UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2152

September Term, 2014

TYKISE MORRISON

v.

STATE OF MARYLAND

Meredith,
Hotten,
Nazarian,

JJ.

Opinion by Hotten, J.

Filed: November 10, 2015

Following the denial of his motion to suppress evidence by the Circuit Court for Baltimore City, appellant, Tykise Morrison, was convicted by a jury of two counts of being a prohibited person in possession of a regulated firearm in violation of Md. Code (Repl. Vol. 2011), §5-133 of the Public Safety Article, and one count of possession with intent to use drug paraphernalia in violation of Md. Code (Repl. Vol. 2012), §5-619 of the Criminal Law Article. The circuit court sentenced appellant on the possession of a regulated firearm convictions to a period of eight years of incarceration to run concurrently to one another and the first five years to be served without the possibility of parole. The court also sentenced appellant on the conviction of possession with intent to use drug paraphernalia to pay a $500 fine, which was suspended. Appellant noted a timely appeal and presents two questions for our review:

1. Did the circuit court err in ruling there was sufficient probable cause to arrest appellant?

2. Did the circuit court err in ruling there was sufficient probable cause for the search warrant to be issued?

For the reasons that follow, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL HISTORY[1]

The Arrest of Appellant's Housemate

Detective Joseph Wiczulis, of the Baltimore City Police Department, testified that on January 23, 2014, after he had received a tip from a confidential informant, he and two

[1] The following facts were elicited during a suppression hearing held on September 17, 2014. The circuit court issued its ruling on September 18, 2014.

other detectives were patrolling in an unmarked vehicle looking for James Anderson ("Mr. Anderson"). When Detective Wiczulis found Mr. Anderson, he observed him discard an object he believed, through his "knowledge, training and experience," to be "street-packaged CDS heroin." Mr. Anderson was thereafter arrested and placed in the police car with the detectives. While enroute to the Eastern District Police Station, Mr. Anderson announced that he had a firearm in his home and "we can go get [it] right now." Mr. Anderson also told the police that he shared the home with his girlfriend, Victoria Whye ("Ms. Whye"), and appellant. Thereafter, Detective Wiczulis then drove to appellant's residence.

Consent to Enter the Home and Plain View #1

When the detectives arrived at the house, Ms. Whye answered the door, invited them in, and consented to a search of the premises. As Ms. Whye was completing a "consent-to-search form," Detective Wiczulis became concerned that she might not have authority to grant consent because he had learned that she did not pay rent, and was not a "homeowner or any kind of lessee." Ms. Whye nonetheless confirmed that she lived in the home with Mr. Anderson and appellant, and that she shared the upstairs rear bedroom with Mr. Anderson. Ms. Whye also stated her mother, who did not live there, was visiting at the time with her boyfriend.

While Ms. Whye was filling out the consent form, Detective Wiczulis noticed sitting on a couch, in plain view, two live rounds of ammunition, and a ripped corner of a clear

plastic bag containing a white powder residue that he suspected to be CDS packaging material.

The Walk-through and Plain View #2

After observing the items on the couch, Detective Wiczulis decided to conduct a "walk-through" of the premises for "officer safety" to make sure nobody was hiding that could "ambush [him] later on." While conducting that walk-through, Ms. Whye's mother and her boyfriend were found upstairs and were escorted downstairs. The detectives walked through the entire house, opening closets and looking under beds, except they did not enter the basement because it was a "mess", and did not enter an upstairs bedroom because it was locked with a padlock. In the closet of the upstairs rear bedroom, Detective Wiczulis found ammunition stacked in boxes, and found Ziploc baggies on the dresser. The home was thereafter secured so that Detective Wiczulis could leave to apply for a search warrant.

Appellant's Arrival and Arrest

Just before Detective Wiczulis left to apply for the search warrant, appellant arrived at the home and was let inside by the detectives. Detective Wiczulis explained that appellant "acknowledged that, you know, it was his house . . . [h]e wasn't questioned or anything." Appellant also said the upstairs front bedroom was his. Appellant was thereafter placed under arrest, and in a search of his person incident to that arrest, a set of keys were recovered. Detective Wiczulis testified that he arrested appellant because he "knew that [appellant] was prohibited from possessing ammunition[]" and because of the CDS packaging and paraphernalia found in the home.

The Warrant and the Search

After a search warrant was obtained, the police returned and the home was searched. The front bedroom (which appellant had earlier identified as his) had a padlock on the door. The police used a key taken from appellant when he was arrested to open that door. Inside the room, police recovered packing material, glass vials, Ziploc baggies, and two handguns from a dresser drawer. They also found paperwork with appellant's name on it.

