

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

PATRICK ALLEN MARTIN,

Defendant-Appellant.

UNPUBLISHED

September 25, 2003

No. 241075

Roscommon Circuit Court

LC No. 98-003587-FC

Before: Smolenski, P.J., and Markey and Wilder, JJ.

PER CURIAM.

After remand to the trial court, defendant again appeals by right his convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b, following a jury trial and his sentence of twenty-five to fifty years' imprisonment for second-degree murder, to be served consecutive to two years' imprisonment for felony-firearm. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm the trial court's denial of defendant's motion to suppress and, therefore, affirm defendant's conviction and sentence.

I. Facts and Proceedings

On the afternoon of March 29, 1998, Roscommon County Sheriff's Deputy Jack Sheppard responded to a report of a shooting at defendant's residence. After Deputy Sheppard arrived, he ordered the occupants of the residence to come outside. Defendant crawled out of the home, visibly wounded, and told Deputy Sheppard, "She just fired again." Deputy Sheppard then entered the home and saw defendant's wife, Dawn, lying on the living room floor. He saw a rifle on the floor next to her and noticed six spent shell casings, various bullet holes, and a large amount of blood in the vicinity. Paramedics were called to the scene, and they took defendant and his wife to the hospital. Dawn Martin died from the wounds she sustained in the altercation. At trial, the prosecution alleged that defendant shot and killed Dawn. Defendant claimed, however, that Dawn had committed suicide.

After defendant and his wife were taken to the hospital, Deputy Sheppard requested that crime lab personnel come process the scene. Before leaving to interview the neighbor who placed the 911 call, Deputy Sheppard directed Deputy Steve LeMire and Deputy Jerry Wallington to stand guard outside of the home.

Around 4:00 p.m., a detective, Lieutenant James Sullivan, and two forensic scientists, Thomas Holcomb and Jennifer Stites, from the Michigan State Crime Laboratory arrived on the scene. A third forensic scientist, Connie Swander, arrived on the scene around 6:25 p.m. The actions of these individuals form the basis for defendant's argument in this case. It is undisputed that these individuals entered defendant's home before the search warrant was issued around 12:00 a.m. on March 30, 1998, and that they collected evidence at some time after their entry.

Approximately one week before trial, defendant moved to suppress the evidence obtained as a result of the search of the premises. Defendant argued that the scientists' entry into the home and collection of evidence without prior authorization of a search warrant constituted an illegal search. The prosecution opposed the motion, arguing that the evidence was admissible because Deputy Sheppard, who lawfully entered the premises, could have seized the evidence that was in his plain view. The trial court denied defendant's motion, stating in its written opinion that Deputy Sheppard observed evidence in plain view and:

When the forensic team was called to the scene they continued to process the evidence which was readily observable.

All of the evidence which is the subject of this motion was in plain view and could have been secured by the deputies—nothing occurred in gathering samples that was uniquely related to the forensic team. These issues are a matter of 'inevitable discovery' and thus the request to suppress should be denied.

* * *

In this case, there is no doubt that the evidence seized could have easily been legally discovered. Deputy Sheppard had a sufficient amount of information gained from his plain view observations that would have justified (and actually did justify) a search warrant being issued.

In his first appeal of right, defendant argued that the warrantless entry into his home, occurring after the exigency that justified Deputy Sheppard's entry into the home ended, violated the Fourth Amendment and United States Supreme Court precedent including *Mincey v Arizona*, 437 US 385; 98 S Ct 2408; 57 L Ed 2d 290 (1978), and *Thompson v Louisiana*, 469 US 17; 105 S Ct 409; 83 L Ed 2d 246 (1984). Therefore, defendant claimed, the evidence seized as a result of that entry should have been suppressed. This Court disagreed and affirmed the trial court's ruling,¹ distinguishing this case from the "murder scene" searches condemned in *Mincey* and *Thompson*. This Court agreed with cases from other jurisdictions that permit a second entry into a residence to process and seize evidence that could have properly been seized during a prior, recent legal entry into the residence. See e.g., *Clark v United States*, 593 A 2d 186 (DC App, 1991); *State v Johnson*, 413 A2d 931 (Me 1980); *People v Reynolds*, 672 P2d 529 (Colo, 1983). Because it was unclear from the record whether the forensic scientists seized only that evidence

¹ Unpublished opinion per curiam, decided December 26, 2000 (Docket No. 217195).

that was in Deputy Sheppard's plain view, this Court remanded this case to the trial court for a factual determination of this issue.²

Defendant sought leave to appeal this Court's decision in the Supreme Court. While his application was pending, plaintiff filed a motion to hold defendant's application in abeyance and to remand this case to the trial court for an evidentiary hearing. In its motion, plaintiff stated that although the parties previously operated under the assumption that the forensic scientists seized evidence before the warrant was issued, plaintiff learned, after this Court issued its opinion, that around 8:00 p.m. on March 29, 1998, the forensic scientists were directed to cease their activities until a search warrant could be obtained and that the scientists complied with that directive. Because the evidence was seized after the search warrant was obtained, plaintiff asserted that any decision by the Supreme Court concerning the reentry into defendant's home would be, in essence, an advisory opinion, given that the scientists did not seize evidence as a result of the entry until after the warrant was issued.

