RENDERED: FEBRUARY 7, 2014; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000920-MR

MICHAEL LARION WILSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 10-CR-01528

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND MAZE, JUDGES.

CLAYTON, JUDGE: Following a conditional guilty plea, Michael Larion Wilson appeals his conviction for possession of a controlled substance in the first degree. Wilson was sentenced to a probated one-year sentence. He contends that the trial court erred in its failure to grant his motion to suppress. After careful

consideration, we affirm the judgment and sentence although for different reasons than those espoused by the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

Wilson was arrested on September 30, 2010, after the execution of a search warrant at his residence. Following the execution of the search warrant, Wilson and a co-defendant, Christian Lamont Powers, were jointly charged with, among other criminal acts, receiving stolen property (firearm); two counts of receiving stolen property valued at more than $500 and less than $10,000; tampering with physical evidence; possession of controlled substance in the first degree (crack cocaine); possession of marijuana; possession of drug paraphernalia; and, receiving stolen property valued at less than $500.

Wilson, along with his co-defendant, made a motion to suppress all physical evidence because, according to them, it was the fruits of an illegal search. Further, they claimed that any statements made by Wilson to the police while being detained in handcuffs for four hours should be suppressed because no *Miranda* warning was given.

On February 10, 2011, the trial court held an evidentiary hearing regarding the aforementioned search. At the hearing, Robert Fraser and Jeffrey May, investigating police officers, testified for the Commonwealth. Carl Hatton, the manager of the apartment complex where the search took place, testified for Wilson. The police officers' testimony is summarized as follows.

Between 6:30 and 8:00 p.m. on September 29, 2010, Michael Todd parked his car and went into a restaurant to dine with his wife. Upon returning to his car, he discovered that someone had stolen, among other things, his Tom-Tom GPS unit, a .380 semi-automatic handgun with a full magazine and a round in the chamber, Apple iPhone, and Maui-Jim sunglasses. Todd called the Lexington police from his residence where he was using software, called "Mobile Me," to track the location of the iPhone on his home computer. Officer Fraser was dispatched to the home.

Upon arrival at the home, Officer Fraser and Todd used the software to monitor the movement of the iPhone on a digital map until the program showed the location of the phone in an area of an apartment complex – Wassmer Commons Apartments, near where the items had been stolen. Based on the location feature of the software, which continued to indicate that the phone was somewhere in or near this apartment complex, Officer Fraser dispatched other officers to the complex including Officers May and Pena.

Wassmer Commons Apartments is an L-shaped two-story structure with front doors that open to outdoor walkways and back doors that face a grassy common area. The common area is within the angle of the building where the back doors open to either a ground-level patio or a second-floor balcony. The patios are partitioned on the sides but are completely open on the front, which faces the common area. Further, an open breezeway through the building's angle

connects the front parking lot to the common area and another pathway along the south wing of the building also provides access to the common area.

Officer Fraser, who was still at Todd's house, directed the police officers to the south wing of the apartment building where the signal on Todd's computer indicated the iPhone was positioned. Fraser called Todd's iPhone while the other officers walked along the front of the apartment to listen for ringtones. They heard none.

At this juncture, Officer Fraser, who was still at Todd's house, left and went to the apartments. It was about 10:45 p.m. He and the other officers continued to walk outside the front of the units located on the most southern point of the complex listening for a ringtone. Then, the officers went through the open breezeway to the common area behind the south wing of the apartment complex. They again dialed the phone number.

Officer May testified that he was leading the way with his head down and listening for a ringtone. While doing so, he saw five rounds of ammunition on the seat of a lawn chair on the edge of Unit 113, which was ultimately determined to be Wilson's patio. The chair was illuminated by an overhead light. As a police officer, May recognized the ammunition as either .380 or 9 millimeter ammunition. Because he knew that the stolen handgun was a .380, Officer May alerted the other officers. Officer May then collected the five rounds of .380 ammunition by reaching into the patio and taking it off the chair. According to his testimony, he did not step onto the patio at that time.