Motion to Suppress

Prior to trial, the defense moved to suppress any evidence recovered from appellant or during the search of the house. Detective Wiczulis was the only witness to testify during the suppression hearing.

The defense first argued that the detectives lacked probable cause to place appellant under arrest when he entered the home. With respect to the detective's assertion that appellant was arrested for being a prohibited person in possession of ammunition, the defense contended that the detective's vague assertion was not backed up by any specific facts and therefore did not amount to probable cause. The defense also contended the CDS paraphernalia found in his home did not amount to probable cause for an arrest.

In addition, the defense argued that the walk-through was an unjustified warrantless intrusion and therefore, the information gleaned therefrom should not have been contained in the warrant application. The defense contended that without the illegally learned information, the warrant application, which had mentioned both the items found in plain

view during the walk-through and the items found on the couch when the detectives first entered the home, lacked probable cause.

The Ruling on the Suppression Motion

The suppression court found that Detective Wiczulis lacked probable cause to arrest appellant because of a lack of any factual basis to support his assertion that appellant was a legally prohibited person from possessing ammunition. The court found that the detectives had probable cause to arrest appellant based on appellant's possession of CDS paraphernalia found on the couch in plain view when the officers first entered the home. After noting that the officer had extensive experience in narcotics investigations, the court found as follows:

> But what becomes important is that while in the living room of this relatively small house, I think it was described as having seven rooms but the bedroom was described, or I'm sorry, the living room, which is the common area, was about 10 x 12, a small room. And in that room, the officer testified uncontradicted, in plain view on a couch was a cut off, ripped corner of a clear plastic bag which contained, the officer testified it contained white powder which was suspected to be cocaine as noted in the affidavit, along with I believe they saw two live rounds or two bullets also in plain view.
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> The officer testified again that he believed it was, and based on his extensive expertise which is set out again in State's Exhibit No. 1, I will find that he had the background, the expertise to make that type of conclusion. That he believed that it was suspected cocaine along with obviously the issue of the two live rounds of ammunition.
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> So we have that subsequent information we'll deal with, the house was secured and then there was this protective sweep that was done and I'll deal with that in a moment. But while they do the protective sweep, they come back and while they're there [appellant] comes in, walks into a house and at that particular point in time, although I think this record is unclear, and I'll get to that also in a minute, there was a statement by [appellant] saying that he lived there. I think for my purposes that most probably is good enough but I think he also articulated that he lived in a particular bedroom at the location.

> So what we have here again is, and looking at the totality of the circumstances, clearly there was in plain view in a common area contraband. In a common area where [appellant] by his own admission, and even taking that certainly by Mr. Anderson's admission, which was corroborated by [appellant] showing up at that location, again being, the drugs being in close proximity and in plain view in a common area, I will find that there was sufficient probable cause at that, under all those, the totality of the circumstances to find that, again probable cause, I'm not talking about preponderance of the evidence or beyond a reasonable doubt but I'll find probable cause. That there was probable cause that he possessed narcotics and/or contraband, specifically the paraphernalia. So as to that I will deny the motion to suppress.

The suppression court assumed, without deciding, that the walk-through was unjustified. Nevertheless, it found that the warrant was still valid even after excising the ammunition and paraphernalia found during the walk-through from the warrant application. The court explained:

> Now as finally as to this issue of the walk through where the officers walked through after they secured the location and then, secured the location and then did what they would call either a walk through, protective sweep, whatever you want to call it. Basically the officers said yeah, I went through to make sure there was nobody else present in the property, I assume for officer safety. I don't really find, and nothing was cited to me, I don't really find that in a sense that this is a necessarily a *Bowie*[2] [sic] situation. *Bowie* [sic] was a search incident to a, there was an arrest of a person at or near the premises and there was also I think, I believe, allegations or evidence that there were co-conspirators involved and possible other people out. I didn't find the exigent circumstances cited or required under *Bowie*, [sic] nothing was cited to me.
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> Now I did try to do some search to see whether or not this is an appropriate use. I did find a case, [*United States v. Taylor*], which is 248 F.3d 506, it's a Sixth Circuit case which has, I guess, some very limited value to me. And it says that, citing from that case, "we think that it follows logically

[2] The Court was referring to *Maryland v. Buie*, 494 U.S. 325 (1990) which addresses the constitutionality of a "protective sweep."

that the principle enunciated in *Bowie* [sic] with regard to officers making an arrest that the officer may conduct a limited protective sweep to ensure the safety of those officers applies with equal force to an officer left behind to secure the premises while a warrant to search those premises is obtained."

