

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of FRED HAROLD KLOSS, JR.,
Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellant,

v

FRED HAROLD KLOSS, JR.,

Respondent-Appellee.

UNPUBLISHED

April 23, 1999

No. 211966

St. Clair Circuit Court

Family Division

LC No. 95-000172

Before: Hood, P.J., and Holbrook, Jr., and Whitbeck, JJ.

PER CURIAM.

Respondent, a juvenile, was charged with possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). The trial court granted respondent's motion to suppress, concluding that the police illegally seized the marijuana. The trial court subsequently dismissed the case after the prosecution was unable to proceed without the evidence of marijuana. The prosecution now appeals as of right. We reverse.

I. Basic Facts And Procedural History

Respondent was charged as a juvenile with possession of marijuana after a police officer found a marijuana cigarette in a pack of cigarettes that was seized from respondent's vehicle. The primary witness at the suppression hearing was Yale Police Officer Todd Haehnle. Officer Haehnle testified that he was working on June 13, 1997, on bicycle patrol at the Lion's Festival in Yale. He stated that he was on his bicycle patrolling the parking lot looking for any suspicious activity, such as people breaking into vehicles, people partying in the parking lot or juveniles gathering around in groups. In the evening, Officer Haehnle observed an occupied vehicle in the southwest rear portion of the parking lot; he observed that there was one person behind the wheel of that vehicle and that the motor was not running

and the lights were off. Except for the festival lights, the vehicle was in a part of the lot that was almost entirely dark.

Officer Haehnle explained that he had encountered similar vehicles in the past:

In prior contacts in the same situation, I had two arrests for marihuana possessions. People partying in the rear portion of the parking lot, drinking alcohol and smoking marihuana [sic].

Officer Haehnle stated that the prior arrests for marijuana possession occurred on that same evening, but could not recall if this incident was the first or last one that night. Officer Haehnle testified that observing this vehicle in the dark part of the parking lot made him suspicious, so he approached the vehicle to make contact with the person in the driver's seat. Officer Haehnle stated that he thought it was odd how the car was parked in the dark with the engine and lights off. However, Officer Haehnle admitted that he did not see any criminal activity in the vehicle before approaching it and that he made contact with the occupant of the vehicle because he felt it was his duty to make sure that that person was either on his way to or about to leave the festival.

Officer Haehnle testified that he tapped on the car's window to ask the individual inside what he was doing; he further testified that the occupant rolled down the window and that he then smelled tobacco smoke. Officer Haehnle stated that within seconds of making contact with the driver, he observed a pack of cigarettes on the dashboard. However, Officer Haehnle also testified that he saw the package of cigarettes on the dashboard as soon as he approached the vehicle on the driver's side, even before the driver of the vehicle rolled down the window. According to Officer Haehnle, the driver told him that he was waiting for a friend or relative.

Officer Haehnle testified that he was suspicious because the occupant of the vehicle looked very young. Officer Haehnle stated that because he smelled tobacco smoke he asked the individual for identification. The individual complied, and Officer Haehnle determined that that individual, later identified as respondent, was a minor. Officer Haehnle testified that he then asked respondent if the cigarettes on the dashboard were his and that respondent admitted that they were. Officer Haehnle stated that he then asked respondent to hand over the cigarette package and respondent complied. Officer Haehnle testified that, after opening the package, he found a marijuana cigarette inside. Officer Haehnle also testified that respondent admitted to him that the marijuana cigarette belonged to respondent.

The defense also presented witnesses at the suppression hearing. Nicholas Rashid was the passenger in respondent's vehicle and testified that he recalled that two officers approached the vehicle, when it was parked only for a minute or two, and asked that they get out. Rashid stated that at that time there were no cigarettes on the dashboard, but just a pack in the door of the vehicle, not in plain view. Rashid stated that he was not aware of any reason why the officers approached the vehicle. However, Rashid admitted that there were both marijuana and cigarettes in the vehicle, but stated that they had not been smoking cigarettes at the time the officer approached the vehicle.

