STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2011
v GARY JEROME WATKINS, Defendant-Appellant.	No. 301771 Oakland Circuit Court LC No. 2010-233514-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ERIC AUGUST WATKINS, Defendant-Appellant.	No. 301772 Oakland Circuit Court LC No. 2010-233511-FH

Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

This case involves two consolidated, interlocutory appeals. In Docket No. 301771, defendant, Gary Jerome Watkins (Gary), appeals by leave granted the trial court's orders: 1) denying his motion to suppress evidence and to dismiss on the basis of an unconstitutional search, and 2) denying his motion to dismiss and for an evidentiary hearing under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. In Docket No. 301772, codefendant, Eric August Watkins (Eric), appeals by leave granted the trial court's order denying his motion to suppress evidence and to dismiss on the basis of an unconstitutional search.

On appeal, both defendants argue that the trial court erred in denying their request for an evidentiary hearing on their motions to suppress the search warrant as related to entry on the premises and dismiss. Gary additionally argues that the trial court erred in denying his motion for an evidentiary hearing under the MMMA. Eric additionally argues that the trial court erred in determining that the search warrant affidavit established probable cause to search his vehicle. We vacate the trial court's orders denying defendants' motions to suppress and remand for an

evidentiary hearing on the motions. We affirm the trial court's order denying Gary's motion to dismiss the charges against him pursuant to the MMMA. We find no error in the court's ruling denying Eric's motion to suppress and dismiss as it pertained to the search of his vehicle.

I

Gary is charged with possession of methamphetamine, MCL 333.7403(2)(b)(*i*), two counts of possession of a firearm during the commission of a felony, MCL 750.227b, manufacture of 20 to 200 plants of marijuana, MCL 333.7401(2)(d)(*ii*), and possession of marijuana, MCL 333.7403(2)(d). Eric is charged with manufacture of 20 to 200 plants of marijuana, MCL 33.7401(2)(d)(*ii*), one count of possession of a firearm during the commission of a felony, MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d). The prosecutor brought the charges after a police search of defendants' home pursuant to a search warrant revealed a total of 21 marijuana plants growing in the home and the back yard, approximately 31 unloaded guns, 4,000 to 5,000 rounds of ammunition, three loaded semi-automatic pistols, and two ecstasy pills. Police officers also found a burnt "roach" inside a Mazda registered to Eric that was parked in the driveway. The district court bound defendants over for trial following the preliminary examination. Defendants subsequently filed the pretrial motions at issue here. Both defendants moved to suppress the evidence and to dismiss, and Gary moved to dismiss the charges against him pursuant to the MMMA. The trial court denied defendants' requests for evidentiary hearings and denied the motions. The trial court stayed the proceedings in both cases pending the resolution of defendants' applications for leave to appeal.

II

Both defendants argue on appeal that the trial court erred in denying their request for an evidentiary hearing on their motions to suppress the evidence seized during the execution of the search warrant. Although a trial court's decision whether to hold an evidentiary hearing is generally reviewed for an abuse of discretion, *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008), questions of law are reviewed de novo, *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). A trial court's decision on a motion to suppress is also reviewed de novo. *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009).

In *People v Talley*, 410 Mich 378; 301 NW2d 809 (1981), overruled in part *People v Kaufman*, 457 Mich 266 (1998), the Court held that "a motion to suppress evidence requires the holding of a full evidentiary hearing and any attempt to rule on such a motion on the basis of a preliminary examination transcript alone is inadequate and erroneous." *Id*. at 389. Our Supreme Court remanded the matter to the trial court for an evidentiary hearing on the motion to suppress. *Id*. at 392. The *Talley* Court stated, however, that "[t]he issue of whether opposing counsel may stipulate to the trial court's sole reliance on a preliminary examination transcript in passing on a motion to suppress evidence is not before us, and we therefore do not consider it." *Id*. at 392 n 4. In *Kaufman*, 457 Mich at 275-276, our Supreme Court addressed the question reserved in *Talley*,

stating that the Court had answered the question by its 1989 adoption of MCR 6.110(D).[1] *Id*. at 275. Hence, our Supreme Court "overrule[d] *Talley* insofar as it has been understood to mean that counsel cannot agree to have a motion to suppress decided on the basis of the record of the preliminary examination." *Id*. at 276.

