STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARK DOUGLAS BICKEL,

Defendant-Appellee.

UNPUBLISHED
September 11, 1998

No. 210688
Kalamazoo Circuit
LC No. 97- 001229 FH

Before: Saad, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

The prosecution appeals as of right from an order of the lower court granting defendant's motion to suppress evidence and dismissing the charge against defendant, possession of less than twenty-five grams of heroin, MCL 333.7403(2)(a)(*v*); MSA 14.15(7403)(2)(a)(*v*).[1] We affirm.

This case arises from an automobile accident in which defendant was involved. When onlookers at the scene retrieved defendant from his automobile, defendant was unconscious and remained in that state en route to the hospital. At the hospital, while disrobing defendant and performing an inventory of his belongings, a nurse discovered in a pocket of defendant's pants a clear plastic bag with a zipper-type seal containing six small foil packets. Although the bag contained no loose powder, the nurse suspected that the packets contained narcotics and gave the bag to the police officer who was investigating the accident. The investigating officer, who shared the nurse's suspicion, took custody of the bag and showed it to a narcotics enforcement officer, who also concurred in their suspicions. Without obtaining a search warrant, the investigating officer removed the foil packets from the bag, weighed the packets, and opened each one. Each foil packet contained a folded sheet of yellow paper. Upon opening this inner paper packet, the officer found a white powder that laboratory tests identified as heroin. Defendant was sedated and immobile at the time the officer opened the packets.

Defendant successfully moved the trial court to suppress the evidence the officer found. The trial judge observed that the officer "had all the time in the world" to draft an affidavit and opined that a magistrate would have likely issued a search warrant in this case. The court held that because no warrant was obtained and no circumstance established an exception to the warrant requirement, the

search was unreasonable. Accordingly, the court dismissed the charge against defendant. Because the parties do not dispute the facts of this case, whether the circuit court properly granted defendant's motion to suppress is a question that we review de novo on appeal. See *People v Nelson*, 443 Mich 626, 631 n 7; 505 NW2d 266 (1993); *People v Goforth*, 222 Mich App 306, 310 n 4; 564 NW2d 526 (1997).

The Fourth Amendment to the United States Constitution and art 1, § 11 of the state constitution guarantee the right of the people to be free from unreasonable searches and seizures. *People v Champion*, 452 Mich 92, 97; 549 NW2d 849 (1996). A search conducted without a warrant is unreasonable unless both probable cause and a circumstance establishing an exception to the warrant requirement exist. *People v Reed*, 393 Mich 342, 362; 224 NW2d 867 (1975); *People v Mayes (After Remand)*, 202 Mich App 181, 184; 508 NW2d 161 (1993). Probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct is in the stated place to be searched. *People v Russo*, 439 Mich 584, 606-607; 487 NW2d 698 (1992). Apparently conceding that the officer had probable cause to believe that he possessed evidence of criminal conduct in the foil packets, defendant argues that the search was unreasonable because probable cause does not alone justify a warrantless search. See *People v Dugan*, 102 Mich App 497, 505; 302 NW2d 209 (1980), abrogated on other gds *Horton v California*, 496 US 128, 150; 110 S Ct 2301; 110 L Ed 2d 112 (1990). Consequently, the question we must decide is whether a circumstance in this case establishes an exception to the warrant requirement.[2] The prosecution always bears the burden of showing that such an exception exists. *Reed, supra* at 362.

The prosecution first argues that defendant had no reasonable expectation of privacy in the foil packets because the package was a container used for the singular purpose of transporting narcotics, thereby precluding any legitimate expectation of privacy and depriving defendant of standing to challenge the search because defendant knowingly exposed the objects to the public. The "single-purpose container rule" is derived from the following footnote in an opinion of the United States Supreme Court:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. [*Arkansas v Sanders*, 442 US 753, 764 n 13; 99 S Ct 2586; 61 L Ed 2d 235 (1979), abrogated on other gds *California v Acevedo*, 500 US 565; 111 S Ct 1982; 114 L Ed 2d 619 (1991).]

