STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL L. KNOTT,

Defendant-Appellant.

UNPUBLISHED
May 26, 1998

No. 199483
Recorder's Court
LC No. 96-005688

Before: Sawyer, P.J., and Kelly and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for attempted carrying a concealed weapon in an automobile, MCL 750.92; MSA 28.287; MCL 750.227; MSA 28.424. Defendant was sentenced to two years' probation for his attempted carrying a concealed weapon conviction. We affirm.

Defendant's first issue on appeal is that the trial court erred in failing to suppress evidence seized during the search of defendant's vehicle. We disagree. Officers stopped defendant's vehicle when they noticed it speeding on the expressway. The stop was also made because defendant had been making a "furtive movement" back and forth in his seat, which, in one officer's experience, indicated an existence of contraband. Defendant was asked whether there were any narcotics or weapons in the vehicle, and when he responded, the officer noticed a change in defendant's tone of voice, and defendant appeared nervous. These reactions, coupled with defendant's furtive movement caused the officer to believe contraband was in the vehicle. Defendant consented to a search of the vehicle. He was handcuffed to his passenger while the search was conducted. A loaded, semi-automatic .45 caliber handgun was found in an unzipped duffel bag in the back seat, passenger side.

Defendant argues that the officers did not have probable cause to search the car, indicating defendant's furtive movement was not enough to establish probable cause that criminal activity was taking place. In addition, defendant argues that, because he was handcuffed to his passenger, he was not free to leave, and thus, he was precluded from leaving the scene and refusing the search. Defendant asserts that consent to search was obtained only through the officers' show of force.

The trial court denied defendant's motion to suppress the evidence seized, indicating the search was legally conducted incident to an arrest. However, the record indicates there was no probable cause to arrest defendant until after the gun was discovered, and that defendant was not placed under arrest until after the search was conducted. Nevertheless, reversal is not necessarily required when a trial court misidentifies the ground for the admission of evidence. *People v Vandelinder*, 192 Mich App 447, 454; 481 NW2d 787 (1992).

An automobile may be searched without a warrant when there is probable cause to believe that evidence of a crime will be found in a lawfully stopped vehicle. *United States v Ross*, 456 US 798, 807-808; 102 S Ct 2157, 2163-2164; 72 L Ed 2d 572 (1982); *People v Anderson*, 166 Mich App 455, 478-479; 421 NW2d 200 (1988). The test for probable cause is whether the facts and circumstances known to the officers would warrant a reasonably prudent person to believe that evidence of a crime or contraband sought is in the vehicle. *People v Carter*, 194 Mich App 58, 61; 486 NW2d 93 (1992). The officers' suspicions and articulated reasons supporting the search without a warrant must be based on objective facts known to the officer which would make his belief reasonable. *Id.* at 61-62.

There is no showing in the record that the stop made was unlawful or pretextual in order to search defendant's vehicle. The officers observed defendant's speeding car and followed him off the expressway. In the interim, the officers noticed a "furtive movement" when defendant leaned forward and then back in his seat with his left hand on the wheel and his right hand out of sight. This caused the officers to be suspicious that defendant might have been moving contraband within the vehicle. A furtive movement, standing alone, is insufficient to support a finding of probable cause and will not justify a search. *People v Howell*, 394 Mich 445, 447; 231 NW2d 650 (1975). However, the other circumstances testified to—defendant's nervousness and change in voice—support the officers' good faith belief that defendant was transporting contraband.