The prosecutor in the instant case argues that under *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), a challenge to a search warrant affidavit must allege deliberate falsehood or reckless disregard for the truth in order to entitle the defendant to an evidentiary hearing. *Franks*, however, involved a challenge to the truthfulness of an affidavit. The prosecutor argues that *US v Karo*, 468 US 705; 104 S Ct 3296; 82 L Ed 2d 530 (1984), applied *Franks* to a claim that information in a search warrant was obtained from a Fourth Amendment violation. *Karo*, 468 US at 719, cited *Franks*, 438 US at 172, for the proposition that information obtained from a Fourth Amendment violation and included in a search warrant affidavit would "invalidate the warrant for the search of the house if it proved to be critical to establishing probable cause for the issuance of the warrant. However, if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant was nevertheless valid." *Karo* did not cite *Franks* for the proposition that a defendant alleging that information in a search warrant affidavit or search warrant was obtained illegally must allege deliberate falsehood or reckless disregard for the truth. The prosecution also cites *People v Waclawski*, 286 Mich App 634, 701; 780 NW2d 321 (2009), without further explanation or argument. *Waclawski*, 286 Mich App at 701, did apply *Franks*, but involved a challenge to the truthfulness of the factual statements in an affidavit. *Talley*, 410 Mich at 380, is a Michigan Supreme Court case, decided after *Franks*, that specifically addresses whether a defendant is entitled to an evidentiary hearing on a motion to suppress. For that reason, we disagree with the prosecutor that *Franks*, rather than *Talley*, applies here.

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[1] MCR 6.110(D) provides:

> If, during the preliminary examination, the court determines that evidence being offered is excludable, it must, on motion or objection, exclude the evidence. If, however, there has been a preliminary showing that the evidence is admissible, the court need not hold a separate evidentiary hearing on the question of whether the evidence should be excluded. The decision to admit or exclude evidence, with or without an evidentiary hearing, does not preclude a party from moving for and obtaining a determination of the question in the trial court on the basis of
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> (1) a prior evidentiary hearing, or
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> (2) a prior evidentiary hearing supplemented with a hearing before the trial court, or
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> (3) if there was no prior evidentiary hearing, a new evidentiary hearing.

Pursuant to both *Talley*, 410 Mich at 380, and *Kaufman*, 457 Mich at 275-276, an evidentiary hearing must be held on a motion to suppress absent a stipulation. In this case, defendants did not agree to have the motion to suppress decided on the basis of the preliminary examination record. On the contrary, they specifically requested an evidentiary hearing at the hearing on their suppression motions. Accordingly, the trial court erred in denying defendants' request for an evidentiary hearing and we vacate the court's orders denying defendants' motions to suppress and remand for an evidentiary hearing on the motions.

III

Gary also contends that the trial court erred in denying his motion to dismiss pursuant to the MMMA without holding an evidentiary hearing. "Questions of statutory interpretation are reviewed de novo." *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010). A trial court's decision whether to hold an evidentiary hearing is generally reviewed for an abuse of discretion. *Unger*, 278 Mich App at 216-217.

Section 4 of the MMMA, MCL 333.26424, provides various protections for qualifying patients and primary caregivers. Subsection (a) is relevant here:

> (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, *12 marihuana plants kept in an enclosed, locked facility*. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. [Emphasis added.]

"'Qualifying patient' means a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(h). "'Enclosed, locked facility' means a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient." MCL 333.26423(c).

Section 8 of the MMMA, MCL 333.26428, creates a defense to a prosecution involving marijuana. It provides, in relevant part:

> (a) Except as provided in section 7, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:
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> (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current

medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;

(2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and

(3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

(b) *A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a).* [Emphasis added.]

Section 7 of the MMMA, MCL 333.26427, places additional limits on the medical use of marijuana:

(a) *The medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act.*

(b) This act shall not permit any person to do any of the following:

(1) Undertake any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice.

(2) Possess marihuana, or otherwise engage in the medical use of marihuana:

(A) in a school bus;

(B) on the grounds of any preschool or primary or secondary school; or

(C) in any correctional facility.

(3) Smoke marihuana:

(A) on any form of public transportation; or

(B) in any public place.

(4) Operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana.

(5) Use marihuana if that person does not have a serious or debilitating medical condition.

(c) Nothing in this act shall be construed to require:

(1) A government medical assistance program or commercial or non-profit health insurer to reimburse a person for costs associated with the medical use of marihuana.

(2) An employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana.

(d) Fraudulent representation to a law enforcement official of any fact or circumstance relating to the medical use of marihuana to avoid arrest or prosecution shall be punishable by a fine of $500.00, which shall be in addition to any other penalties that may apply for making a false statement or for the use of marihuana other than use undertaken pursuant to this act.

