STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY CLAY,

Defendant-Appellant.

UNPUBLISHED
April 11, 1997

No. 183101
Kent Circuit Court
LC No. 94-0827-FH

Before: Reilly, P.J. and MacKenzie, and B.K. Zahra*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon, MCL 750.227; MSA 28.424, and habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant was sentenced to five to twenty years' imprisonment. Defendant appeals as of right. We reverse and remand for further proceedings.

Defendant claims that the trial court should have granted his motion to suppress evidence (the weapon and defendant's statements) as fruit of the poisonous tree because the arrest was invalid and a pretext to search for evidence. According to defendant, the police did not have probable cause to believe defendant aided and abetted a crime or committed a misdemeanor when he was arrested. We agree and hold that because defendant's arrest was invalid, the trial court erred when it denied defendant's motion to suppress.

At about 2:00 a.m. defendant was a passenger in a truck that was stopped at a traffic light in Grand Rapids. Officers Kessner and Smith were in their squad car stopped directly behind the truck. Defendant got out of the truck as the traffic light turned green. Defendant went over to the driver's side of the truck and spoke with the driver for approximately five to ten seconds, which prevented the police car from proceeding through the green light. Defendant then walked away from the truck and into the parking lot of an Amoco gas station that was open twenty-four hours a day. From the direction in which defendant was walking, it appeared to the officers that defendant was cutting across the lot. The

* Circuit judge, sitting on the Court of Appeals by assignment.

squad car went into the parking lot, Kessner got out, and said, "Sir, could you wait a minute, I need to speak to you." Defendant continued walking. Kessner again attempted to converse with defendant. Defendant glanced back, turned around and started running. After a chase on foot, defendant was arrested for trespassing in a gas station parking lot and failing to obey a police command. During the search incident to his arrest, the police discovered a nine-millimeter semiautomatic pistol in a shoulder holster under defendant's coat. Officers present during the arrest testified that defendant told Kessner that defendant had a gun as Kessner was handcuffing defendant. Kessner testified that he never heard defendant say that defendant had a gun.

The trial court denied defendant's motion to suppress. The court determined that this case did not involve an investigatory stop by the police. However, the court concluded that the officers legally arrested defendant, having observed him commit three "misdemeanors" in their presence, specifically, aiding and abetting in a traffic violation, trespassing, and willful failure to obey the lawful directions of an officer.

The trial court's factual findings following a suppression hearing will not be disturbed on appeal unless the findings are clearly erroneous. *People v LoCicero*, 453 Mich 496; ___ NW2d ___ (Docket Nos.104174, 104545, issued 12/27/96). However, the application of the constitutional standard to essentially uncontested facts, as in this case, is not entitled to the same deference as factual findings. *Id.*

The officers did not have probable cause to arrest defendant for aiding and abetting a traffic offense that was merely a civil infraction. Nondrivers may be convicted under the aiding and abetting statute for driving offenses. See *People v Branch*, 202 Mich App 550; 509 NW2d 525 (1993); *People v Hoaglin*, 262 Mich 162; 247 NW 141 (1933). We note that neither of these cases involve driving offenses that are merely civil infractions. The prosecution has not identified the particular statute or ordinance that the truck driver allegedly violated when the driver failed to proceed after the traffic light turned green. However, the statutes governing stopping, standing and parking of motor vehicles, MCL 257.672 *et seq.;* MSA 9.2372 *et seq*. concern offenses that are deemed civil infractions, not misdemeanors as indicated by the trial court. A civil infraction is not a crime. MCL 257.6a; MSA 9.1806(1). The prosecution has not cited and we are not aware of any authority indicating that the aiding and abetting statute may be applied when the principal offense is a civil infraction, rather than a crime. Because the driver of the truck did not commit a crime by temporarily blocking the traffic lane, defendant could not be guilty as an aider or abettor. The officers did not have probable cause to believe that defendant had committed a crime and therefore, he could not be legally arrested for the same.

Defendant was also not lawfully arrested for trespassing on the gas station parking lot. Kessner testified that he believed that defendant was trespassing in the parking lot and that he was aware of a letter that the owner of the gas station had on file with the Grand Rapids Police Department giving the police permission to arrest trespassers on the lot. The applicable trespassing statute applies when an individual has been forbidden to enter or was notified to depart and neglects or refuses to do so. MCL 750.552; MSA 28.820(1). Defendant was not told to depart from the premises, and inasmuch as the

lot was open to the general public, the "No Trespassing" signs were inadequate to inform defendant that he was forbidden to enter the parking lot. Accordingly, the officers did not have probable cause to arrest defendant for trespassing.

Because the officers had no basis for concluding that defendant had committed a criminal offense, Kessner's attempts to converse with defendant could not properly go beyond a "first-tier contact" to which an individual need not respond. *People v Shabaz*, 424 Mich 42, 57; 378 NW2d 451 (1986). Thus, defendant's failure to respond to Kessner's request that he stop also did not give the officers probable cause to arrest defendant.

This case falls in line with a pretextual stop described in *People v Haney*, 192 Mich App 207, 210; 480 NW2d 322 (1991). The officers did not have probable cause to believe that defendant had committed a criminal offense, and the officers were not authorized by state or municipal law to effect a custodial arrest for the particular offenses. *Id.* Because defendant was improperly arrested, the evidence that was obtained as a result of the improper arrest must be suppressed.

In light of our conclusion regarding the first issue, defendant's remaining arguments that he did not validly waive his right to counsel and that he was denied his right to counsel because the trial judge did not allow him use of the law library are moot.

Because the motion to suppress was erroneously denied, defendant's convictions are reversed and the case is remanded for further proceedings, dismissal or retrial, at the prosecutor's option, consistent with this opinion. We do not retain jurisdiction.

/s/ Maureen Pulte Reilly
/s/ Barbara B. MacKenzie
/s/ Brian K. Zahra