Following discussion among the officers, Officer May returned to Wilson's patio and stepped onto it for the first time while again listening for a ring tone. As he stood by a lawn chair, May looked down into a garbage can, next to the chair, and saw the reflection of a GPS unit. The lid of the garbage can was halfway off. May knew that such an item had been stolen from Todd, so he picked it up and gave it to Officer Fraser. Officer Fraser turned the GPS on, and Todd's address showed up as the home address for the GPS.

Then, after Hatton informed the officers that Wilson resided in Unit 113, they split up to secure both entrances to Unit 113. Fraser knocked on the door but no one answered. At this point, Wilson approached the apartment unit, and Hatton identified him as the apartment's resident. The officers identified themselves, explained the reason that they were there, told him what they had found on his patio, and asked if anyone was in the apartment. Wilson said that Powers might be inside.

The officers informed Wilson that he was not under arrest but asked if they could search the apartment. According to Officer May, when he asked for permission to search, he explained to Wilson that if there was anything of a minor nature that was incriminating, like marijuana or drug paraphernalia, they would work with Wilson and possibly just give him a citation. Wilson declined permission to search the apartment. Thereupon, Wilson was detained while Officer Fraser left to obtain a search warrant. Officer May handcuffed Wilson

because, according to his testimony, it was possible that only a single officer would be available to supervise Wilson.

A couple minutes after Officer Fraser left, Wilson told the officers that he had a little bit of weed in a safe. Since Fraser had already left, they told Wilson that they would wait for the warrant. Then, a few minutes later, Wilson repeated the statement about the marijuana and told the officers that they could search the apartment. Still, the officers decided to let Fraser get the warrant. But after the officers contacted Officer Fraser regarding Wilson's statement giving them permission to search, he stopped working on the warrant and went back to the apartment complex to obtain Wilson's signature on a consent-to-search form.

Meanwhile, Powers walked out of the apartment. Officer May stopped him and took him into custody because of a pre-existing arrest warrant. After Powers said something to Wilson, he withdrew his consent for the search. Officer Fraser immediately went back to police headquarters and redrafted the search warrant and affidavit. Since the police officers were uncertain whether the seizure of the GPS was proper, Fraser did not include it in the affidavit. The search warrant was issued at 3:19 a.m.

When officers searched the apartment, they found marijuana, cocaine, drug paraphernalia, and other stolen items. They discovered Todd's stolen .380 handgun wrapped in a shirt and inside a cabinet on the back patio. Further, a police dog used in the search found the iPhone twenty-feet across from Wilson's front door in a wooded area on the other side of a fence.

Next, Hatton testified at the hearing on behalf of Wilson. In his testimony, he said that five police officers knocked on his door three separate times that evening to inquire about certain named tenants. Hatton said that he eventually asked them why they kept asking him about tenants.

Then, one of the police officers, who Hatton could not specifically identify, led him out the back of his apartment to the patio of Unit 113. Hatton said that the officer informed him that they had found a "tracked" cell phone and bullets in the trash can at Unit 113. Hatton said that the trash can was on the edge of the patio and the lid was askew when it was shown to him. In fact, more than a month prior to the search, Hatton had asked Wilson to keep his trash can next to the patio wall and covered so as not to attract insects. According to Hatton, Wilson had complied with this request since then.

Next, Hatton returned to the front walkway and saw Wilson. He told Wilson that the officers had found something on his patio. At this point, Hatton testified the police officers' attitude toward him changed. They told him to "shut up," shoved him back into his apartment, and closed the door. When Hatton opened it at a later point, an officer told him that if he did not remain inside, he would be arrested. Hatton also stated that he knew who Powers was because a month before the search, he had removed Powers from the premises at Wilson's request.

The trial judge ruled from the bench. He recited the undisputed facts regarding the theft of items from the car, plus the tracking of the iPhone to a

relatively restricted area. Additionally, the trial judge said that the front of the apartment building and its walkways were open to the public, and thus, the police had as much right to be there as anyone. Further, the trial judge ruled that the grassy area behind the building was not fenced or restricted, and therefore, the police had the authority to be on the grassy area in order to locate the iPhone.

The trial judge continued and determined that since the police officer first observed the bullets while he was walking on the grassy common area and recognized them as ammunition consistent with the type of ammunition used in the stolen handgun, he properly retrieved the evidence. While the trial court judge had issues with the retrieval of the GPS unit from the trash can, the judge noted that it was not the basis for his ruling. The trial court concluded that based upon the tracking of Todd's iPhone to a relatively restricted area, the stolen weapon, and the evidence collected, the police officers obtained the search warrant. The trial judge then found that there was a basis for the issuance of the search warrant and denied the motion to suppress.

Later, Wilson entered a conditional guilty plea to possession of a controlled substance in the first degree in exchange for a recommended one-year sentence and dismissal of the other counts. He acknowledged that he possessed crack cocaine. Wilson was sentenced to one-year, which was probated for four years.

Wilson now appeals the trial court's decision to deny the motion to suppress. On appeal, Wilson maintains that the trial court's failure to grant the

motion to suppress the seized evidence is a violation of his rights under the Fourth Amendment, the United States Constitution, and Section 10 of the Kentucky Constitution. In particular, Wilson argues that the search of his patio by police officers was illegal, and hence, the retrieval of five rounds of .380 ammunition and the GPS unit should have been suppressed because the evidence was the fruit of an illegal, warrantless search. Further, he contends that his statements to the police were the result of a custodial interrogation in which he was never informed of his *Miranda* rights, and hence, should also have been suppressed. Moreover, based on these factors, Wilson maintains that because these items and statements were improperly acquired, the search warrant was not valid.

The Commonwealth disagrees with Wilson that he is entitled to withdraw a guilty plea because some evidence is suppressed. Relying on *United States v. Leake*, 95 F.3d 409 (6th Cir. 1996), the Commonwealth asserts that suppression of some evidence does not mandate that the defendant may withdraw a guilty plea. The Court noted that:

> We do not mean to imply that every time a defendant manages to exclude any evidence on appeal following a conditional plea of guilty, he is entitled to withdraw his plea. The inquiry requires an examination of the degree of success and the probability that the excluded evidence would have had a material effect on the defendant's decision to plead guilty.

Id. at 420 n. 21. Based on this line of reasoning, the Commonwealth propounds that to prevail Wilson must establish that the search warrant was invalid. Furthermore, the Commonwealth asserts that the police officers properly located

and seized the five rounds of .380 ammunition and the GPS unit and that since Wilson was not interrogated, the admissibility of his statements are not relevant to their inclusion in the affidavit.

STANDARD OF REVIEW

Here, the issue encompasses several factors in determining whether the basis for the search warrant was sufficient and legal. These issues include whether the seizure of certain items prior to the issuance of the search warrant was valid and whether Wilson's statements were allowable since he was detained without being given *Miranda* warnings.

Our Court's standard of review for a motion to suppress is as follows:

> An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.

Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky. App. 2002) (footnotes omitted). Moreover, "a reviewing court should give due weight to the assessment by the trial court of the credibility of the officer and the reasonableness of the inferences." *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002).

In the instant case, the trial court's findings of fact are supported by substantial evidence, and thus are conclusive. Hence, we turn our attention to the trial court's application of the law to those facts.

ANALYSIS

The Fourth Amendment of the United States Constitution and Section Ten of the Kentucky Constitution provide safeguards against an unwarranted and unreasonable search and seizure by the state. As illuminated by the United States Supreme Court, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). It is not disputed that in the instant case the search of the residence was conducted after the procurement of a search warrant. The primary issue, however, is whether evidence seized prior to the issuance of the search warrant should be suppressed and whether this evidence had some bearing on the efficacy of the search warrant itself.

Warrantless search

When a search is conducted without a warrant, "[t]he Commonwealth carries the burden to demonstrate that the warrantless entry falls within a

recognized exception to the warrant requirement." *King v. Commonwealth*, 386 S.W.3d 119, 122 (Ky. 2012).

