

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
August 7, 2014

v

DATRIUS LAMON MCKINNEY,
Defendant-Appellee.

No. 315483
Oakland Circuit Court
LC No. 2012-240403-FH

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

AUBREY LEA TILLIS,
Defendant-Appellee.

No. 315484
Oakland Circuit Court
LC No. 2012-241225-FH

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

GLEICHER, J. (*concurring*).

I concur with the result reached by the majority. I write separately to elaborate why defendant Tillis possessed a reasonable expectation of privacy from governmental intrusion in McKinney’s home, and to highlight the reasons that the independent source doctrine does not require a remand in this case.

In *Jones v United States*, 362 US 257; 80 S Ct 725; 4 L Ed 2d 697 (1960), overruled in part on other grounds by *United States v Salvucci*, 448 US 83, 85; 100 S Ct 2547; 65 L Ed 2d 619 (1980), the United States Supreme Court permitted a defendant to invoke the protections of the Fourth Amendment under circumstances similar to those presented here. A friend had given the defendant in *Jones* the use of an apartment. The defendant had a key to the apartment and stowed some clothing there, but had slept overnight in the premises “maybe a night.” *Jones*, 362 US at 259. Despite the defendant’s lack of any traditional property right in the apartment, the Supreme Court held that a warrantless search of the premises violated the defendant’s Fourth

Amendment rights. *Id.* at 266. The Supreme Court reaffirmed this holding in *Rakas v Illinois*, 439 US 128, 143; 99 S Ct 421; 58 L Ed 2d 387 (1978), observing:

Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his “interest” in those premises might not have been a recognized property interest at common law.

The facts of the instant case closely resemble those of *Jones*. Tillis kept some possessions in McKinney’s home (the police reported finding a prescription pill bottle bearing Tillis’s name), had a key to the house, and exercised dominion and control over it. As the Supreme Court stated in *Rakas*:

One of the main rights attaching to property is the right to exclude others and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. [*Id.* at 144 n 12 (citation omitted).]

The evidence supports that Tillis and McKinney shared common authority over the premises, used them mutually, and enjoyed free access to them. Although the home was also Tillis’s workplace, these were not commercial premises where an expectation of privacy is less than that applicable to a private dwelling. See *New York v Burger*, 482 US 691, 700; 107 S Ct 2636; 96 L Ed 2d 601 (1987). Tillis was not merely present on the premises by coincidence or happenstance, but because he had a significant connection to the home that imbued him with an expectation of privacy therein. Thus, the trial court correctly concluded that Tillis could challenge the legality of the warrantless search.

I further concur with the majority’s conclusion that the prosecutor’s belated invocation of the independent source doctrine does not merit a remand for further consideration by the trial court. After hearing the evidence, the trial court determined that Tillis had not consented to a search of McKinney’s home, a finding that this Court may not disturb for the reasons described by the majority. Although the trial court believed that the search warrant application eventually signed by deputy Daniel Main “arguably” established probable cause for a search of McKinney’s home, I believe it falls decidedly short of that goal.

The affidavit recites that Main had witnessed the narcotics transaction conducted in the grocery store parking lot between Tillis and Harry Smith. Although the affidavit states that “this was the third time Tillis had left and returned to the residence within a 30 minute period,” the affidavit supplies no information regarding where Tillis went on the other two trips. During the hours of the surveillance, the police did not observe visitors to McKinney’s address who might have been buying narcotics. In my view, deputy Main’s surmise that “it seemed apparent that Tillis was making narcotics deliveries from 25 North Anderson” qualifies as pure conjecture. No evidence recited in the affidavit (other than that acquired during the warrantless search) linked McKinney’s *home* to narcotics activity. Moreover, the police surveilling McKinney’s home made no effort to apply for a warrant despite their suspicion that Tillis was selling narcotics in the nearby parking lot. And even after arresting Tillis, the police elected to conduct a

warrantless, unconsented search of a private home rather than seek a warrant. In my view, these facts render illegitimate the prosecutor's independent source claim.

Segura v United States, 468 US 796; 104 S Ct 3380; 82 L Ed 2d 599 (1984), exemplifies a proper use of the of the independent source doctrine. In *Segura*, the police arrested defendants in their apartment for drug trafficking. *Id.* at 799-800. While waiting for a search warrant to issue, the officers elected to "secure" the apartment by conducting a warrantless search. *Id.* at 800-801. Although this initial search was illegal, no information learned from it was used to procure the warrant. *Id.* at 814. Under those circumstances, the Supreme Court held that the independent source doctrine shielded the evidence obtained pursuant to the valid warrant from Fourth Amendment challenge. *Id.* The Court emphasized the *independent* nature of the evidence submitted to the magistrate:

None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged. [*Id.*]

Following *Segura*, in *Murray v United States*, 487 US 533, 542; 108 S Ct 2529; 101 L Ed 2d 472 (1988), the Supreme Court cautioned that a search warrant could not meet the criteria for an independent source "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."

Here, the illegal search of McKinney's home precipitated the officers' decision to seek a search warrant. No evidence suggests that the police would have pursued a search warrant based solely on their observations of Tillis's single trip to the parking lot. Furthermore, the warrant affidavit signed by Officer Main recited in great detail the multiple items of contraband discovered during the warrantless search, including the weapons giving rise to the firearms charges leveled against both defendants. When the information gleaned from the warrantless search is excised from the affidavit, the remaining allegations fall sort of establishing probable cause for a warrant to search McKinney's home. Although the affidavit is replete with conclusions and opinions about the behaviors of drug dealers, no specific or particularized facts linked McKinney's *residence* to Tillis's acts. In short, no evidence suggested that Tillis or McKinney kept drugs in the home. Accordingly, I agree with the majority that a remand for consideration of the independent source doctrine is unnecessary.

/s/ Elizabeth L. Gleicher