We have been unable to locate a decision either from a Michigan or federal court upholding a warrantless search on the basis of this rule.

In contrast to deciding whether the foil packets and the circumstances of this case give rise to probable cause to search, the more specific question that the single-purpose container rule poses is whether the foil packets intrinsically divulge their contents, thereby obviating the need for a search warrant. Without addressing the wisdom of the single-purpose container rule, we find that the rule does

not apply in this case. A foil packet is simply not a container used for the singular purpose of transporting narcotics. Rather, tin foil is a common material used for packaging many legitimate items. Thus, the contents of a packet wrapped in foil are only arguably realized when the container *plus* another fact is present, e.g., a suspicious locale, a defendant's furtive gestures, an officer's experience in narcotics enforcement. A foil packet alone does not announce its contents.

Next, the prosecution argues that the foil packets fall within the plain view exception to the warrant requirement. The plain view exception allows police officers to seize, without first obtaining a search warrant, items in plain view if the officers are lawfully in a position from which they view the item and if the item's incriminating character is immediately apparent. *People v Taylor*, 454 Mich 580, 591; 564 NW2d 24 (1997); *Champion, supra* at 101. The prosecution's reliance on the plain view doctrine in this case is mistaken because our Supreme Court emphasized in *Champion* that a fundamental characteristic of the plain view doctrine is that it is exclusively a rationale for seizure.[3] *Id.* No searching, no matter how minimal, may be done under the auspices of the plain view doctrine. *Id.* To the extent that the prosecution infers a contrary rule of law from earlier decisions of this Court,[4] its reading of those cases is inconsistent with the recent pronouncement in *Champion.*

Because no circumstance in this case establishes an exception to the warrant requirement, the lower court properly granted defendant's motion to suppress the evidence and dismissed the charge against him.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

[1] Originally, defendant was also charged with operating a vehicle while under a controlled substance, MCL 257.625(1); MSA 9.2325(1); however, this charge was dismissed and is not at issue on this appeal.

[2] In addition to responding to the issue the prosecution presents on appeal, defendant also challenges the nurse's relinquishment of the foil packets as improper because the hospital and its personnel were acting as a bailee of defendant's belongings. See *People v Jordan*, 187 Mich App 582, 592; 468 NW2d 294 (1991). However, defendant did not make this argument below, nor did he present the argument in a cross-appeal pursuant to MCR 7.207. Consequently, we decline to address the merits of defendant's argument. See *People v Emig*, 188 Mich App 687, 689; 470 NW2d 504 (1991) (declining to address the defendant's arguments because they were not properly raised in a cross-appeal); *People v Winchell*, 171 Mich App 662, 665; 430 NW2d 812 (1988) (declining to address the defendant's argument because it was based on grounds different from the argument he made below).

[3] The prosecution asserts that in *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996), our Supreme Court held that the opening of the pill bottle retrieved from the defendant was a search authorized pursuant to the plain view doctrine. To the contrary, the Court explicitly stated that it was authorized as a search incident to arrest. *Id.* at 117 n 17.

[4] The prosecution cites the following decisions of this Court: *People v Lewis*, 100 Mich App 518, 519-520; 299 NW2d 63 (1980), in which the majority limited its holding to stating that the officer had probable cause to seize the defendant's coin envelopes; *People v Washington*, 77 Mich App 598, 603; 259 NW2d 151 (1977), in which this Court relied on the plain view doctrine but gave no indication that the officers searched the coin envelopes only that they seized them from the defendant's residence and that the envelopes were "later found" to contain heroin; and *People v Ridgeway*, 74 Mich App 306, 312 n 4; 253 NW2d 743 (1977), in which this Court again relied on the plain view doctrine but noted that because the police officers found the foil packets in the defendant's automobile, application of the "exigent circumstances" exception to the warrant requirement was justified.