One exception to the requirement for a search warrant is the seizure of evidence found within "plain view." *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Kerr v. Commonwealth*, 400 S.W.3d 250 (Ky. 2013). The U.S. Supreme Court refined the requirements for this exception and explained that there are four requirements for application of that exception: (1) the item seized must be in plain view; (2) its incriminating character must be immediately apparent; (3) the enforcement officer must be lawfully located in a place from which the object can be plainly seen; and (4) the officer must have a lawful right of access to the evidence itself. *Horton v. California*, 496 U.S. 128, 136–37, 110 S.Ct. 2301, 2308, 110 L.Ed.2d 112 (1990).

Our Supreme Court in *Hazel v. Commonwealth*, 833 S.W.2d 831, 833 (Ky. 1992), confirmed the necessary elements for evidence that is in "plain view" to be seized under this exception. The Court explained that to seize items under the plain view exception, the following elements must exist: first, the law enforcement officer must not have violated the Fourteenth Amendment in arriving at the place where the evidence could be plainly viewed. Second, "not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must have a lawful right of access to the object itself." Finally, the object's "incriminating character must also be 'immediately apparent.'" *Id.* (*citing*

Coolidge, 91 S.Ct. at 2038); *see also Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006).

Because the GPS and the ammunition were taken from Wilson's patio we must ascertain the status of the patio – was it private or public. No reasonable expectation of privacy exists in open or public areas of private property, so the discovery of items in these areas does not constitute a search. *Ousley v. Commonwealth*, --- S.W.3d ---, 2011 WL 2496279 (Ky. App. 2011). Yet, the area of land commonly used in connection with a dwelling, the curtilage, is not an open area, which may be subject to a general search. *Id*.

In *Dunn*, the U.S. Supreme Court articulated a non-exclusive list of four factors to consider in deciding whether an area of property is within the curtilage, that is, private area of the home. *United States v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987). Those factors are: (1) whether the area is included in an enclosure with the home, (2) whether the resident has taken steps to prevent observation from the people passing by, (3) how the area is used, and (4) the proximity of the area to the home. *Id*. Here, the patio was adjacent to the apartment and enclosed on two sides, it was used as an extension of the home's living space and was entered into from the home. Thus, the patio was part of the curtilage of the home and not a public space. Such enclosures are not open areas which may be entered for a search. *Trevathan v. Commonwealth*, 384 S.W.2d 500 (Ky. 1964).

Having determined that the patio was a private area that was not open to an unauthorized search by the police officers, we return to our analysis of the plain-view exception. First, we review the retrieval of the GPS from the trash can on the patio. Based on the factors in *Dunn,* we hold that the taking of the GPS from the trash can, which was located on Wilson's patio, was an illegal search. The patio was contiguous to the house, the interior walls of the apartment extended to enclose the patio on two sides, the use was social, and anyone going on the patio was considered trespassing. As explained by Hatton, the apartment manager, any outsider who went onto an apartment patio was subject to arrest for trespass. Consequently, the plain-view exception is not applicable because the officers could not have seen GPS without intruding illegally upon a private space.

Before scrutinizing the impact of the plain-view exception on the legality of the recovery of the ammunition, we direct our attention to Wilson's contention that based on the testimony of his witness, Hatton, the location of the .380 ammunition is uncertain. He claims that rather than the police officer's statement that the ammunition was on a chair at the edge of Wilson's patio, it was in a trash can. First, we observe that Hatton asserts this fact based on his understanding of the police officer's statements, that is, Hatton's report is based on hearsay. Second, we have decided the trial court's findings of fact are supported by substantial evidence. On appellate review, if the trial court's findings of fact are supported by substantial evidence, they are conclusive. *See Neal,* 84 S.W.3d 920.

It is Wilson's position that the plain-view exception to a warrant requirement is also not applicable here because even though the officer stayed on the common area, he breached the private area when he reached in and picked up the ammunition. Whereas the Commonwealth contends that since the bullets were visible, the officer was lawfully in a position to view them (from the common, grassy area), and the ammunition, given the .380 stolen handgun, was obviously incriminating. The question, however, remains as to whether the police officer had a lawful right of access to the object itself, that is, could he under the plain-view exception, reach in and retrieve the bullets while breaching the patio space.

