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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE EFIONG ETOK,

Defendant and Appellant.

C068082

(Super. Ct. No. SF111597A)

Defendant Andre Efiang Etok was tried by jury and convicted of four felonies (cultivation of marijuana, possession of marijuana for sale, theft of utility services, and possession of a firearm by a felon) and three misdemeanors (driving under the influence of alcohol, driving with a blood-alcohol content of 0.08 percent or above, and leaving the scene of an accident). He was sentenced to an aggregate state prison term of three years and four months (middle term of two years for the firearm possession), plus two consecutive eight-month terms (one-third the middle term) for the cultivation of marijuana and the theft of utility services); concurrent sentences were imposed on the remaining counts).

On appeal, defendant challenges the denial of his motion to suppress evidence made initially at the preliminary hearing and renewed before the trial court. He also asserts that the trial court should have stayed execution of sentence on either his conviction for driving under the influence of alcohol or his conviction for driving with a blood-alcohol content of 0.08 percent or above pursuant to Penal Code section 654.¹ As we shall explain, the suppression motion was appropriately denied. However, as the Attorney General concedes, we must modify the judgment to stay execution of the sentence imposed for driving under the influence of alcohol. As modified, we affirm the judgment.

BACKGROUND

Because the only issue on appeal requiring a statement of facts involves the denial of defendant's motion to suppress evidence, which was heard concurrently with the preliminary hearing, this summary is based on the testimony adduced during that hearing.

During the early morning hours of April 17, 2009, defendant crashed his Honda Accord into a Saturn driven by Francisca Casalta as the two vehicles traveled southbound on Interstate Highway 5 in Stockton. North of Monte Diablo Avenue, the Honda approached the Saturn "at a very high rate of speed" and cut "across all lanes of the freeway," hitting the Saturn from behind as Casalta "changed lanes to the fast lane" in an attempt to avoid the collision. The impact pushed the Saturn into the center median and caused it to collide with the guardrail. The Honda, now missing the front and rear bumpers, came to rest in the middle of the freeway. The front axle and engine compartment took considerable damage in the crash. The accident also claimed a third vehicle as a pickup truck swerved to avoid the already-wrecked cars and rolled over on its side.

¹ Undesignated statutory references are to the Penal Code.

Law enforcement and emergency medical personnel arrived a short time later. Casalta and her passenger complained of back and neck pain, but declined transport to the hospital. Defendant was nowhere to be found. Because the accident occurred on “a blind corner,” California Highway Patrol (CHP) Officer Keith Sweeney’s first concern was slowing traffic and getting the wreckage off of the freeway. Accordingly, Officer Sweeney had another officer create a traffic break and called for three tow trucks to remove the vehicles. Sweeney then searched the Honda for indicia of ownership and found mail addressed to defendant. The address on the mail was less than a mile from the accident site. A cell phone was found in the car with a digital image of defendant as the phone’s wallpaper. The keys were also left in the ignition.

About an hour after arriving at the crash site, “directly after the freeway was clear,” Officer Sweeney and several other CHP officers drove to defendant’s address, a house with a back yard that abutted the onramp connecting Monte Diablo Avenue to the freeway. The entire house was surrounded by a wrought iron fence. A light was on toward the back of the house. Sweeney “secured the house” by sending officers into the front and back yards “in case someone tried to flee.” Sweeney also requested a San Joaquin County Sheriff’s Department unit with a Custody Information System Photo Viewer, “which had the capability of showing a photograph of the possible subject.” When the Sheriff’s Department unit arrived 10 to 15 minutes later, Sweeney confirmed that the image on the cell phone was that of defendant.

At this point, one of the officers who was dispatched to the back yard advised Officer Sweeney that there was a broken window in the back of the house. Sweeney entered the back yard and saw that the broken window had blood on it. Through the window, Sweeney could see into the kitchen. On the kitchen floor, defendant was “lying down on a mattress under a blanket” and “[a]ppeared to be sleeping.” There was a “very strong” odor of marijuana coming from inside the house. Sweeney requested a Sheriff’s

Department K-9 unit to assist in making entry into the house, which arrived 10 to 15 minutes later.

About 40 minutes after arriving at defendant's house, and nearly two hours after the accident, Officer Sweeney entered the house with the help of the K-9 unit. The dog's handler loudly identified himself through the broken window and ordered defendant to show his hands. Defendant did not respond. After several such commands, defendant "lifted his head up, opened his eyes and then almost immediately put his head back down and closed his eyes like he was going back to sleep." The deputy then broke the remainder of the window and followed the dog into the house. The dog first went to a box in the kitchen and then went to defendant and grabbed his arm with its mouth. Sweeney and several other officers also entered the house with weapons drawn and took defendant into custody.