I mean there is that authority for that and for that, based on that and if I, you know, want to find that in fact this protective sweep was appropriate then the officers were perfectly within their rights to include whatever they found in the affidavit, search warrant.

Now I think what's probably more likely is there is a decision by the Court of Special Appeals recently, [*Kamara v. State*], which is actually fairly close on point although they don't really necessarily deal directly with this issue, it's 205 Md. App. 607. And there in a sense the Court of Special Appeals sort of jumped over, there was actually a very similar situation, they secured the place, they then do a protective sweep and during that they do actually come up with certain information which actually is subsequently included in an affidavit of a search warrant.

But what the Court of Special Appeals in that case did look at two Supreme Court cases which, which is [*Murray v. United States*] and [*Cipuro v. United States*][3] (phonetic spelling), which are fairly seminal cases for search and seizure law. But basically the state, the Court of Special Appeals found, they just assumed that the items seized during the protective sweep were illegal.

So I for purposes of this will also assume what was recovered was illegal. But they also note that, and I'm talking specifically, citing specifically the Court of Appeals says "the court in [*Murray*] noted the inquiry in that case was whether the information obtained during the initial search was presented to the judge and affected the decision to issue the warrant. In making this assessment, the Court of Appeals has explained that a court need not consider the actual affect [sic] of the evidence on the individual. Rather the following objective test is employed, whether after the constitutionally tainted information is excised from the warrant the remaining information is sufficient to support a finding of probable cause. And again further, if the remaining information in the warrant apart from the tainted information establishes probable cause the warrant is lawful.

[3] In all likelihood the Court was referring to *Segura v. United States*, 468 U.S. 796 (1984).

> And it seems to me, if I excise out, which appears to be on page nine, there appears to be four lines, well more than that, it says "the house was secured by Det. Hersl, Det. Moore and I so that a search and seizure warrant could be obtained. [Ms.] Whye stated that only she and her mother were present in the house. While conducting a walk-through for officer safety Ellerby (phonetic spelling) Johnson was discovered in the upstairs front rear bedroom," And this is the most important part, "in plain view in this room was the packaging material (small ziplock baggies) and additional live information." That was included in the warrant. If I excise that out, it will find looking at this warrant clearly there was probable cause. Doing a standard evaluation for probable cause and warrants, there was certainly probable cause for this particular warrant. Maybe in and of itself the fact that the co-defendant, Mr. Anderson, this was his house and there was a gun there. But certainly once they got there and saw what they believed to be narcotics and additional ammunition based on their expertise, leaving that additional narcotics and firearms, which would be there, I find that there is probable cause, excuse me, there would be probable cause in the affidavit even absent the information that was obtained during the protective search. And for all those reasons I will deny the motions to suppress.

DISCUSSION

Appellant contends that the police lacked probable cause to arrest him when he arrived at the home, and that as a result, the evidence acquired as a result of that illegal arrest – the keys removed from his person that unlocked the padlock on his upstairs bedroom – should also have been suppressed. He also asserts that the warrant application lacked probable cause because the evidence obtained during the walk-through (which he claims was unjustified), should not have been part of the warrant application.

The State contends that the arrest of appellant was supported by both probable cause to believe that appellant was in possession of (1) ammunition as a prohibited person, and/or (2) CDS paraphernalia. The State also maintains that, even if there was no probable cause

to connect appellant with the ammunition and paraphernalia found when the detectives first entered the home, that the items found in appellant's locked bedroom were admissible against appellant under the "inevitable discovery doctrine" because even if they had not used the key removed from appellant pursuant to a search incident to arrest to open the locked door, they had the authority to cut the lock off pursuant to a valid warrant.

Regarding the paraphernalia and ammunition found during the walk-through, the State argues that the walk-through was consented to, as well as justified, and that even if the walk-through were not justified or consented to, that the warrant application still contained probable cause to search the home.

We need not entertain the question of the lawfulness of appellant's arrest because we agree with the suppression court that the evidence against appellant recovered from his locked bedroom was recovered during a lawful search pursuant to a valid warrant, regardless of the lawfulness of the arrest of appellant and the legality of the walk-through.

In *Murphy v. State*, 192 Md. App. 504, 511 (2010) we explained the standard of review of a denial of a motion to suppress evidence:

> In reviewing a circuit court's denial of a motion to suppress evidence, "we view the evidence adduced at the suppression hearing, and the inferences fairly deducible therefrom, in the light most favorable to the party that prevailed on the motion." *Williamson v. State*, 413 Md. 521, 531–32, 993 A.2d 626 (2010). We accept "[t]he factual findings of the suppression court and its conclusions regarding the credibility of testimony . . . unless clearly erroneous." *Rush v. State*, 403 Md. 68, 83, 939 A.2d 689 (2008) (citations omitted). With respect to the ultimate issue of constitutionality, however, we "make our own independent constitutional appraisal 'by reviewing the law and applying it to the facts of the case.' " *Williamson*, 413 Md. at 532, 993 A.2d 626 (*quoting Bailey v. State*, 412 Md. 349, 362, 987 A.2d 72 (2010)).