(e) All other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act. [Emphasis added.]

In *People v Redden*, ___ Mich App ____; ___ NW2d ___ (2010) (slip op at 8-10), the majority rejected the prosecution's argument that the affirmative defense under section 8 was unavailable to the defendants because they did not possess valid registry identification cards at the time of the offense. The prosecution argued that section 7(a), incorporated by reference into section 8, required a defendant to have complied with section 4 in order to invoke section 8. The majority agreed with the defendants that "the MMMA provides two ways in which to show legal use of marijuana for medical purposes in accordance with the act. Individuals may either register and obtain a registry identification card under § 4 or remain unregistered and, if facing criminal prosecution, be forced to assert the affirmative defense in § 8." *Id*. at 10. It declined to address the prosecution's argument that a section 8 defense was not available because the marijuana was not kept in an "enclosed, locked facility" because defendants had not raised the issue on appeal and it had not been fully briefed by the parties. It noted, however, "that the language concerning an 'enclosed, locked facility' is set forth in the context of § 4, not in the context of § 8." *Redden*, ___ Mich App at ____ (slip op at 11 n 8.)

In *People v King*, ___ Mich App ___; ___ NW2d ___ (2011) (slip op at 4), the panel addressed the question left open in *Redden*: whether failure to comply with the requirements of section 4 forecloses a defendant from asserting the affirmative defense under section 8. The majority held that "the express reference [in § 8] to § 7 and § 7(a)'s statement that medical use of marijuana must be carried out in accordance with the provisions of the [M]MMA, requires defendant to comply with the growing provisions in § 4." *Id*. The majority also addressed the question of the meaning of "enclosed, locked facility," and held that a chain-link dog kennel that was open on the top and could be lifted off the ground did not meet the definition. *Id*. at 5-6. Nor did an unlocked closet meet the requirement. *Id*. at 6-7. The majority held that, because the

defendant failed to comply with the requirement under the MMMA that he keep the marijuana in an "enclosed, locked facility," the trial court abused its discretion in dismissing the charges against him. *Id*. at 7.

Thus, under *King*, ___ Mich App at ___ (slip op at 4), Gary was required to establish his compliance with the "enclosed, locked facility" requirement of MCL 333.26424(a), even though he was asserting a defense under section 8. It is abundantly clear from the preliminary examination testimony that he did not meet that requirement. Again, "'enclosed, locked facility' means a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient." MCL 333.26423(c). According to the preliminary examination testimony, when Novi Police Officer Jeff Brown entered the home, Eric and his fiancé were sitting in the dining room. Numerous marijuana plants were out in the open in various rooms of the house, including the sun room, family room, furnace room, and the bedrooms, as well as in a plastic greenhouse in the backyard. The sun room was directly behind the dining room where Eric and his fiancé were sitting. Officer Brown testified that the plants in that room were not locked up in any way and were in plain view from outside of the sun room. There were plants in the family room that were not hidden in any way. There were also plants growing inside a hallway closet with no door or drapes. The plants were visible from outside the closet. The plants in the backyard were in a "plastic zipper style greenhouse" with no lock. This manner of storage clearly does not meet the "enclosed, locked facility" requirement.

Section 8(b), MCL 333.26428(b), provides that "[a] person may assert the medical purpose for using marijuana in a motion to dismiss, and *the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a)*." (Emphasis added.) Nothing in this provision grants a defendant an automatic right to an evidentiary hearing once he files a motion to dismiss on the basis of the MMMA defenses. This section merely requires dismissal of marijuana charges where the defendant succeeds in establishing the elements of the section 8 defense at an evidentiary hearing. In general, the decision on a motion for an evidentiary hearing is within the discretion of the trial court, *Unger*, 278 Mich App at 216-217, and we decline to extend *Talley*, 410 Mich 378, which pertains to motions to suppress. Given the preliminary examination testimony clearly indicating that Gary could not establish his compliance with the "enclosed, locked facility" requirement, and his failure to explain why an evidentiary hearing was required on this particular question, the trial court did not abuse its discretion when it denied Gary's request for an evidentiary hearing and denied his motion to dismiss pursuant to the MMMA.

IV

Finally, Eric asserts that the trial court erred in denying his motion to suppress as it pertained to the evidence seized during the search of his vehicle. Again, we review de novo a trial court's decision on a motion to suppress. *Hyde*, 285 Mich App at 438.

