

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 191128

Lenawee Circuit Court

MATTHEW R. MAGNUS,

LC No. 95-006414-FC

Defendant-Appellant.

Before: Holbrook, Jr., P.J., and Fitzgerald and Smolenski, JJ.

FITZGERALD, P.J. (concurring.)

In light of the fact that defense counsel merely asked the trial court to review the district court's decision on the motion to suppress and did not request an evidentiary hearing, I concur with the majority's conclusion that on these facts defendant has not established that the trial court erred in relying upon the findings of the district court. However, I disagree with the majority's suggestion that the Supreme Court intended, by the adoption of MCR 6.110(D)(1), to deny a defendant the right to an evidentiary hearing in the trial court in those cases where an evidentiary hearing was held in district court. In my opinion, MCR 6.110(D)(1) simply provides *authority* for a trial court to make a determination of a party's motion to admit or exclude evidence based on a prior evidentiary hearing. I do not believe that the court rule was intended to deny an evidentiary hearing in the trial court, however, if such a hearing is sought by a party. Thus, I would hold that a defendant is entitled to an evidentiary hearing before both the district court and the trial court.

I also disagree with the majority's acknowledgment that there is tension between *People v Talley*, 410 Mich 378; 301 NW2d 809 (1981) and MCR 6.110(D). In *Talley*, the defendant did not bring a motion to suppress before the district court, but did bring such a motion before the trial court. This Court held that a trial court may not rule on a defendant's motion to suppress based on the *transcript of the preliminary examination* alone. 410 Mich at 391. The court rule requires at least a prior evidentiary hearing on which the trial court can base a decision on a motion to suppress, see MCR 6.110(D)(1), and MCR 6.110(D)(3) requires a new evidentiary hearing in the trial court where there was no prior evidentiary hearing. Thus, MCR 6.110(D) is harmonious with *Talley*.

/s/ E. Thomas Fitzgerald