The Fourth Amendment to the United States Constitution protects against "unreasonable searches and seizures[.]" U.S. CONST. amend. IV. "[E]xcept when pursuant to valid consent or exigent circumstances, . . . the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant." *Jones v. State*, 425 Md. 1, 28-29 (2012) (quotations and citations omitted). Generally, when the police obtain evidence in violation of the Fourth Amendment, the illegally obtained evidence is excluded under the exclusionary rule. *Cox v. State*, 194 Md. App. 629, 653 (2010). "This judicially imposed sanction serves to deter lawless and unwarranted searches and seizures by law enforcement officers." *Kamara v. State*, 205 Md. App. 607, 623 (2012) (quotations omitted).

There are circumstances, however, in which evidence obtained after initial unlawful conduct can be purged of taint. These exceptions to the exclusionary rule aim to balance the interests of society in deterring unlawful police conduct with the interest of ensuring juries receive all probative evidence of a crime. *Williams v. State*, 372 Md. 386, 409–10 (2002). One such circumstance occurs when the evidence was derived from an independent source. *See United States v. Wade*, 388 U.S. 218, 239–242 (1967). '"The independent source doctrine . . . applies when the evidence actually has been discovered by lawful means. Its focus is on what actually happened—was the discovery tainted by the illegal search?'" *Kamara, supra at* 624. (*quoting Williams*, 372 Md. at 410).

Under the independent source doctrine, evidence that was in fact discovered lawfully, and not as a direct or indirect result of illegal activity, is admissible. *United States*

v. Herrold, 962 F.2d 1131, 1140 (3d Cir.1992). The United States Supreme Court has made clear that, even if there is initial illegal conduct, evidence seized pursuant to a subsequent warrant may be admissible pursuant to the independent source doctrine. *Murray v. United States*, 487 U.S. 533, 537 (1988).

In *Kamara*, an undercover officer arranged for a man to purchase drugs for him. 205 Md. App. at 614. That man entered Kamara's house and when he left, he had marijuana. *Id*. A short time later, police witnessed Kamara engage in a drug transaction with another man outside of the home. *Id*. Approximately fifteen minutes after the latter transaction, without a warrant, officers approached the house, knocked on the door and entered. *Id*. Once inside, the officers informed Kamara and his brother that the police were going to get a search warrant and that they were being detained until the warrant was obtained. *Id*. at 615. The officers then performed a protective sweep of the home. *Id*. During the sweep, one of the officers saw marijuana in a bedroom. *Id*. at 615-16. Approximately four hours later, a judge signed the search warrant. *Id*. at 616. During the ensuing search pursuant to that warrant, officers seized the marijuana and a scale. *Id*. at 617.

Kamara filed a motion to suppress. *Id* at 611. The State conceded that the initial entry into the house was illegal but argued that the evidence was "admissible pursuant to the doctrine of inevitable discovery." *Id*. At 617. The court denied the motion. Although it agreed that the initial entry and protective sweep violated the Fourth Amendment, it ruled that the marijuana found in the bedroom was admissible pursuant to the independent source

doctrine, as articulated in *Williams. Id*. at 618-20. On appeal, we affirmed. Relying in part on the Supreme Court's decision in *Murray, supra*, we explained:

> [T]he issue here is whether the later search pursuant to the warrant was genuinely independent of the earlier observation of the marijuana in the house. The Court in *Murray* gave guidance on how to assess this issue. It noted two situations in which the evidence would not be deemed to be obtained by independent lawful means: (1) where the officer's 'decision to seek the warrant was prompted by what they had seen during the initial entry'; and (2) where 'information obtained during that entry was presented to the [judge] and affected his decision to issue the warrant.'
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> * * *
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> We do note that, in this case, unlike in *Segura* and *Murray*, the warrant did contain a paragraph referencing the drugs found during the initial entry and search of appellant. That, however, is not determinative. The Court in *Murray* noted that the inquiry was whether the information obtained during the initial sweep was presented to the judge **and** *"affected [the] decision to issue the warrant.*" *Murray*, 487 U.S. at 542, 108 S.Ct. 2529. In making this assessment, the Court of Appeals has explained that a court need not consider the *actual* effect of the evidence on the individual judge. Rather, the following objective test is employed: "[W]hether, after the constitutionally tainted information is excised from the warrant, the remaining information is sufficient to support a finding of probable cause." *Williams*, 372 Md. at 419, 813 A.2d 231.
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> If the remaining information in the warrant, apart from the tainted information, establishes probable cause, the warrant is lawful. *Id*. at 420, 813 A.2d 231. In this circumstance, the independent source doctrine applies, and evidence seized pursuant to the warrant need not be suppressed. . . .