With respect to the first three prongs of the *Horton* test, the Commonwealth is on solid ground. The bullets were in plain view. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 88 S.Ct. at 511. Further, observations of areas within the curtilage from locations outside the curtilage are generally permissible. *United States v. Hedrick*, 922 F.2d 396, 399 (7th Cir. 1991). In essence, Wilson cannot claim he had a reasonable expectation of privacy when a neighbor, a passerby, or for that matter, the police could observe the bullets if they passed by his patio. Second, based on the theft of the semi-automatic handgun, the bullets were clearly incriminating. Third, the officer himself was lawfully in a location from which the item could be seen for purposes of *Horton*. The officer adamantly stated that when he picked up the ammunition, he never stepped onto the patio.

However, the fourth factor of the Horton test-the officer's right of access to the evidence-is at first blush more troublesome. In *Coolidge*, the Supreme Court explained that even where the object in plain view is contraband, the police may not enter private premises and make a warrantless seizure. *Coolidge,* 91 S.Ct. at 2039. "[N]o amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'" *Horton*, 110 S.Ct. at 2308.

In the case at hand, the item seized was ammunition, which is not, on its face, contraband. The Commonwealth alleges that because the police were looking for an individual or individuals that had stolen a handgun that the seizure of the ammunition was permissible. The officer, unaware of the number of rounds in the handgun, was concerned for his safety and the other officers' safety since it was possible that an armed individual was on the other side of the apartment window. Consequently, it suggests that police officer's limited intrusion into the plane of the property to retrieve the ammunition was reasonable since the officer recognized that it might be consistent with the size and caliber of the type of ammunition used in the stolen firearm.

The Commonwealth then cites several federal cases, including *New York v. Class*, 475 U.S. 106, 117, 106 S.Ct. 960, 967, 89 L.Ed.2d 81 (1968), for the proposition that when the immediate search is for a weapon, the courts have struck a balance to allow the weighty interest in police officers' safety to justify warrantless searches if there is a reasonable suspicion of criminal activity.

We are not persuaded by this argument of the Commonwealth.

First, the Commonwealth makes no case that exigent circumstances existed. Nor does it address the fact that it could have sought a search warrant to procure the ammunition. Whether evidence in plain view may be seized in circumstances where no search warrant exists is an independent question outside the plain-view analysis. For instance, if an officer observed seizable evidence through the window of a residence, the presumptive rule would require that a warrant be obtained before entering the premises to make a seizure. As the Supreme Court observed in *Horton*, "[N]ot only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself." *Horton*, 110 S.Ct. at 2308.

The distinction between a warrantless seizure in a public place and such a seizure in a private home is significant to the jurisprudence of search and seizure. Here, the police officers took the ammunition off a chair on the patio. We have already determined that the patio was curtilage. Thus, the officer violated Wilson's Fourth Amendment rights when he breached the private area of the patio to get the ammunition. Therefore, the search was illegal.

Statements made during detention

Wilson alleges that his statements to the police were the result of unMirandized custodial interrogation, and thus, should have been suppressed. The statement by Wilson in the affidavit for the search warrant states:

> Upon knocking on the front door, officers made contact with Michael L. Wilson. We explained to Mr. Wilson why we were at his residence and asked for consent to search the residence. Mr. Wilson advised he did not want us to search the residence due to having Marijuana, inside the residence, in a safe.

Pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct 1602, 16 L.Ed.2d 694 (1966), *Miranda* warnings must be given when a person is both "interrogated" and is "in custody." The Commonwealth does not dispute that Wilson was never given *Miranda* warnings and concedes that for purposes of *Miranda*, Wilson was in custody. But it does maintain that Wilson was not interrogated.

The U.S. Supreme Court has held that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Here, the police officers' inquires to Wilson do not rise to the level of interrogation. Their questions were ones "normally attendant to arrest and custody." Further, an "incriminating response" is any response, either inculpatory or exculpatory, that the prosecution might later seek to introduce at trial. *Id*. Here, Wilson's guilty plea was not based on his admission that he possessed marijuana.

