, followed by approximately 30 seconds of silence. The defendant stated that he then heard the door creaking open, without an accompanying knock, and a voice calling: "Mr. Kopecky, come out here. We would like to speak to you." The defendant felt he had no choice but to go to the door, as he thought they had opened the door and might come inside. The defendant testified that when he reached the doorway, the interior door was open a foot or more and the aluminum storm door was being held open by Edwards. He agreed that he did not see anyone enter his home.

¶ 7 The defendant stated that he was asked to step outside. The defendant maintained that after complying with this request, he closed the interior door behind him. The defendant stated that he denied participating in a cannabis-growing operation, and he also denied the agents' request for consent to search his residence. The defendant testified that he then requested to call his father, and maintained that he had explicitly stated to the agents that his father was his attorney, and that was the reason he wanted to call him. He first sought to go inside and retrieve his cell phone, but was told that unaccompanied access was prohibited. The defendant stated that he was told that he was "free to go" but

could not go inside his home. The defendant stated that he was told that they could do this "the easy way or the hard way" and that if the defendant made them get a search warrant or he called an attorney, then they would "go hard" on him. Though Edwards offered the defendant the use of his cell phone, the defendant stated that he declined due to the lack of privacy and his suspicion that the phone was bugged. He testified that even though he was told that he could retrieve his cell phone if he was accompanied inside by one of the agents, he declined in order to protect the privacy of his home. The defendant stated that this back-and-forth–the agents' request to search and his requests to place a call to his father–continued for approximately 30 minutes.

¶ 8 The defendant testified that the agents eventually seemed to realize that he was not going to consent, and Edwards left to pursue the search warrant. Trooper Bundren arrived shortly thereafter. The defendant testified that during this time, he decided that the benefits of speaking to legal counsel outweighed the detriment of being overheard, and he requested the previously offered use of the agent's cell phone. However, the defendant was told that it was too late, as Edwards had already gone to apply for the search warrant. A second request was likewise denied. After Edwards returned with the warrant, a search was conducted while the defendant remained outside. After the search, the defendant was handcuffed, taken inside, and given his *Miranda* rights. He testified that he was given these rights twice, because it was noisy during the search; he stated that he did not hear the right-to-an-attorney clause either time. The defendant stated that he then made incriminating statements to Edwards, Harbison, and Halliday. The defendant stated that he did not tell any of the officers that he no longer wished to speak to an

attorney, and did not initiate the incriminating conversation. The defendant stated that he "felt like [he] had to" answer questions at that point, as he had been denied his attempts to call his father, was already in custody, and was tired and hungry. The defendant's counsel presented no other witnesses.

¶ 9 The State moved for a finding that the defendant had not met his *prima facie* burden. Specifically, the State argued that no illegal search had occurred, as the officers were never seen inside the defendant's residence until after the search warrant arrived; that the defendant's sixth amendment right to counsel had not attached at the time he requested to call his father, as he was not under arrest at that point; and that the defendant's fifth amendment *Miranda* rights did not attach until he was under arrest, which did not happen until after the officers executed the search warrant. The defendant's counsel responded that the evidence supports the possibility of an illegal entry, as the defendant maintained that both doors were closed before the officers arrived, yet ended up open–suggesting "the agents opened the inner door and that would be an illegal entry into the house. They had no warrant at that time." Defense counsel also noted that "you can't use an initial illegality to get probable cause to get a search warrant later on." Defense counsel also argued that the denial of the defendant's request for counsel violated *Edwards v. Arizona*, 451 U.S. 477 (1981), which states that a person need not be under arrest for his fifth amendment rights to attach; he need only be an obvious suspect in an investigation, which was the case here. Finally, defense counsel noted the issues on the face of the warrant, in that there was no probable cause to issue it.

¶ 10 In rebuttal, the prosecution noted that there was no evidence regarding the warrant presented at the hearing. The prosecution also disputed defense counsel's *Edwards* argument, arguing that the defendant was given several options for calling his father, and the evidence indicated that any incriminating statements were made only after the defendant had been arrested and given *Miranda*. After this exchange, the court stated that "[a]fter considering the testimony of [the defendant] and reviewing the written motion to suppress, the Court finds that the defendant's motion to suppress evidence and arrest should be denied, and it is hereby denied."

¶ 11 On July 5, 2012, the defendant filed a motion to reconsider. As Judge Kimmel had retired, the case was reassigned to the Honorable Kimberly Dahlen. The court denied the motion on September 4, 2012.

¶ 12 The defendant's stipulated bench trial resulted in a December 10, 2012, conviction on both counts. His motion for a new trial, which contended that the trial court erred in denying his motion to suppress evidence and arrest, was denied on January 30, 2013. The defendant appeals.