On top of the couch in the living room, visible from the kitchen, was a .45 caliber semi-automatic handgun. Another officer brought this to Officer Sweeney's attention after he had taken defendant into custody. Behind the couch was a "garbage bag full of marijuana clippings." Next to the box in the kitchen was a scale. Sweeney took defendant to his patrol car and placed him inside. Defendant's breath "had a strong odor of alcohol," his eyes were "red and watery," and he was "very unsteady on his feet." On the way to the patrol car, defendant asked "if anybody was injured in the collision." Sweeney then came back into the house, secured the gun, and conducted a protective sweep of the rest of the house. During the sweep, officers discovered that the upstairs bedrooms contained about 150 marijuana plants.

When Officer Sweeney returned to the patrol car after finding the marijuana plants upstairs, defendant stated: "You found the gun and the little ladies." On the way to the jail, defendant stated: "I wish I was -- it's too bad I wasn't awake when you came into the house because I would have grabbed my gun and killed one of you before you killed me." Defendant's blood was drawn about four hours after the accident. His blood-

alcohol content was 0.11 percent. Officers later secured a search warrant and seized the evidence described above.

As mentioned, defendant filed a motion to suppress evidence pursuant to section 1538.5. The motion was heard concurrently with the preliminary hearing and denied. The magistrate found that entry into defendant's back yard was justified by the hot-pursuit doctrine. He explained: "This was an accident that happened on the freeway. The officers did -- there's nothing to indicate they delayed in taking care of the matter as expeditiously as they could. And they weren't in sight of the fleeing perpetrator at the time, but they acted as reasonably properly as could be expected. [¶] They had been told the driver had been driving very rapidly before he hit the victims in the case, and also [were] told by the victims they had been injured, they felt some pain. And so it was reasonable for [officers] to pursue the perpetrator on the basis that it was a possible felony hit and run." The officers also knew that "defendant was driving very erratically, bounced off the guardrail and ran into these two people who said they had been injured, [so] there was also a possibility of [charging defendant with] driving under the influence with injury." After learning of defendant's identity and address from searching the car, the officers drove to his house as soon as they had cleared the freeway. The magistrate described this as "a very logical progression" of events that fell within the hot-pursuit doctrine at least to the extent of justifying entry into the back yard.

Once the officers were in the back yard, the magistrate explained, they had two independent bases to enter the house. First, they saw a broken window with blood on it and defendant lying on a mattress in the kitchen. This fit the evidence at the accident scene because defendant left his keys in the car and probably could not get into the house "unless he broke a window or something like that." In light of the blood on the window and defendant's apparent inability to respond to commands, "a reasonable person seeing those circumstances would be worried that [he] needed medical aid." Second, Officer Sweeney could smell the "strong odor of marijuana" coming from inside the house,

“which again put together with the information he had from the accident scene suggests that the person driving that Honda was under the influence of marijuana at least.”

Relying on *People v. Thompson* (2006) 38 Cal.4th 811 (*Thompson*), the magistrate found that because “just like alcohol the effects of marijuana dissipate with time,” Officer Sweeney had “very good reason to believe” that if he did not act promptly evidence that defendant was under the influence of marijuana would disappear.

Once inside the house, the officers placed defendant under arrest and discovered the handgun, which was “in plain view.” However, the magistrate found that the protective sweep was unreasonable, explaining: “Now, at that point the officers are confronted with what amounts to a traffic offense committed by a single person, the only person seen in the car was the driver. . . . The officers now have that person in custody. He offers no further threat. I don’t think that’s right that they had a justification for then going upstairs to check the house for marijuana. [¶] They could clearly smell marijuana, and they certainly had a justification for getting a warrant at that time, but I don’t think that the excuse of going up to look for more perpetrators or finding out whether there might be somebody else in the house is justification for searching through the house. [¶] . . . [¶] You can’t use protective sweep as an excuse for searching the rest of the house, especially where there’s only one perpetrator. It involves a traffic offense. There are no accomplices involved.”

After excising all information obtained during the protective sweep from the declaration submitted in support of the search warrant, the magistrate concluded that the warrant would have issued even without this improperly obtained information. He explained: “[T]he officer knows that defendant is driving erratically, he goes to the defendant’s house, the defendant is acting as if he is unconscious, the officer smells a strong odor of marijuana, he enters, sees the gun, and smells marijuana very strongly inside the house as well. [¶] That would certainly have been justification to issue a warrant to search that entire house for evidence of the marijuana. And so I think that the

search warrant was properly issued based upon that information, even after you eliminate the improper information.”

Defendant renewed the suppression motion before the trial court. During the hearing, defense counsel argued that “the crux of the case” was the fact that officers “immediately went into the back yard without any legal reason to do so.” Counsel elaborated: “[T]he bottom line is they had no right to be in the back yard to make an observance through the window, to see, hear, or smell anything because they shouldn’t have been there in the first place.” The trial judge disagreed and denied the motion, finding that the officers acted reasonably in entering the back yard following defendant’s flight from the accident scene.

DISCUSSION

I

Denial of the Motion to Suppress

Defendant argues that the trial court erred in denying his motion to suppress, specifically: (1) warrantless entry into his back yard was not justified by the hot-pursuit exception to the warrant requirement; (2) warrantless entry into his home was not justified by the “emergency aid” exception to the warrant requirement or by the need to quickly obtain evidence that he was driving under the influence; (3) the protective sweep of the house was unreasonable because the officers had no facts supporting an inference that other occupants were in the house; and (4) the trial court should have quashed the search warrant that was ultimately secured because it was based entirely on information unlawfully obtained in violation of defendant’s Fourth Amendment rights. We address each of these arguments in turn.

A.

Entry into Defendant’s Back Yard

Defendant argues that his Fourth Amendment rights were violated by the warrantless entry into his back yard. In making this argument, he specifically addresses

the exception to the warrant requirement relied upon by the magistrate in denying his motion to suppress, i.e., “hot pursuit.” As we explain, while we agree that there was no pursuit of defendant from the scene of the accident to his house, we nevertheless conclude that entry into defendant’s back yard to prevent him from fleeing from the house was reasonable and did not violate the Fourth Amendment.

Because the initial motion to suppress was made during the preliminary hearing, and the renewed motion before the trial court was submitted on the transcript of that hearing pursuant to section 1538.5, subdivision (i), we disregard the findings of the trial court and review the determination of the magistrate who ruled on the initial motion. “We review the evidence in the light most favorable to the magistrate’s ruling and will uphold the magistrate’s express or implied findings if supported by substantial evidence.” (*People v. Nonnette* (1990) 221 Cal.App.3d 659, 664; *People v. Ramsey* (1988) 203 Cal.App.3d 671, 678-679.) “The question of whether a search was unreasonable, however, is a question of law. On that issue, we exercise ‘independent judgment.’” (*People v. Camacho* (2000) 23 Cal.4th 824, 830 (*Camacho*), quoting *People v. Leyba* (1981) 29 Cal.3d 591, 597; *People v. Memro* (1995) 11 Cal.4th 786, 838.)

“The Fourth Amendment provides ‘[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated’ (U.S. Const., 4th Amend.) This guarantee has been incorporated into the Fourteenth Amendment to the federal Constitution and is applicable to the states. [Citation.] A similar guarantee against unreasonable government searches is set forth in the state Constitution (Cal. Const., art. I, § 13) but, since voter approval of Proposition 8 in June 1982, state and federal claims relating to exclusion of evidence on grounds of unreasonable search and seizure are measured by the same standard. [Citations.] ‘Our state Constitution thus forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the

federal Constitution as interpreted by the United States Supreme Court.’ [Citation.]” (*Camacho, supra*, 23 Cal.4th at pp. 829-830.)

The United States Supreme Court has explained: “We have long held that the ‘touchstone of the Fourth Amendment is reasonableness.’ [Citation.] Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances. ¶ In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry. Thus, in [*Florida v. Royer* (1983) 460 U.S. 491 [75 L.Ed.2d 229]], we expressly disavowed any ‘litmus-paper test’ or single ‘sentence or . . . paragraph . . . rule,’ in recognition of the ‘endless variations in the facts and circumstances’ implicating the Fourth Amendment. [Citation.] Then, in [*Michigan v. Chesternut* (1988) 486 U.S. 567 [100 L.Ed.2d 565]], when both parties urged ‘bright-line rule[s] applicable to all investigatory pursuits,’ we rejected both proposed rules as contrary to our ‘traditional contextual approach.’ [Citation.] And again, in [*Florida v. Bostick* (1991) 501 U.S. 429 [115 L.Ed.2d 389]], when the Florida Supreme Court adopted a *per se* rule that questioning aboard a bus always constitutes a seizure, we reversed, reiterating that the proper inquiry necessitates a consideration of ‘all the circumstances surrounding the encounter.’ [Citation.]” (*Ohio v. Robinette* (1996) 519 U.S. 33, 39 [136 L.Ed.2d 347, 354-355]; *Cady v. Dombrowski* (1973) 413 U.S. 433, 439 [37 L.Ed.2d 706, 713] [the “ultimate standard set forth in the Fourth Amendment is reasonableness”].)

“‘It is a “basic principle of Fourth Amendment law” that searches and seizures inside a home without a warrant are presumptively unreasonable.’ [Citation.] Indeed, ‘the “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”’ [Citation.] The requirement of a warrant ‘minimizes the danger of needless intrusions of that sort.’ [Citation.]” (*Thompson, supra*, 38 Cal.4th at p. 817; *Payton v. New York* (1980) 445 U.S. 573, 586 [63 L.Ed.2d 639, 650].) “This presumption can be overcome by a showing of one of the few ‘specifically established

and well-delineated exceptions' to the warrant requirement [citation], such as "hot pursuit of a fleeing felon, or imminent destruction of evidence, . . . or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling" [citation]. The United States Supreme Court has indicated that entry into a home based on exigent circumstances requires *probable cause* to believe that the entry is justified by one of these factors such as the imminent destruction of evidence or the need to prevent a suspect's escape." (*People v. Celis* (2004) 33 Cal.4th 667, 676; *Minnesota v. Olson* (1990) 495 U.S. 91, 100 [109 L.Ed.2d 85, 95-96] (*Olson*).)

These rules also apply to the "curtilage" of the home, i.e., "the land immediately surrounding and associated with the home" and "to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" (*Oliver v. United States* (1984) 466 U.S. 170, 180 [80 L.Ed.2d 214, 225].) Thus, defined "by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private," the United States Supreme Court has "extended Fourth Amendment protection to the curtilage." (*Ibid.*)

Here, there can be no doubt that defendant reasonably expected his back yard would remain private. Indeed, both the front and back yards were surrounded by a fence with one point of entry, a gate leading to the front door. "A person who surrounds his back yard with a fence and limits entry with a gate, locked or unlocked, has shown a reasonable expectation of privacy." (*People v. Winters* (1983) 149 Cal.App.3d 705, 707.) Officer Sweeney did not have a warrant to enter the back yard. Thus, the question is whether or not he had probable cause to believe that entry into the back yard was justified by exigent circumstances.

1. Hot Pursuit of a Fleeing Felon

As mentioned, the magistrate concluded that entry into the back yard was justified by the hot-pursuit exception to the warrant requirement. Defendant disagrees, arguing that "there was no pursuit at all. Nobody followed [him] from the scene of the accident;

no percipient witness was able to identify him for law enforcement; and -- most important -- Officer Sweeney was at the scene of the accident for an hour before driving to [his] residence with other officers.” We conclude the hot-pursuit exception does not apply.

In certain circumstances, “the fresh pursuit of a fleeing felon may constitute a sufficiently grave emergency to justify an exception to the warrant requirement and make it constitutionally reasonable for the police to enter a private dwelling without prior authorization of a magistrate. [Citations.] ‘There is no ready litmus test for determining whether such circumstances exist, and in each case the claim of an extraordinary situation must be measured by the facts known to the officers.’ [Citation.]” (*People v. Escudero* (1979) 23 Cal.3d 800, 808-809.) However, while “it is not necessary that the suspect be kept physically in view at all times,” the doctrine does require that the pursuit “must be substantially continuous and afford the law enforcement authorities no reasonable opportunity to obtain a warrant.” (*Id.* at p. 810.) Moreover, the doctrine “does not apply where the suspect poses no imminent danger if allowed to temporarily remain at large.” (*People v. Keltie* (1983) 148 Cal.App.3d 773, 779.)

In *Welsh v. Wisconsin* (1984) 466 U.S. 740 [80 L.Ed.2d 732] (*Welsh*), Welsh drove erratically, crashed his car, and left the scene on foot. Police arrived within a few minutes of the accident and questioned a witness who described the driver as “either very inebriated or very sick.” Police then checked the registration, discovered that Welsh lived a short distance away, and immediately went to his home. Entering the home without a warrant, police arrested Welsh for driving under the influence. (*Id.* at pp. 742-743.) The United States Supreme Court found the claim of hot pursuit to be “unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime. Moreover, because the petitioner had already arrived home, and had abandoned his car at the scene of the accident, there was little remaining threat to public safety.” (*Id.* at p. 753.)

Similarly, here, there was no immediate or continuous pursuit of defendant from the accident scene to his house. Instead, there was an investigation that promptly, and quite reasonably, led Officer Sweeney to conclude that defendant had fled on foot to his house, a short distance from the accident scene and with a back yard abutting the Monte Diablo Avenue onramp. Without a pursuit, the hot pursuit exception could not justify warrantless entry into defendant's house. Nor do we believe that it justifies such an entry into his enclosed back yard. However, as we explain immediately below, a related exception to the warrant requirement, "the need to prevent a suspect's escape" (*People v. Celis, supra*, 33 Cal.4th at p. 676; *Olson, supra*, 495 U.S. at p. 100 [109 L.Ed.2d at pp. 95-96]), does reasonably justify the entry into defendant's back yard in this case.

2. *The Need to Prevent a Suspect's Escape*

In determining whether entry into defendant's back yard to surround the house and prevent him from fleeing was reasonable in this case, we look to the United States Supreme Court for guidance.

In *Olson, supra*, 495 U.S. 91 [109 L.Ed.2d 85], a lone gunman robbed a gas station and killed the station manager. Hearing the police dispatch concerning the robbery, officers immediately suspected Ecker and drove to his home. An Oldsmobile arrived at the same time, took evasive action, and spun out of control. Two men fled from the car on foot. Ecker, who was later identified as the gunman, was captured a short time later. The second man (Olson) escaped. A search of the car uncovered a sack of money, the murder weapon, and certain documents revealing Olson's name and address. (*Id.* at p. 93.) The next day, police learned that Olson was staying in a duplex with two women, that he had confessed to being the driver of the getaway car, and that he planned to leave town by bus. (*Id.* at pp. 93-94.) Police surrounded the duplex to prevent Olson's escape. Fifteen minutes later, they entered without a warrant and found Olson hiding in a closet. (*Id.* at p. 94.)

The United States Supreme Court upheld the Minnesota Supreme Court's determination that warrantless entry into the duplex was not justified by exigent circumstances, explaining: "The Minnesota Supreme Court applied essentially the correct standard in determining whether exigent circumstances existed. The court observed that 'a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, [*Welsh, supra*, 466 U.S. 740 [80 L.Ed.2d 732]], or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling.' [Citation.] The court also apparently thought that in the absence of hot pursuit there must be at least probable cause to believe that one or more of the other factors justifying the entry were present and that in assessing the risk of danger, the gravity of the crime and likelihood that the suspect is armed should be considered. Applying this standard, the state court determined that exigent circumstances did not exist. [¶] We are not inclined to disagree with this fact-specific application of the proper legal standard. The court pointed out that although a grave crime was involved, respondent 'was known not to be the murderer but thought to be the driver of the getaway car,' [citation], and that the police had already recovered the murder weapon, [citation]. 'The police knew that [two occupants] were with the suspect in the upstairs duplex with no suggestion of danger to them. Three or four Minneapolis police squads surrounded the house. The time was 3 p.m., Sunday It was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended.' [Citation.] We do not disturb the state court's judgment that these facts do not add up to exigent circumstances." (*Olson, supra*, 495 U.S. at pp. 100-101 [109 L.Ed.2d at pp. 95-96].)

Here, defendant drove erratically on the freeway, crashed into another car, and fled from the accident scene on foot. The occupants of the other car appeared to be injured. Hit and run causing injury is a serious crime in California. (Veh. Code, § 20001, subd. (b).) Given the close proximity of defendant's house, Officer Sweeney believed

that defendant went there. When Sweeney and the other officers arrived, they noticed that the back yard abutted the freeway onramp and there was a light on towards the back of the house. Based on all of these facts, Sweeney had probable cause to believe that defendant was inside the house. Having already fled from the scene of the accident, there was good reason to believe that defendant would also flee from the house if given the chance. And because the back yard abutted the freeway onramp, if defendant was allowed to jump over the back fence, there was a serious risk that he would further endanger himself and others in an attempt to escape capture by crossing the freeway on foot.

As in *Olson, supra*, 495 U.S. 91 [109 L.Ed.2d 85], these circumstances would not have justified entry into the house. As there, surrounding the house was sufficient to prevent defendant's escape. But surrounding the house is precisely what the officers did in this case. And while the *Olson* opinion does not disclose whether the officers in that case were required to enter the curtilage in order to surround the duplex, here, defendant's entire house was surrounded by a fence, making it difficult to surround without entering the curtilage.

We conclude that the officers acted reasonably in entering defendant's back yard in order to surround the house to make sure he did not escape.

B.

Entry into Defendant's Home

Defendant also contends that, even if the officers acted reasonably in entering his back yard, the warrantless entry into his home was not justified by the "emergency aid" exception to the warrant requirement or by the need to quickly obtain evidence that he was driving under the influence. We conclude that entry into the house was justified by the emergency aid exception. We express no opinion as to whether entry would have been justified by the need to obtain evidence that defendant was driving under the influence.

“[L]aw enforcement officers ‘may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.’ [Citation.] This ‘emergency aid exception’ does not depend on the officers’ subjective intent or the seriousness of any crime they are investigating when the emergency arises. [Citation.] It requires only ‘an objectively reasonable basis for believing,’ [citation], that ‘a person within [the house] is in need of immediate aid,’ [citation].” (*Michigan v. Fisher* (2009) 558 U.S. 45, 47 [175 L.Ed.2d 410, 413] (*Fisher*); *Brigham City v. Stuart* (2006) 547 U.S. 398, 403-405 [164 L.Ed.2d 650, 657-658] (*Brigham City*)).

In *Fisher, supra*, 558 U.S. 45 [175 L.Ed.2d 410], police officers responded to a residential disturbance and found three broken house windows, a truck with a smashed front end in the driveway, and damaged fence posts along the side of the property. Blood was on the hood of the truck, on clothes inside of it, and on one of the doors to the house. Fisher was inside the house screaming and throwing things. Seeing a cut on his hand, officers asked if he needed medical attention. Fisher did not answer the question and instead told the officers to get a warrant. One of the officers then entered the house and found Fisher pointing a gun at him. Fisher was ultimately arrested and charged with assault with a dangerous weapon and possession of a firearm during the commission of a felony. (*Id.* at p. 547.)

The United States Supreme Court found the entry into the house was justified by the emergency aid exception to the warrant requirement. The court first described the facts of *Brigham City, supra*, 547 U.S. 398 [164 L.Ed.2d 650]: “There, police officers responded to a noise complaint in the early hours of the morning. ‘As they approached the house, they could hear from within an altercation occurring, some kind of fight.’ [Citation.] Following the tumult to the back of the house whence it came, the officers saw juveniles drinking beer in the backyard and a fight unfolding in the kitchen. They watched through the window as a juvenile broke free from the adults restraining him and

punched another adult in the face, who recoiled to the sink, spitting blood. [Citation.] Under these circumstances, we found it ‘plainly reasonable’ for the officers to enter the house and quell the violence, for they had ‘an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning.’ [Citation.]” (*Fisher, supra*, 130 S.Ct. at p. 548 [175 L.Ed.2d at p. 413].)

The Supreme Court then explained: “Just as in *Brigham City*, the police officers here were responding to a report of a disturbance. Just as in *Brigham City*, when they arrived on the scene they encountered a tumultuous situation in the house -- and here they also found signs of a recent injury, perhaps from a car accident, outside. And just as in *Brigham City*, the officers could see violent behavior inside. Although [the officers] did not see punches thrown, as did the officers in *Brigham City*, they did see Fisher screaming and throwing things. It would be objectively reasonable to believe that Fisher’s projectiles might have a human target (perhaps a spouse or a child), or that Fisher would hurt himself in the course of his rage. In short, we find it as plain here as we did in *Brigham City* that the officer’s entry was reasonable under the Fourth Amendment.” (*Fisher, supra*, 558 U.S. at pp. 48-49 [175 L.Ed.2d at pp. 413-414].)

Here, officers arrived at defendant’s house after he fled from the scene of a car accident a short distance away. When they surrounded the house in order to prevent his escape, the officers noticed a broken window with blood on it. The strong odor of marijuana emanated from the window. Defendant appeared to be asleep on a mattress in the kitchen. He did not respond to any orders from the Sheriff’s Department K-9 handler who was called in to assist except for briefly opening his eyes and lifting his head before returning to his previous position on the mattress as if he were going back to sleep. Defendant’s car was badly damaged in the accident. The occupants of the car he crashed into complained of back and neck pain caused by the accident. Thus, as in *Fisher*, there were signs of a recent injury, perhaps from a car accident. And while, unlike *Fisher*, there was no “tumultuous situation” going on in the house, the reason that was important

there was the fact that officers could reasonably conclude that Fisher would further hurt himself in his rage or be unable to properly care for the injury he had already received. (*Fisher, supra*, 558 U.S. at pp. 48-49 [175 L.Ed.2d at pp. 413-414].) Here, the fact that defendant appeared to be passed out, was possibly under the influence of marijuana, and apparently was unable to respond to commands, would lead an officer to reasonably conclude that he could not properly care for his injury.

Nevertheless, defendant argues that there are “two aspects of the current case that undercut any conclusion that officers were justified in entering [his] residence to ensure that he was not seriously injured.” First, defendant claims there is “a lack of evidence of *serious* injury,” arguing that there is “no band aid exception to the warrant requirement.” However, the Supreme Court rejected a similar argument in *Fisher, supra*, 558 U.S. at page 49 [175 L.Ed.2d at p. 414], explaining: “Officers do not need ironclad proof of ‘a likely serious, life-threatening’ injury to invoke the emergency aid exception. The only injury police could confirm in *Brigham City* was the bloody lip they saw the juvenile inflict upon the adult.”

Second, defendant argues that “the officers at [his house], the people who were in the position to evaluate the facts that were known to them, clearly did not believe that there was an immediate need to ensure [his] safety. Officers arrived at [defendant’s] residence at 2:53 a.m.; they did not enter the residence until 3:30 a.m.” Again, the Supreme Court rejected a similar argument in *Fisher, supra*, 558 U.S. at page 49 [175 L.Ed.2d at p. 414], explaining that “the test, as we have said, is not what [the officers] believed, but whether there was ‘an objectively reasonable basis for believing’ that medical assistance was needed, or persons were in danger, [citation].” (*Ibid.*) Here, there was a reasonable basis for believing that defendant was injured and unable to properly care for himself.

We conclude that entry into defendant’s house was justified by the emergency aid exception to the warrant requirement.

C.

The Protective Sweep

Defendant further asserts that the protective sweep of the house was unreasonable because the officers had no facts supporting an inference that other occupants were in the house. This is what the magistrate found. We agree with his assessment.

As a preliminary matter, the Attorney General asserts that defendant has forfeited this claim by failing to raise the constitutionality of the protective sweep below. While it is true that this issue was never raised by defendant, it was raised by the magistrate, who found the protective sweep to be unconstitutional. As already mentioned, because the initial motion to suppress was made during the preliminary hearing, and the renewed motion before the trial court was submitted on the transcript of that hearing pursuant to section 1538.5, subdivision (i), we must disregard the findings of the trial court and review the determination of the magistrate who ruled on the initial motion. (*People v. Nonnette, supra*, 221 Cal.App.3d at p. 664; *People v. Ramsey, supra*, 203 Cal.App.3d at pp. 678-679.) Thus, we shall review the magistrate's ruling that the protective sweep was unconstitutional.

“The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.” (*Maryland v. Buie* (1990) 494 U.S. 325, 337 [108 L.Ed.2d 276, 288].) As our Supreme Court has stated: “A *Buie* sweep is unlike warrantless entry into a house based on exigent circumstances (one of which concerns the risk of danger to police officers or others on the scene); such an entry into a home must be supported by *probable cause* to believe that a dangerous person will be found inside. [Citation.] A protective sweep can be justified merely by a *reasonable suspicion* that the area to be swept harbors a dangerous person. [Citation.] Like the limited patdown for weapons authorized by [*Terry v. Ohio* (1968) 392 U.S. 1 [20 L.Ed.2d

889]], a protective sweep may not be based on ‘a mere “inchoate and unparticularized suspicion or ‘hunch.’”’ [Citation.]” (*People v. Celis, supra*, 33 Cal.4th at p. 678.)²

Here, as the magistrate found, Officer Sweeney had no specific and articulable facts supporting a reasonable suspicion that the upstairs bedrooms harbored an individual posing a danger to those on the arrest scene. At the time of the sweep, the officers had probable cause to believe that defendant had driven under the influence causing an accident, that he had unlawfully fled from the scene, that he possessed a firearm (which was in plain view on the back of the couch), and that the house contained marijuana. But none of this supports a reasonable suspicion that *someone else* was in the house. As the magistrate explained: “Now, at that point the officers are confronted with what amounts to a traffic offense committed by a single person, the only person seen in the car was the driver. . . . The officers now have that person in custody. He offers no further threat. . . . [¶] . . . I don’t think that the excuse of going up to look for more perpetrators or finding out whether there might be somebody else in the house is justification for searching through the house. [¶] . . . [¶] You can’t use protective sweep as an excuse for searching the rest of the house, especially where there’s only one perpetrator. It involves a traffic offense. There are no accomplices involved.” We conclude that the protective sweep violated the Fourth Amendment.

² Defendant’s supplemental opening brief provides an incomplete version of the above-quoted language from *People v. Celis, supra*, 33 Cal.4th at page 678, using ellipses to completely change the meaning of the passage: “A *Buie* sweep . . . must be supported by probable cause to believe that a dangerous person will be found inside.” We give defendant’s appellate counsel the benefit of the doubt as to whether this misstatement of the law was deliberate or simply careless. However, even careless misquotation is “inexcusable upon the part of any lawyer, and places additional burdens upon this court.” (*Weinfeld v. Weinfeld* (1958) 159 Cal.App.2d 608, 612; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 708, p. 778.)

D.

Independent Source Rule

Finally, we also agree with the magistrate's conclusion that the officers would have secured a search warrant for the entire house based on observations made prior to the unlawful protective sweep and that, after excising from the warrant application all tainted information, the warrant was supported by probable cause. Thus, the warrant provides an independent source for the discovery of the marijuana plants in the upstairs bedrooms sufficient to purge the taint from the unlawful protective sweep.