In sum, Wilson's statements were not the result of an interrogation but instead those that, under these circumstances, are normally attendant to during arrest and custody. Thus, the statements do not require suppression.

Search warrant's efficacy

Because the retrieval of the GPS and the ammunition was illegal, it is necessary to determine whether the suppression of these items renders the search warrant itself illegitimate. The Commonwealth maintains that the search warrant was still valid since the seizure of the GPS and retrieval of the ammunition was not used in the search warrant affidavit. In fact, the affidavit for the warrant does not mention the GPS and refers to the ammunition as follows: ". . . we found five live .380 rounds of ammunition laying, in plain view, on a chair, which was on the rear patio."

While the language of the warrant refers to the ammunition, it does so by noting that it was located on a chair on the edge of the patio. The statement could have been based on the officers' visual observation of the ammunition. Therefore, given that a .380 handgun had been stolen juxtaposed with the presence of the ammunition supports probable cause. Further, notwithstanding that the officer picked up the ammunition, the same information could have been based merely on observation. It is not improper for the officers to see the ammunition and report it on the affidavit.

We believe that the record supports the trial judge's conclusion that the officers had probable cause to obtain a search warrant. Probable cause existed

based on the ping from the "Mobile Me" program showing the location of the stolen iPhone over Wilson's apartment in the complex and the presence of the ammunition on his patio.

To conclude, the search warrant affidavit provided sufficient evidence to support a finding of probable cause that Todd's stolen items would be found at Wilson's apartment upon the execution of the search warrant.

Inevitable Discovery

Lastly, in a somewhat circular argument, the Commonwealth asserts that even if the seizure of the ammunition and GPS unit were improper, these items should not be suppressed based on the doctrine of inevitable discovery. It reasons that since the GPS and the ammunition would most certainly have been seized under the search warrant, the inevitable discovery rule applies.

In *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), the United States Supreme Court adopted the "inevitable discovery rule" to permit admission of evidence unlawfully obtained upon proof by a preponderance of the evidence that the same evidence would have been inevitably discovered by lawful means. *Id*. at 444, 104 S.Ct. at 2509; *Hughes v. Commonwealth*, 87 S.W.3d 850, 853 (Ky. 2002).

In *Nix*, the Court explained that the rationale behind excluding evidence found in the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States*, 371 U.S. 471, 488; 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963) was that the prosecution should not be put in a better place than it would have been if no police

error or misconduct had occurred. *Hughes*, 87 S.W.3d at 853. Conversely, the Court concluded in *Nix* that neither should the prosecution be put in a worse position than if no police error or misconduct had occurred. *Id*.

Wilson, however, clarifies the applicability of the inevitable discovery doctrine by noting that pursuant to *Murray v. United States*, 487 U.S. 533, 542, 108 S.Ct 2529, 2535, 101 L.Ed2d 472 (1988), the independent source [or inevitable discovery] applies if the lawful seizure is genuinely independent of the earlier, tainted one. Wilson argues that the police would not have sought a search warrant but for the seizure of the items on the patio. But as we have highlighted in our discussion of the efficacy of the search warrant, notwithstanding the seizure of these items, the search warrant was validly granted since the police officers had probable cause to search this apartment.

Because we have concluded that the record supports the trial court's conclusion that the officers had probable cause to obtain a search warrant to search the apartment, both the record and commonsense dictate that the police would have inevitably recovered the suppressed evidence. Consequently, even though this evidence was illegally seized, under the inevitable discovery rule, there was no error. Hence, the items do not require suppression.

CONCLUSION

Although the GPS and ammunition were illegally seized during a warrantless search, the affidavit for the search warrant provided probable cause, which was not tainted by the police officers' warrantless search. Based on the

inevitable discovery doctrine, these items would have been discovered anyway upon the execution of the search warrant, and hence, it is unnecessary to suppress them. Accordingly, the judgment of conviction and sentence imposed by the Fayette Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Karen Shuff Maurer
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

James Havey
Assistant Attorney General
Frankfort, Kentucky