¶ 13 We note at the outset that neither the warrant nor a transcript of the preliminary hearing was introduced as evidence at the suppression hearing, and the record indicates that the suppressing judge gave no consideration to them. However, this court is not limited to evidence presented at the suppression hearing; upon review of a defendant's motion to suppress, the entire record may be considered to determine whether an officer made an arrest or seizure with probable cause. *People v. Dennison*, 61 Ill. App. 3d 473, 477 (1978). With the entirety of the record before us, we find that the ambiguity

surrounding the opening of the defendant's interior door, which allowed the officers to detect the odor that served as the basis for the search warrant's probable cause, requires this case to be remanded for a continuation of the suppression hearing on the merits.

¶ 14 In reviewing a trial court's ruling on a motion to suppress, mixed questions of fact and law are presented. *People v. Jones*, 215 Ill. 2d 261, 267 (2005). Findings of fact will be upheld by a reviewing court unless they are against the manifest weight of the evidence, as a circuit court is in the superior position when determining witness credibility and resolving conflicts in testimony. *Id*. at 268. However, a reviewing court may undertake its own assessment of the facts in relation to the issues presented and draw its own conclusions when deciding what relief should be granted; therefore, the ultimate question of whether the evidence should be suppressed is reviewed *de novo*. *Id*. As the suppressing court in this instance made no express findings of fact, this reviewing court must presume that the trial court credited only the testimony that supports its ruling. *People v. Winters*, 97 Ill. 2d 151, 158 (1983). However, because the only evidence before the court was the defendant's testimony, we find that the ruling in favor of the State at that point in the proceedings was premature and thus erroneous.

¶ 15 The defendant bears the burden of proof on a motion to suppress. 725 ILCS 5/114-12(b) (West 2010). Upon making a *prima facie* showing that evidence was obtained as a result of an illegal search, the State must meet the defendant's showing, although the ultimate burden remains with the defendant. *People v. Gipson*, 203 Ill. 2d 298, 306-07 (2003). A *prima facie* showing means that the defendant has the primary responsibility for establishing factual and legal bases for the motion to suppress. *People*

v. Berg, 67 Ill. 2d 65, 68 (1977). Where the basis for the motion is an allegedly illegal search, it is incumbent on the defendant to establish both that there was a search and that it was illegal. *Id*. As discussed above, we think that the defendant met this burden, and the court's ruling to the contrary was error.

¶ 16 A search is a governmental intrusion into a reasonable and actual expectation of privacy. *Kyllo v. United States*, 533 U.S. 27, 33 (2001). An invasion of the home "by even a fraction of an inch" violates this tenet. *Silverman v. United States*, 365 U.S. 505, 512 (1961). The home's curtilege is included in this sacrosanct area, and the government may not lurk in the area around the home, seeking evidence. *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. *Kyllo*, 533 U.S. at 33. Where an initial search is unlawful, it cannot form the basis for the issuance of a search warrant, and evidence so obtained is inadmissible. *People v. Bowen*, 164 Ill. App. 3d 164, 177 (1987).

¶ 17 The complaint for the search warrant states that through the partially open door, the officers detected the scent of raw cannabis. At the suppression hearing, the only evidence presented was the defendant's testimony regarding the incident. If this testimony is to be believed, the defendant's interior door was closed before the officers arrived; consequently, it could only have been opened through the actions of the officers. While we recognize that "a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do" (internal quotation marks omitted) (*Jardines*, 133 S. Ct. at 1416), it is also clear that the officer

may invade no further without a warrant. If the basis of the warrant–the odor of cannabis coming from inside the home–was the result of Edwards' intentional intrusion into the defendant's home, then Edwards' subsequently obtained warrant would be based on illegally obtained evidence, because opening the interior door permitted the officers to acquire information that they would not have been otherwise entitled to detect. This scenario makes out the defendant's *prima facie* showing of an illegal search that, if unrebutted, would result in suppressible evidence. We note, of course, that the warrant complaint indicates that the defendant answered the officer's knock and left the door open behind him; Edwards' testimony at the preliminary hearing, which indicates that the door opened upon knocking, further muddles–if not outright contradicts–the warrant complaint. In short, the factual discrepancies among the warrant complaint, the preliminary hearing testimony, and the suppression hearing testimony must be resolved, and this remand order for a presentation of the State's evidence will allow the suppressing court to draw the appropriate conclusion on the search's legality and the appropriateness of suppressing the disputed evidence.

¶ 18 As we are vacating the judgment below, we decline to address the defendant's remaining contentions on appeal. For the foregoing reasons, we vacate the order denying the defendant's motion to suppress evidence and remand for presentation of the State's evidence.

¶ 19 Judgment vacated; cause remanded for further proceedings.