“It has long been established that even if a criminal investigation involved some illegal conduct, courts will admit evidence derived from an ‘independent source.’” (*People v. Weiss* (1999) 20 Cal.4th 1073, 1077, quoting *Silverthorne Lumber Co. v. United States* (1920) 251 U.S. 385, 392 [64 L.Ed. 319, 321].) “If, after some illegal conduct, the police obtain a search warrant they would have sought without that conduct, and none of the supporting documents cites information derived from that conduct, application of the doctrine is relatively easy: The court need not suppress evidence found in the resulting search. ‘Because “[n]one of the information on which the warrant was secured was derived from or related in any way to the initial [unlawful conduct],” . . . the search warrant was “a ‘means sufficiently distinguishable’ to purge the evidence of any ‘taint’ arising from the [unlawful conduct].” [Citation.]” (*Weiss, supra*, at p. 1078.) And where “the affidavit supporting the search warrant [does] contain information derived from unlawful conduct as well as other, untainted, information” (*ibid.*), “the reviewing court must excise all tainted information but then must uphold the warrant if the remaining information establishes probable cause.” (*Id.* at p. 1081.)

Here, as mentioned, the magistrate excised all information obtained during the unlawful protective sweep and concluded the remaining information established probable cause to believe the house contained marijuana. The record does not contain a copy of the affidavit, but the magistrate summarized the remaining information at the hearing:

“[T]he officer knows that defendant is driving erratically, he goes to the defendant’s house, the defendant is acting as if he is unconscious, the officer smells a strong odor of marijuana, he enters, sees the gun, and smells marijuana very strongly inside the house as well. [¶] That would certainly have been justification to issue a warrant to search that entire house for evidence of the marijuana. And so I think that the search warrant was properly issued based upon that information, even after you eliminate the improper information.” We agree with this assessment.

In sum, officers arrived at the scene of an accident on the freeway, discovered that defendant, the driver responsible for the accident, had fled on foot, most likely to his house a short distance away. The officers drove to defendant’s house as soon as the wreckage was cleared from the freeway. Upon arrival, they saw a light on toward the back of the house and noticed that the back yard abutted the freeway onramp. Concerned that defendant would again attempt to escape the consequences of his actions, officers reasonably entered the front and back yards in order to surround the house. In the back yard, they found a broken window with blood on it. The strong odor of marijuana emanated from the broken window. Defendant, who appeared to be unconscious on a mattress in the kitchen, did not respond to commands. Given that defendant was involved in a serious traffic accident, appeared to be injured, and also appeared to be unable to properly care for himself, officers were justified in entering the house to make sure the injury was not serious or life-threatening. Up to this point, the officers’ actions were eminently reasonable. And while the subsequent protective sweep violated the Fourth Amendment, we conclude the warrant that was ultimately obtained provides an independent source for the discovery of the marijuana plants in the upstairs bedrooms sufficient to purge the taint from the unlawful protective sweep. Accordingly, the motion to suppress was appropriately denied.

II

Section 654

Defendant also asserts that the trial court should have stayed execution of sentence on either his conviction for driving under the influence of alcohol (Count 6) or his conviction for driving with a blood-alcohol content of 0.08 percent or above (Count 7) pursuant to section 654. The Attorney General concedes the issue. We accept the concession. Section 654 prohibits multiple punishment when there is a single act or an indivisible course of conduct. Because defendant “was convicted of two offenses arising from one prohibited activity, driving after excessive drinking,” he may be punished for *either* driving under the influence or for driving with a blood-alcohol content of 0.08 percent or above, *but not for both*. (*People v. Duarte* (1984) 161 Cal.App.3d 438, 446-447.)

For each conviction, the trial court imposed a concurrent six-month sentence. The trial court has discretion to stay either conviction. (*People v. Duarte, supra*, 161 Cal.App.3d at p. 488.) Instead of remanding this sentencing matter to the trial court, we modify the judgment to stay execution of the sentence imposed for driving under the influence of alcohol (Count 6).

We note the abstract of judgment does not reflect defendant’s conviction for driving under the influence (Count 6) or for driving with a blood-alcohol content of 0.08 percent or above (Count 7). We direct the trial court to include its sentences for conviction on Counts 6 and 7 in the amended abstract of judgment, indicating the sentence on Count 6 (driving under the influence of alcohol) is stayed pursuant to section 654.

DISPOSITION

The judgment is modified to reflect that the sentence on Count 6 (driving under the influence of alcohol) is stayed pursuant to Penal Code section 654 and to include the sentence on Count 7. As modified, the judgment is affirmed. The trial court is directed

to prepare an amended abstract of judgment reflecting the modification affecting Counts 6 and 7, and to forward a certified copy to the Department of Corrections and Rehabilitation.

HOCH, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.