In lieu of granting leave to appeal, in an order dated November 20, 2001, the Supreme Court vacated this Court's opinion and remanded the case to this Court with instructions to remand to the trial court "for a hearing on the matters raised in plaintiff's motion to remand, plus any additional matter raised by defendant concerning the search." 465 Mich 909; 638 NW2d 46 (2001). The Court further ordered that "[a]t the end of the hearing, the circuit court must resolve any factual and legal issues raised and the aggrieved party may have an appeal of right from such determination. The motion to remand is GRANTED." *Id.* This Court subsequently remanded this case to the trial court in compliance with the Supreme Court's order.

On April 12, 2002, the trial court conducted the evidentiary hearing as ordered and received testimony from four witnesses: Detective Tim Lenhard, the officer who directed the scientists to stop working until the search warrant could be obtained, and Holcomb, Swander, and Stites (whose last name had changed to Patchin by the time of the hearing). Lenhard testified that he arrived at the scene around 7:45 p.m. and found the forensic scientists standing in the doorway of defendant's home. When he arrived, the forensic scientists were not wearing the gowns they wear while processing crime scene evidence. After discussing with them that a warrant had not been obtained, Lenhard instructed them to stop what they were doing. Lenhard then called the prosecuting attorney, initiated procedures for requesting a search warrant, and left the premises. He called the team of scientists around 12:10 a.m. on March 30, 1998, and told them that a warrant had been issued and that they could resume their work.

Holcomb testified that he arrived on the scene with Stites and Lieutenant Sullivan at 4:20 p.m. on March 29, 1998. When Holcomb arrived, he took photographs of the outside of the mobile home, then went inside and took "non-specific" photographs of the home's layout.³

² On March 26, 2001, however, the parties filed a stipulation indicating that "all the material evidence examined and seized by members of the Michigan State Police Crime Lab had been seen in plain view by Deputy Sheppard during his earlier lawful entry of the residence," thus dispensing of the need for the trial court to address the issue.

³ According to Holcomb, the "non-specific" photographs did not focus on any particular piece of
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Jennifer Stites testified that upon arrival at the scene, she began processing evidence outside the home, including collecting a shirt, a cigarette lighter, and blood found inside a vehicle. Approximately thirty minutes to one hour after her arrival, she went inside the home and began making observations, including observing blood spatter patterns, in the living room and kitchen. Swander arrived around 6:25 p.m., went inside, and began discussing the case with the others on the scene. Upon entering the home, she, too, observed blood spatter patterns in the living room and kitchen.

Each of these individuals testified that they did not process or analyze any evidence inside the residence before Detective Lenhard arrived around 7:45 p.m. After he arrived and instructed them to stop working until a warrant could be obtained, the three stopped working, but stayed inside the mobile home because it was raining outside. They testified that they spent much of their down time sitting on sofas in the living room talking about, in general, what the blood spatter patterns might indicate. When they stopped working, the only step that had been taken to preserve evidence was placing markers near the shell casings on the floor to prevent people from stepping on them.

The trial court found that the testimony received during the hearing was credible and that the officers did not perform an invasive search. The trial court concluded that evidence that “is in the plain view from one officer can be used by another officer to draw a conclusion, especially if it’s noninvasive. Anything that was invasive was as result of and occurred after the search warrant, so that is admissible.” Accordingly, the trial court denied defendant’s motion.

Defendant again appeals the trial court’s denial of his motion to suppress.

II. Standard of Review

When reviewing a trial court’s decision concerning a motion to suppress, this Court reviews the trial court’s findings of fact for clear error and reviews de novo the trial court’s interpretation of the law or application of a constitutional standard to uncontested facts. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

III. Analysis

Defendant again argues on appeal that the warrantless entry into and search of his home by the forensics officers violates *Thompson, supra*. We disagree.⁴

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evidence. “Specific” photographs were not taken until after the warrant had been issued.

⁴ On remand to the trial court, in its brief opposing defendant’s motion to suppress, plaintiff claimed that the forensic scientists did not search the premises because they merely processed evidence that was in Deputy Sheppard’s plain view. Although the trial court noted that the forensic scientists made observations after they entered defendant’s home, it did not make a legal finding whether this constituted a “search” for Fourth Amendment purposes. Neither party addresses on appeal whether the scientists’ presence in the home constituted a “search,” and we do not address the issue, other than to note that “a search for purposes of the Fourth Amendment occurs when the government intrudes on a reasonable, or justifiable, expectation of privacy” and
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In *Thompson*, the United States Supreme Court reiterated the rule announced in *Mincey* that a general “murder scene” exception to the warrant requirement does not exist. *Thompson, supra* at 21. In *Thompson*, homicide investigators conducted a “general exploratory search for evidence” after deputies had responded to a report of a homicide and searched the residence for suspects or other victims. *Id.* at 18-19. The Court held that the warrantless search conducted by the homicide investigators did not come within any recognized exception to the warrant requirement and, therefore, violated the Fourth Amendment, as well as *Mincey*. *Thompson, supra* at 20-21.⁵

The instant case is clearly distinguishable from *Mincey* and *Thompson* because no generalized search of premises occurred. On the contrary, as defendant stipulated, “all material evidence examined and seized” during the second entry into defendant’s home was seen in Deputy Sheppard’s plain view when he was lawfully present in the home. Neither *Mincey* nor *Thompson* addresses the situation presented in this case.