In *People v Jones*, 249 Mich App 131; 640 NW2d 898 (2002), this Court addressed whether the defendant was entitled to suppression of the evidence seized from a vehicle found at the residence searched by police, where the vehicle was not specifically identified in the affidavit or search warrant as a place to be searched. *Id*. at 135. The *Jones* Court agreed with the analysis

in *United States v Percival*, 756 F2d 600, 612 (CA 7, 1985), in which the Seventh Circuit reasoned that a vehicle is personal property equivalent to a suitcase or handbag, and thus held "'that a search warrant authorizing a search of particularly described premises may permit the search of vehicles owned or controlled by the owner of, and found on, the premises.'" *Jones*, 249 Mich App at 139, quoting *Percival*, 756 F2d at 612.

In this case, both the search warrant affidavit and warrant identified "the person, place or thing to be searched" as "[a]ny and all rooms, spaces, compartments, safes, persons, vehicles, and out buildings located in or at the residential dwelling located at [defendants' address] . . . ." They identified "the property to be searched for and seized," in part, as:

> "[a]ll substances being in violation of the Michigan Public Health Code, specifically, but not limited to, marijuana; materials and equipment for manufacturing/handling said controlled substances, scales and weighing equipment for controlled substances, lists and records pertaining to the manufacture, possession, ownership and/or sales of controlled substances, lists and records of possession and/or ownership and/or residency of the above place to be searched . . . ."

The affidavit specifically stated that Officer Brown had observed, through gaps in the fence, "one large plant, approximately 3 to 4 feet tall sitting in a bucket under a grow light," and, in a different room, "another 5 grow lights hanging over several other green plants" that "were around 10 inches tall." The affidavit explained that drug traffickers commonly maintain records pertaining to the procurement, distribution, and storage of controlled substances, as well as drug paraphernalia "in locations to which [they] have frequent and ready access, i.e., homes, business[es], and automobiles." The affidavit stated that, according to Secretary of State records, Eric had a 2008 Mazda registered to the address in question and that his driver's license listed the same address.

Under *Jones*, 249 Mich App at 139, the affidavit's statements concerning the marijuana observed in the house and the records indicating that Eric resided there and that his Mazda was registered at that address established probable cause to search the entire premises, including Eric's vehicle. In his argument to the contrary, Eric focuses on the specific linkage the affidavit draws between drug *traffickers* and their vehicles, and points out that this case began as an investigation of a suspected marijuana growing operation, not a suspected trafficking operation. Indeed, Officer Brown acknowledged at the preliminary examination that the investigation began as an investigation of a "suspected grow operation." He specifically denied any initial suspicion that marijuana was being sold out of the house.

Nonetheless, because the affidavit cited records indicating that both defendants lived at the address where the marijuana was observed, the investigation properly encompassed both defendants. It was reasonable to assume that evidence relevant to the investigation of a marijuana *growing* operation, including records, receipts, or growing-related paraphernalia may be found in the suspects' vehicles. Moreover, the affidavit noted in particular that Eric had a previous conviction of possession of marijuana. That the affidavit identifies a specific possible linkage between the home and the vehicle that involves trafficking in no way suggests that the *only* possible linkage pertains to trafficking.

V

Because an evidentiary hearing is required on a motion to suppress unless the parties stipulate that the motion may be decided on the basis of the preliminary examination record and no such stipulation exists on this record, the trial court erred in denying defendants' requests for an evidentiary hearing on their motions to suppress. With regard to Gary's individual argument, given the preliminary examination testimony clearly indicating that he could not establish his compliance with the "enclosed, locked facility" requirement, and his failure to explain why an evidentiary hearing was required on this particular question, the trial court did not abuse its discretion when it denied Gary's request for an evidentiary hearing and motion to dismiss under the MMMA. With regard to Eric's individual argument, the trial court did not err in denying his motion to suppress and dismiss as it pertained to the search of his vehicle because the search warrant and search warrant affidavit established probable cause to search the entire premises, including the vehicle which was both on the premises and included within the scope of the warrant.

We vacate the trial court's orders denying defendants' motions to suppress the search warrant as related to entry on the premises and remand to the trial court for an evidentiary hearing on those motions. We affirm the trial court's order denying Gary's motion to dismiss the charges against him pursuant to the MMMA and affirm the court's ruling denying Eric's motion to suppress and dismiss as it pertained to the search of his vehicle. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause