STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

CHRISTOPHER BOYCE,

Defendant-Appellant.

UNPUBLISHED

January 21, 1997

No. 182886
LC No. 94-008563

Before: MacKenzie, P.J., and Wahls and Markey, JJ.

MEMORANDUM.

Following a bench trial, defendant was convicted of carrying a concealed weapon, MCL 750.227(2); MSA 28.424(2). Defendant was sentenced to a term of nine to sixty months' imprisonment. Defendant appeals as of right. We reverse.

Defendant contends that the trial court erred when it denied his motion to suppress the gun found in the vehicle he was operating on the morning of his arrest. We agree. We will not reverse a trial court's decision to suppress evidence unless that decision was clearly erroneous. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). After carefully reviewing the record, we are left with a definite and firm conviction that the trial court made a mistake. *Id.*, p 449.

The trial court based its denial of defendant's motion to suppress on the testimony of one of the arresting officers who testified that defendant's vehicle was initially stopped for two traffic violations. The subsequent search of defendant's vehicle was based merely on the officer noticing defendant reaching down toward the front of the driver's seat as the officer approached the vehicle. However, the officer did not articulate any facts other than defendant's "furtive gesture." In addition, the officer conceded the fact that once defendant was ordered out of the vehicle, he did not pose a threat to the officer's safety or that of others. Accordingly, the search of defendant's vehicle could not be justified under the automobile exception to the warrant requirement. *California v Acevedo*, 500 US 565, 570; 111 S Ct 1982; 114 L Ed 2d 619 (1991); *People v Terrell*, 77 Mich App 676, 680; 259 NW2d 187 (1977); *People v Pitts*, 40 Mich App 567, 576; 199 NW2d 271 (1972).

In addition, the search was not justified by the search incident to arrest exception because the police did not have probable cause to arrest defendant prior to the search. *People v Champion*, 452

Mich 92, 115-116; ___ NW2d ___ (1996). Finally, the search was not justified under the plain view exception because the arresting officer conceded that he did not see the gun until after he entered the vehicle and ran his hands under the driver's seat. No searching, no matter how minimal, may be done under the auspices of the plain view doctrine. *Id.*, p 101. Accordingly, the gun found during that illegal search should have been suppressed as "the fruit of the poisonous tree." *Wong Sun v United States*, 371 US 471, 487-488; 83 S Ct 407; 9 L Ed 2d 441 (1963); *People v Shabaz*, 424 Mich 42, 65; 378 NW2d 451 (1985).

In light of our disposition of the above issue, it is unnecessary to address defendant's remaining issues.

Reversed.

/s/ Barbara B. MacKenzie
/s/ Myron H. Wahls
/s/ Jane E. Markey