Even if there had been no probable cause, the evidence would still have been admissible pursuant to the "consent exception" to the warrant requirement, which allows a search without a warrant and seizure when consent is obtained from one having a reasonable expectation of privacy in the thing to be searched. *People v Malone*, 180 Mich App 347, 355; 447 NW2d 157 (1989). However, such waiver or consent must be proven by "clear and positive testimony *and there must be no duress or coercion, actual or implied, and the prosecutor must show a consent that is unequivocal and specific, freely and intelligently given.*" *People v Kaigler*, 368 Mich 281, 294; 118 NW2d 406 (1962) (emphasis in original). A party's lack of knowledge of his right to refuse to consent does not mandate a conclusion that the consent was involuntary. *People v Whisnant*, 103 Mich App 772, 777; 303 NW2d 887 (1981). The validity of consent is determined by the totality of the circumstances in each case. *Kaigler, supra*, 368 Mich 295; *Malone, supra*, 180 Mich App 355-356.

Defendant's consent was voluntarily given. At the suppression hearing, the prosecution presented undisputed testimony that defendant gave the officers permission to look in the vehicle. Defendant's argument that such consent was made under duress because of the authoritative nature of the officers' conduct (handcuffing defendant and the passenger together) is without merit. Defendant

consented to the search prior to being handcuffed. The mere handcuffing of defendant with his passenger was not an arrest. Rather, it was a detention. Detention is short of arrest, and therefore, unlike a true arrest, detention does not require probable cause. *People v Bloyd*, 416 Mich 538, 548-549; 331 NW2d 447 (1982). Nevertheless, officers must still have an articulable basis for suspecting an individual of criminal activity. *Id.* The articulable facts are weighed along with the officers' justifications for detention. For example, the officers may want to prevent flight, minimize harm to themselves, or allow for easier facilitation of searches. *Id.* at 550, 553. Regardless of the reasons given for detention, the detention must still be reasonable. *People v Chambers*, 195 Mich App 118, 123; 489 NW2d 168 (1992). Handcuffing defendant to his passenger was a precautionary measure taken by the officers while the vehicle was searched. Defendant's consent was freely given, whether he had actual knowledge that he could refuse the request. The trial court's determination that this was a search incident to a lawful arrest was erroneous, yet the court reached the right result for the wrong reason, and reversal is not necessarily required when a trial court misidentifies the ground for admitting evidence. *Vandelinder, supra*, 192 Mich App 454.

Defendant's second issue on appeal is that the prosecution failed to present sufficient evidence to support his conviction. We disagree.

To support a conviction for carrying a concealed weapon in an automobile, the prosecution must show the presence of a weapon in a vehicle operated or occupied by the defendant, that the defendant knew or was aware of the weapon's presence, and that he was "carrying" it. *People v Courier*, 122 Mich App 88, 90; 332 NW2d 421 (1982). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Defendant argues that there was insufficient evidence to show the duffel bag or its contents belonged to defendant, or that defendant knew there was a weapon in the bag. Defendant points out there were two individuals in the car, and evidence that defendant was the driver of the vehicle was insufficient to establish he was also the owner of the bag.

The Michigan Supreme Court has noted factors considered in other jurisdictions for evaluating the sufficiency of the evidence against a defendant charged with carrying a weapon in an automobile when the defendant argues he had no knowledge of its presence:

> (1) the accessibility or proximity of the weapon to the person of the defendant, (2) defendant's awareness that the weapon was in the motor vehicle, (3) defendant's possession of items that connect him to the weapon, such as ammunition, (4) defendant's ownership or operation of the vehicle, and (5) the length of time during which defendant drove or occupied the vehicle. [*People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982).]

The evidence in this case, viewed in a light most favorable to the prosecution, was sufficient to establish the element of knowledge. Defendant was the owner of the vehicle, as evidenced when he presented the registration for the vehicle and proof of insurance. In addition, because the gun was in an

unzipped bag in the back seat of the car, defendant had ready access to it. Defendant exercised such dominion and control over the automobile as to establish his knowledge of its presence. Finally, defendant's "furtive movement" of moving forward and then back in his seat caused the officers to believe defendant was relocating the contraband. A rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could find the elements of the crime to have been proven beyond a reasonable doubt. *Jolly, supra* at 466; *People v Beard*, 171 Mich App 538, 541; 431 NW2d 232 (1988).

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Michael R. Smolenski