Kamara, 205 Md. App. At 627-29. (emphasis in original).

Next, we noted that the "uncontradicted evidence" established that the police planned to get a warrant prior to the protective sweep or the discovery of any contraband. *Id*. at 628. We then recognized that the officers included in their application for a search warrant information about the drugs seen during the protective sweep. *Id*. We explained

that fact did not require suppression, however, because when that information was excised from the application, the remaining information established probable cause. *Id.* at 628-30.

Kamara instructs us to apply the above analysis to determine if the search pursuant to the warrant was an independent source of the contraband found in the bedroom. To do that we must reject, as did the suppression court, the reference to the evidence found pursuant to the protective sweep and then determine whether the remaining information supplied adequate facts from which the warrant-issuing judge could have concluded that probable cause existed for the issuance of the warrant.

Probable cause has been defined '"as a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Agurs v. State*, 415 Md. 62, 76 (2010), (*quoting Patterson v. State*, 401 Md. 76, 91 (2007)). "'The rule of probable cause is a non-technical conception of a reasonable ground for belief of guilt, requiring less evidence for such belief than would justify conviction but more evidence than that which would arouse a mere suspicion.'" *Wilkes v. State*, 364 Md. 554, 584 (2001), (*quoting Doering v. State*, 313 Md. 384, 403 (1988)). "[P]robable cause does not demand the certainty associated with formal trials; it is sufficient that a 'fair probability' existed[.] Moreover, probable cause is based on the factual and practical considerations of everyday life on which reasonable people act." *Kamara*, 205 Md. App. at 630, *accord Malcolm v. State*, 314 Md. 221, 233 (1988); *Wilkes*, 364 Md. at 584.

In the instant case, we assume as the suppression court did, that the walk-through of the home was unjustified. We must then ascertain whether the decision to seek the warrant

was made prior to the walk-through. Unlike *Kamara*, in the instant case, the police already had validly entered the home pursuant to the consent of both Mr. Anderson and Ms. Whye. Upon lawful entry, the police saw, in plain view CDS paraphernalia and ammunition inside the home. It was at that point that the police changed tactics and conducted a walk-through of the home to secure the premises. While the transcript of the suppression hearing was not a model of clarity on the exact timing of the decision to seek a warrant, it is a fair inference that the police made the decision to seek the warrant after they became concerned about the validity of the consent, after they found the paraphernalia and ammunition on the couch, and before the walk-through. There is no other logical explanation for the police to have abruptly terminated what would have been a consensual search of the premises and instead conduct a walk-through and seek a warrant. Because an appellate court will accept that version of the evidence, most favorable to the prevailing party and it will resolve ambiguities and draw inferences in favor of the prevailing party, *Morris v. State*, 153 Md. App. 480, 489-90 (2003), we conclude that the record fully supports the inference that the police made the decision to seek the warrant before conducting the walk-through.

Second, we must consider whether there was sufficient information upon which the warrant issuing judge could have made a probable cause determination absent the evidence obtained during the walk–through, *i.e*. the ammunition and paraphernalia found in the upstairs bedroom. With that information excised, the following facts support a finding of probable cause: (1) that the co-occupant, Mr. Anderson, who had just been arrested for a narcotics violation, told the police that he lived in the house and that a firearm could be

found inside, (2) that Mr. Anderson consented to the entry of the home, (3) that Ms. Whye, Mr. Anderson's girlfriend, consented to the entry of the home, (4) that upon entering the home, the police saw suspected narcotics paraphernalia in plain view, and (5) that upon entering the home, the police saw ammunition in plain view. We believe that such information clearly established probable cause to issue a search warrant.

Accordingly, the evidence seized from appellant's bedroom after the warrant was issued, was admissible pursuant to the independent source doctrine, and the circuit court correctly declined to suppress it. As a result, it matters not whether appellant was lawfully or unlawfully arrested because he admitted that the front locked room was his, and the evidence was thereafter lawfully obtained from that room pursuant to a valid search warrant – with or without the keys that were obtained as a result of the lawful or unlawful arrest.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED. COSTS TO BE PAID BY APPELLANT.