Respondent testified that the officer approached his vehicle just as he was parking it and that the officer's car blocked respondent's vehicle in. Respondent denied that there was a pack of cigarettes on the dashboard, but stated that he did have cigarettes underneath the seat. Respondent explained that he did not have the lights on for his vehicle because it was still light outside and he did not need them. Respondent denied doing anything illegal that might justify the officer approaching his vehicle. Respondent also denied admitting to the officer that the marijuana found in the cigarette pack belonged to him. Respondent claimed that the officer only asked for his identification after he was arrested and after the vehicle was searched.

The trial court issued a written decision granting respondent's motion to suppress the evidence. Because the prosecution could not proceed to trial without the evidence, it agreed to dismiss the charge.

II. Standard Of Review

This Court reviews a trial court's factual findings on a motion to suppress evidence for clear error. However, we review all mixed questions of law and fact, and questions of law de novo. *People v Goforth*, 222 Mich App 306, 310, n 4; 564 NW2d 526 (1997). The issue here is whether the seizure of the pack of cigarettes was allowable under the plain view doctrine of search and seizure, and we review that mixed issue of law and fact de novo.

III. The Plain View Doctrine

A. Introduction

The prosecution argues that the trial court erroneously concluded that there was no illegal activity involved to justify the seizure of the package of cigarettes from respondent. We agree that the trial court erred in its conclusions and reverse the order suppressing the evidence and the order dismissing this matter.

B. The Trial Court's Findings

In its findings, the trial court generally found that Officer Haehnle's version of events was accurate and that he engaged in reasonable conduct. The trial court found that Officer Haehnle saw the cigarette pack or packs on the dashboard when he first approached the vehicle and reasonably asked respondent for identification. The trial court also found that Officer Haehnle determined that respondent was a juvenile before confiscating the package of cigarettes. However, the trial court determined that there was no illegal activity to justify Officer Haehnle's subsequent actions in seizing the package of cigarettes from the dashboard.

C. *Terry*

The police are permitted under *Terry v Ohio*, 392 US 1, 16; 88 S Ct 1868; 20 L Ed 2d 889 (1968), to stop citizens without a warrant to investigate a suspicion that criminal activity has been or is afoot even where the individual stopped is seized within the meaning of the Fourth Amendment. However, not all contact between a police officer and an individual amounts to a seizure within the

meaning of the Fourth Amendment. *Id.* at 17. Where an individual is not "seized" under the Fourth Amendment, a police officer's questioning of that individual need not be justified under *Terry*.

Even when police officers have no basis for suspecting a particular individual is involved in criminal activity, they may ask questions of that individual so long as the officers do not convey the message that compliance is required. The test must focus on all circumstances surrounding the encounter to determine whether the police officers' conduct would have communicated to a reasonable person that he was not free to decline the officers' requests or terminate the encounter. *People v Bloxson*, 205 Mich App 236, 242 (Holbrook, Jr., J.), 250 (Fitzgerald, J.); 517 NW2d 563 (1994), following *Florida v Bostick*, 501 US 429, 436; 111 S Ct 2382; 115 L Ed 2d 389 (1991). Thus, a person is seized under the Fourth Amendment when a reasonable person would not have believed that he was free to leave in view of all the circumstances. *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). A person is not seized where an officer approaches that individual and seeks voluntary cooperation through noncoercive questioning. *Id.*

D. The Initial Contact

It is arguable that the initial contact between Officer Haehnle and respondent did not rise to the level of a seizure under the Fourth Amendment. The trial court appeared to accept Officer Haehnle's version of the facts, to the effect that Officer Haehnle merely asked respondent what he was doing and for identification. From Officer Haehnle's version of the facts, there was no coercion placed on respondent to cooperate and answer these questions. Thus, the prosecution may not have been required to show that *Terry* was satisfied to justify Officer Haehnle's initial encounter with respondent.

However, the trial court, by referring to a "Terry stop" appeared to find that there was in fact a seizure of respondent when Officer Haehnle asked questions of him and asked him to produce identification. Whether the initial encounter amounted to a seizure was not argued before the trial court. Thus, we address the issue of whether the initial encounter was justified under *Terry*.

Pursuant to *Terry*, *supra*, 392 US at 16, the police may make investigative stops of citizens without a warrant where, under the totality of the circumstances as understood by law enforcement officers, there exists a particular suspicion that the individual being investigated has been, is or is about to be engaged in criminal activity. The officer's suspicion must be both reasonable and articulable. *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993).

In analyzing the totality of the circumstances, common sense and everyday life experiences predominate over uncompromising standards, and law enforcement officers are permitted, if not required, to consider the modes or patterns of operation of certain kinds of lawbreakers. [*Nelson*, *supra*, 443 Mich 635-636]. "The question is not whether the conduct is innocent or guilty. Very often what appears to be innocence is in fact guilt, and what is indeed entirely innocent may in some circumstances provide the basis for the suspicion required to make an investigatory stop." *Id.* at 632. [*People v Yeoman*, 218 Mich App 406, 410; 554 NW2d 577 (1996).

From Officer Haehnle's testimony, it is apparent that, based upon his experience, particularly in patrolling in parking lots during festivals, that criminal activity often occurred in vehicles parked in dark areas of the parking lot. Officer Haehnle was able to articulate his suspicions about respondent's vehicle to explain why he approached the vehicle. The vehicle was parked in the dark area with its lights off and the engine was not running. It was also occupied. We conclude that this evidence satisfied *Terry* and allowed Officer Haehnle to approach the driver of the vehicle to further investigate and either confirm or dispel his suspicions that criminal activity was afoot. *Nelson, supra*, 443 Mich 637-638. Here, Officer Haehnle had a specific suspicion that criminal activity was going on in respondent's vehicle based upon his experience in patrolling parking lots at festivals. Officer Haehnle was specifically patrolling the parking lot at the festival to prevent criminal activity from occurring in or near cars at the festival. Compare *People v LoCicero (After Remand)*, 453 Mich 496, 506-507; 556 NW2d 498 (1996); *People v Freeman*, 413 Mich 492; 320 NW2d 878 (1982).

We conclude that Officer Haehnle had a valid reason for asking respondent what he was doing sitting in the car in the parking lot and, upon observing both the respondent's appearance and the cigarettes on the dashboard, asking him for his license for identification. Such questions were properly within the scope of *Terry* to allow Officer Haehnle to determine if there was criminal activity in progress.

E. The Seizure

We hold the trial court erred when it concluded that there was no evidence of illegal activity at the time Officer Haehnle seized the package of cigarettes. By the time Officer Haehnle took possession of the cigarettes, he had already determined that respondent was a juvenile and that the cigarettes belonged to respondent. Because it is illegal for an individual under the age of eighteen years to possess tobacco (cigarettes), MCL 722.642; MSA 25.282, Officer Haehnle had evidence that an offense had been committed and that the cigarettes were contraband, properly subject to seizure from respondent. A police officer is entitled to seize contraband without a warrant when that contraband is in plain view and the officer is lawfully in a position from which to view the item. *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996). Here, Officer Haehnle was lawfully in a position to view the contraband cigarettes and, therefore, could seize this evidence without waiting to obtain a warrant. *People v Alfafara*, 140 Mich App 551, 556-557; 364 NW2d 743 (1985); *People v DeLeon*, 110 Mich App 320, 327; 313 NW2d 110 (1981), rev'd on other grounds 414 Mich 851 (1982). Once Officer Haehnle legally seized the cigarette package and found marijuana inside it, he had grounds upon which to arrest respondent and search the vehicle.

F. Conclusion

We hold that the trial court erred in concluding that the seizure of the package of cigarettes was unlawful. The trial court should not have granted the motion to suppress nor should it have entered an order of dismissal of the charge of possession of marijuana.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Donald E. Holbrook, Jr.

/s/ William C. Whitbeck