As a substantial number of other jurisdictions have decided, and like the panel before us, we conclude that when police officers enter a private residence pursuant to exigent circumstances and observe evidence in plain view but do not seize the evidence, a subsequent warrantless entry shortly after the first entry to process evidence that could have legally been seized by the officer who first viewed the evidence does not violate the Fourth Amendment. *State v Coulter*, 67 SW3d 3, 44 (Tenn Crim App, 2001); *Wofford v State*, 952 SW2d 646, 653 (1997); *Taylor v Mississippi*, 733 So2d 251, 255-256 (Miss, 1999). The “second entry” in this case, “restricted in nature and scope to securing the evidence observed in plain view” by Deputy Sheppard, constitutes a permissible continuation of Deputy Sheppard’s search. *Wofford, supra* at 23; see also *Taylor, supra* at 256.

Defendant unsuccessfully attempts to distinguish the warrantless “second entry” that occurred here from the reentry in *Michigan v Tyler*, 436 US 499, 501-503; 98 S Ct 1942; 56 L Ed 2d 486 (1978). In *Tyler*, fire department officials reentered a building that ignited around midnight on January 21, 1970, a number of times to investigate the cause of the fire. *Id.* Defendant asserts that *Tyler* applies only to fire investigations and that the exigency in *Tyler* continued at the time of the warrantless reentry approved of by the Court. On the contrary, the Court stated in *Tyler* that Fourth Amendment principles applicable to law enforcement officers also apply to fire investigators. *Id.* at 504-505. Conversely, then, it follows that the Fourth Amendment principles applied in *Tyler* to fire investigators also apply to law enforcement officers. Additionally, the Court’s decision upholding the early morning reentries of the

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that “the Fourth Amendment viciously protects one’s privacy interest in the home as against warrantless governmental intrusions.” *People v Taylor*, 253 Mich App 399, 404, 406; 655 NW2d 291 (2002). Defendant’s argument assumes that a search occurred, however, and, as plaintiff asserts, defendant’s position leaves this Court to decide the identical issue decided by the first panel of this Court to address this case.

⁵ More recently, in *Flippo v West Virginia*, 528 US 11; 120 S Ct 7; 145 L Ed 2d 16 (1999), the United States Supreme Court held that a warrantless search of a closed briefcase, which the trial court said was opened ““in the ordinary course of investigating a homicide,”” violated the rule announced in *Mincey*. *Id.* at 12, 14.

premises did not rest on a finding that exigent circumstances still existed when the fire investigators returned to the scene. Rather, noting that visibility hampered investigation efforts while the fire was being extinguished, the Court stated that

[l]ittle purpose would have been served by [the officers] remaining in the building, except to remove any doubt about the legality of the warrantless search and seizure later that same morning. Under these circumstances, we find that the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence. [*Id.* at 511.]

Regarding the searches that occurred after January 22, 1970, however, the Court held that these searches “were clearly detached from the initial exigency and warrantless entry” and were, therefore, unlawful. *Id.* Similarly, in the instant case, Deputy Sheppard was not equipped to seize forensic evidence upon his initial entry into defendant’s residence. His first responsibility was to assist the victims of the shooting and secure the premises. It would have made little sense to require him to remain in the residence until crime lab personnel arrived to assist him in seizing the evidence.⁶ We borrow from and apply here the words of the Court in *Taylor, supra, quoting Smith v State*, 419 So 2d 563, 572 (Miss, 1982):

“The actions of the [forensic scientists] (after the re-entry of the [mobile home]) were merely to effectuate the physical seizure of articles in plain view which [Deputy Sheppard] would have been able to seize had not the circumstances been so “exigent.” There was no unwarranted delay in time, nor was there any expansion of the scope of the search. The fact that the actual physical taking of the items into the custody of the police was effectuated by [forensic scientists] who [were] trained to preserve the evidentiary value of the objects, rather than by the first officers to view the objects, is not significant.”

Affirmed.

/s/ Michael R. Smolenski
/s/ Jane E. Markey
/s/ Kurtis T. Wilder

⁶ The instant case is also distinguishable from *DiCesare v Stuart*, 12 F 3d 973 (CA 10, 1993), and *Bilida v McCleod*, 211 F 3d 166 (CA 1, 2000), where the initial investigating officers departed the scenes and returned later to make warrantless seizures. In the instant case, although Deputy Sheppard left the scene, the officers posted at the door kept the residence under police control at all times.