# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARKEE BAILEY,

Defendant-Appellant.

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UNPUBLISHED
December 12, 1997

No. 199473
Genesee Circuit Court
LC No. 93-049618-FH

Before: Sawyer, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession with intent to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). He subsequently pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083, and was sentenced to four to eight years' imprisonment. Defendant filed an application for leave to appeal, and a motion for rehearing in this Court, which was denied. Defendant then filed an application for leave to appeal to the Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to this Court for consideration as on leave granted. We reverse.

On the date of the incident, at approximately 5:15 p.m., Officers Stephen Mayfield and Cedric Kendall of the Flint Police Department drove into Dewy Park, which was a posted drug loitering area. The officers were driving an unmarked police car and wearing plain clothes. As the officers entered the park, they saw a man leaning against a tree and drinking beer. After arresting the man with the beer, the officers noticed a van, legally parked, with several people inside. The officers noticed "some movements inside. The driver appeared to be hiding something or shifting something around inside of the van." As a result, the officers exited their car and one approached each side of the van. Officer Kendall drew his weapon "when [he] was standing next to the van talking to [defendant]." He held his gun down by his left leg. The occupants of the van were ordered to put their hands up. After repeating the order about four times, the occupants complied. As defendant began to step out of the van, he continued to hide his right hand. Once defendant exited the van, he brought his right hand up to his chest area, and a ziplock baggie containing approximately one half ounce of marijuana dropped to the ground. Defendant was then arrested. A subsequent search of the van and its six occupants produced

more marijuana,[1] a razor blade and an opened and used package of cigarette papers. Defendant had a pager and $77 in cash.

Defendant first argues that the trial court erred in refusing to suppress the marijuana evidence where the police did not have a reasonable and articulable suspicion that criminal activity was afoot to justify an investigatory stop. We agree. A trial court's findings of fact following a suppression hearing will not be disturbed by an appellate court unless the findings are clearly erroneous. *People v LoCicero*, 453 Mich 496, 500; 556 NW2d 498 (1996).

The Fourth Amendment of the United States Constitution and its Michigan counterpart guarantee the right of people to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *LoCicero*, supra at 501. However, an officer is permitted to stop a party and make reasonable inquiries regarding his suspicion when the officer observes behavior which leads him to conclude that a party has engaged, or is about to engage, in criminal activity. *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). This Court has held that in order to justify an investigative stop, the police must have had a particularized suspicion, based on objective observations, that the person stopped has been, is, or is about to be engaged in some type of criminal wrongdoing. *People v Daniels*, 186 Mich App 77, 80; 463 NW2d 131 (1990) (citations omitted). Whether or not the police conduct violates the Fourth Amendment and amounts to an unlawful seizure must be evaluated in light of all the circumstances surrounding the incident in each case. *Id*. at 80-81.

Defendant relies on *People v Shabaz*, 424 Mich 42; 378 NW2d 451 (1985). In *Shabaz,* plain clothed police officers driving an unmarked car observed the defendant on a street at night in a high crime area. *Id*. at 46. The defendant was leaving an apartment building wherein the observing officers had previously made a number of arrests for concealed-weapons violations and narcotics offenses. After looking in the direction of the unmarked police vehicle, the defendant was observed attempting to conceal "a [small] paper bag like under his vest" or "in his pants." *Id*. at 60. When the officers slowed their vehicle to a stop, defendant "took off running." *Id.* The officers chased the defendant into a building, but did not see anything in his hands. *Id.* at 47. After catching up with the defendant, the officers found a closed brown paper bag in the vestibule of the building, which contained a gun. The defendant was arrested for unlawfully carrying a concealed weapon. *Id*. In concluding that the *Terry* stop was invalid, the Supreme Court stated, in relevant part:

> While the *crime rate in a neighborhood* may be a valid consideration to be taken into account when assessing reasonable suspicion, that *alone would not establish the grounds for an investigatory stop*. Defendant's presence in a high-crime neighborhood does nothing to distinguish him from any number of other pedestrians in the area. It provides no particular reasonable basis for suspicion as to the activity of the defendant. . . .
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> *Similarly, defendant's effort to conceal the paper bag in his vest, by itself, did not afford grounds for a stop.* There was no evidence that the size or shape of the bag suggested that it contained a weapon. It may have contained money, liquor, food, jewelry, or any number of small items one might lawfully carry in a small bag and

> wish to conceal from view while walking down a darkened street in a high-crime area. It might, on the other hand, have contained unlawful contraband or an illegally concealed weapon. It is precisely because the officers could only speculate about the contents of the bag that they had no reasonable or articulable basis to conclude what its contents were.
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> *Because the police could only guess about what defendant was seeking to hide, their speculation did not provide a particularized suspicion of possessory wrongdoing, but only a generalized one*. [*Id*. at 60-61 (citations omitted). Emphasis added.]

The Supreme Court concluded that:

> Considering the totality of the circumstances with which the police were confronted before the defendant began to run, it is clear that the officers were entirely without authority to confront the defendant and require him to submit to an investigatory stop and interrogation because, on the basis of what they had observed, the officers had no articulable or particularized grounds to suspect, reasonably, that the defendant was, had been, or was about to be engaged in criminal activity. *Nothing in their observation of him to that point provided the objectively reasonable and articulable suspicion that would justify the limited intrusion upon the defendant's liberty and privacy interests permitted under Terry*. [*Id*. at 62. Emphasis added.]

We agree with defendant that *Shabaz* is controlling and compels reversal of his conviction. Considering the totality of the circumstances with which the police were confronted before they requested that defendant raise his hands, it is clear that on the basis of what they had observed, the officers had no articulable or particularized grounds to reasonably suspect that defendant was, had been, or was about to be engaged in criminal activity. Here, the plain clothed officers' observations which formed the basis of their particularized suspicion are clear: their observation of a van with several occupants inside legally parked in broad daylight in an area known for drug activity; and, their observation of defendant making suspicious movements as if he was attempting to hide something. Both of these grounds, without something more, were specifically rejected by the Supreme Court for supporting a particularized suspicion for a *Terry* stop.[2] *Id*. at 60-61. The record in this case is devoid of any reference to other specific facts which would cast a suspicious light on defendant's "suspicious movements" or the presence of his van in the parking lot.

We therefore conclude that the investigative stop and seizure of defendant were invalid and, but for this stop and seizure, the evidence would not have been discovered. The circumstances surrounding the seizure of defendant as they appeared to the police officers at the time of the stop, considered in their totality, did not provide the requisite particularized suspicion of criminal activity based on objective observation sufficient to outweigh the defendant's privacy interest under the Fourth Amendment. *Id*. at

65. Therefore, all incriminating evidence flowing from the invalid *Terry* stop and subsequent arrest of defendant should have been suppressed. *Id*.

In view of our disposition of this issue, we need not address defendant's remaining issues on appeal.[3]

Reversed.

/s/ Harold Hood
/s/ Joel P. Hoekstra

[1] The total amount of marijuana seized from defendant and the occupants of the van was 21.2 grams.

[2] See also, *People v Freeman*, 413 Mich 492, 496-497; 320 NW2d 878 (1982) (where the Supreme Court ruled that the officers' observation of a lone automobile parked, with its parking lights on and its motor apparently running, near a darkened house in a private parking lot at approximately 12:30 a.m. does not, without more, support a reasonable suspicion of criminal activity.)

[3] We note that had we addressed the remaining issues, we would conclude that none have merit.