STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 11, 2007
v	No. 270476 Oakland Circuit Court
GARY STUART LYON, Defendant-Appellant.	LC No. 2005-202163-FH

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession with intent to deliver less than 50 grams of cocaine within 1000 feet of a school, MCL 333.7410(3). Defendant was sentenced to 24 months' probation with the first 365 days to be served in jail. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court erred in finding exigent circumstances to justify the warrantless search of his home. We disagree. We review a trial court's findings of fact on a motion to suppress evidence for clear error, but the ultimate decision is reviewed de novo. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003). Clear error exists when, on review of the entire record, the "appellate court is left with a definite and firm conviction that a mistake has been made." *Id.* Deference is given to the trial court's findings of fact, especially those related to witness credibility. *Id.* The prosecution bears the burden of proving that a recognized exception to the warrant requirement exists. *Id.*

Police generally must have probable cause and a warrant based thereon to search for evidence of a crime in a dwelling. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). A recognized exception to the warrant requirement is the existence of exigent circumstances. *Id.* Pursuant to the exception, officers must have probable cause to believe both that a crime was recently committed on the premises and that evidence or perpetrators of that crime are still present. *In re Forfeiture of $176,598*, 443 Mich 261, 275; 505 NW2d 201 (1993). Additionally, police must establish, on the basis of specific and objective facts, the existence of an actual emergency requiring immediate action to "(1) prevent the imminent destruction of evidence, (2)

protect police officers or others, or (3) prevent the escape of the accused." *Id.* Evidence of a crime discovered during a warrantless entry under these circumstances is admissible. *Id.*

The trial court held that the 911 hang-up call, the sound of smashing glass, defendant's suspicious behavior and lack of identification as the homeowner, and the story of an unknown armed burglar would all require a reasonable police officer to investigate further. The officer testified that he followed defendant while in the home, matching his moves to make sure he did not pick up any weapons, as they had not yet been able to search the house for weapons or other potential subjects, or even verify defendant as the homeowner. Drugs and drug paraphernalia were found in plain view. "[T]he validity of an entry for a protective search without a warrant depends on the reasonableness of the response, *as perceived by police*." *People v Cartwright*, 454 Mich 550, 559; 563 NW2d 208 (1997) (emphasis in original). Under the circumstances, we cannot conclude that the trial court's finding of exigent circumstances was clearly erroneous. The trial court properly denied the motion to suppress relative to the warrantless entry.[1]

Defendant next argues that the trial court erred in finding statements that he made while in custody were voluntary and in finding that his *Miranda*[2] waiver was voluntary, knowing, and intelligent. "'Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights.'" *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999) (citation omitted). We review the entire record de novo, but this Court will not disturb a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights unless that ruling is found to be clearly erroneous. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). Credibility determinations are crucial, and the trial court is in the best position to assess credibility. *Id.* *Miranda* rights have been properly waived only when the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension. *Id.* at 633.

Defendant argues that his lack of food and sleep, the influence of intoxicants, and promises of leniency made by the police if he cooperated rendered his waiver involuntary. We disagree. The trial court concluded that there was "no indication [defendant] was deprived of food, sleep, or medical attention at the time he gave these statements." With respect to discussions about the possibility of defendant keeping his job if he cooperated, the court found that "this discussion regarding cooperation took place after the statements were given by the defendant."

Defendant testified that he had been without sleep for approximately 22 hours before writing out his first statement. He also testified that he had not slept between writing out his first

[1] Defendant's argument that police should not have even entered the backyard also lacks merit in light of the 911 call and the sound of smashing glass coming from behind the home.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 694 (1966).

and second statements, and that he had not had anything to eat from the time he was arrested until making the second statement. However, defendant admitted that he "laid down inside the jail cell" while at the police station, and that he had been laying down prior to being retrieved for the second interview. He also stated that despite the alleged lack of sleep, he understood when he was advised of his right to remain silent that anything he said could be used against him in court, that he had a right to consult a lawyer, that one would be provided to him if he could not afford representation, and that he could stop answering questions at any time.

With respect to the opportunity to eat, a police officer testified that the feeding schedule at the jail provided for a meal to be served at 6:00 or 7:00 a.m. The first interrogation ended around 6:06 a.m. and the second interrogation began around 10:50 a.m. Thus, defendant had the opportunity to eat between his first and second interrogations under the jail's feeding schedule. Whether defendant took advantage of the opportunities at the jail to eat or sleep was not within the control of the police. There is no evidence in the record to suggest that the police purposely withheld food or sleep with an intent to coerce a confession from defendant. Additionally, we find no basis to conclude that a lack of sleep or food rendered defendant's statement or waiver involuntary.

Moreover, the officer who interrogated defendant testified that he did not promise defendant anything and that he did not trick defendant. The officer stated that he did speak with defendant about cooperation, but that this conversation occurred after the second interview.

As for the influence of drugs and alcohol, being under the influence of intoxicants does not per se render a statement involuntary. *People v Lumley*, 154 Mich App 618, 624; 398 NW2d 474 (1986). The record indicates that defendant last used any intoxicants before midnight. Thus, at the time of defendant's first interrogation at 4:50 a.m., it had been at least five hours since he had last ingested any intoxicants, and by the beginning of the second interrogation it had been 11 hours. This passage of time significantly reduced the likelihood that defendant's statements were rendered involuntary by either drugs or alcohol. Indeed, two police officers that had close contact with defendant on the night and day in question did not suspect him to be under the influence of drugs or alcohol. The interrogating officer also testified that defendant denied being under the influence when asked and that defendant was able to read the waivers out loud and sign them, as well as write out legible statements and sign them.

Whether a waiver was knowingly and intelligently made depends on the suspect's level of understanding, police conduct notwithstanding. *Daoud*, *supra* at 636. Only a basic understanding is required. *Id.* at 644. Factors for the court to consider include age, education, background, experience, and intelligence level, and whether the suspect has the capacity to understand the warnings given, the nature of the rights, and the consequences if they are waived. *Id.* at 634. No single factor is determinative. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Defendant was 51-years-old, college educated, and had taken some graduate classes. Defendant was read all of his rights, verbally indicated that he understood them, and placed his initials next to each one. The interrogating officer also had defendant read aloud the waiver of rights form and asked him if he understood it, which defendant answered affirmatively. Defendant was able to write out both statements clearly and legibly. Thus, defendant had the

intellectual capability to understand the rights that were read to him, making his waiver knowing and intelligent.

Under these facts, the trial court's findings that there was a voluntary statement and a voluntary, knowing, and intelligent waiver of defendant's *Miranda* rights were not clearly erroneous, and the court's ruling denying suppression of the statements was proper.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette