STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 14, 1999
v	No. 202378 Oakland Circuit Court
FRANK LOUIS SPANO, Defendant-Appellee.	LC No. 96-149065 FH

Before: Smolenski, P.J., and McDonald and Saad, JJ.

PER CURIAM.

The prosecution appeals as of right an order of dismissal. We vacate and remand.

Defendant was charged with receiving, possessing or concealing stolen property valued over $100, MCL 750.535; MSA 28.803. At defendant's preliminary examination Troy Police Officer Christopher Swift testified. Following is a summary of Swift's testimony. At approximately 4:00 a.m. on August 18, 1996, Swift received a dispatch indicating that an attempted larceny from an automobile was in progress at the Charter Square Apartments in Troy and that a suspect had fled in a certain direction. Upon proceeding to the area where the suspect had reportedly fled, Swift observed defendant riding a bicycle. Knowing that cellular telephones are often one of the items stolen in a larceny from an automobile and seeing a cellular telephone in defendant's possession, Swift stopped and questioned defendant. Swift told defendant that he (defendant) was not under arrest.

At some point, defendant also gave the officer a story concerning his alleged purchase of the bicycle that could not be verified by Swift. At some point, Swift inspected the bicycle, found the serial number and wrote it down. At some point, Swift ran the serial number but it came back "clear in the law enforcement computer." At some point, Swift explained to defendant that he (Swift) would like to keep the bicycle "for proper ownership." Defendant stated that "he had no problem with that but he asked for my name so that he could . . . later check with the police department" to get his property back.

At some point, there was another potential suspect in the vicinity of Swift and defendant. At some point, the larceny victim was brought to where Swift, defendant and the other suspect were

located. The victim identified the other suspect as the person at the Charter Square Apartments. The other suspect had no stolen property and was not arrested. Swift also let defendant go but kept defendant's bicycle.

Swift subsequently determined that the bicycle had been stolen. The owner of the bicycle testified that the bicycle had been stolen from her garage.

Following the testimony of the witnesses at the preliminary examination, defense counsel moved to dismiss, contending that Swift did not have probable cause to stop defendant and to take the bicycle. The prosecution claimed that Swift had conducted an investigatory stop of defendant based on reasonable suspicion and that defendant did not object to the taking of the bicycle. The district court found that Swift had not arrested defendant but rather had conducted a classic investigatory stop of defendant. The district court noted that the officer had written down the bicycle's serial number and noted that defendant had no right to complain "about the bike being taken, he apparently had no right to it, anyway." The district court bound defendant over as charged.

Defendant subsequently moved to suppress the bicycle and dismiss the case. Relying on facts elicited at the preliminary examination and in the police report, which indicated that Swift had handcuffed defendant, defendant contended that once Swift had determined that defendant was not involved in any larceny from an automobile, then Swift no long had probable cause or reason to detain defendant. Defendant contended that Swift should have therefore released him and not confiscated the bicycle. Defendant contended that he was in no position to object to the seizure of the bicycle because he was in handcuffs.

In response, the prosecution argued that Swift's detention of defendant was a lawful investigatory stop based on reasonable suspicion and that defendant had consented to the seizure of the bicycle.

The trial court granted the motion to suppress in part but denied the motion to dismiss. Specifically, the trial court ruled that Swift had had reasonable suspicion to conduct an investigatory stop of defendant, but that Swift had not had probable cause to seize the bicycle and defendant had not consented to its seizure. The trial court therefore suppressed the bicycle itself but ruled that there no was reason to suppress any evidence obtained before the bicycle's illegal seizure, including the bicycle's serial number.

The prosecution moved for reconsideration, contending that defendant had consented to the bicycle's seizure. The prosecution contended that the trial court had erred in utilizing the preliminary examination transcript to rule on the issue of consent[1] and that the court should have conducted a de novo evidentiary hearing. Defendant likewise sought an evidentiary hearing to clarify exactly when Swift had obtained the bicycle's serial number, i.e., before or after the officer seized the bicycle. The trial court granted the requests for an evidentiary hearing.

Following is a summary of Swift's testimony at the evidentiary hearing. Approximately one week before his encounter with defendant that is the subject of this case, Swift responded to a call from

the Charter Square Apartments in Troy concerning a vehicle break-in. Private citizens had chased two suspects, apprehending one, Michael Emig, but failing to apprehend the other, who was described as a "white male in his 20's with a long pony tail." Swift talked to Emig and recovered two bicycles that had been abandoned by Emig and the other suspect. Emig showed Swift the location of the bicycles and explained that he (Emig) and the other suspect had been using the bicycles as their transportation. Emig then told Swift that defendant had been involved in a series of vehicle and residential break-ins involving the thefts of cellular telephones, bicycles and power tools. Emig told Swift that sometimes defendant committed these break-ins alone and sometimes defendant committed these break-ins with Emig. After receiving this information, Swift went to the police station and looked up a photograph of defendant, who had previously been arrested in Troy.

Approximately one week later, on August 18, 1996, at 4:00 a.m., Swift received information that a possible or attempted larceny from an automobile had just occurred at the Charter Square Apartments and that a suspect had fled in a certain direction. Although some description of the suspect was given, it was "very vague" and "wasn't very very specific where you could pinpoint an individual." There was no mention that the suspect was riding a bicycle or that a cellular telephone had been stolen.

After proceeding to the area where the suspect had allegedly fled, Swift observed defendant riding a bicycle. The bicycle was an expensive name brand, appeared to be new and was equipped with expensive accessories, including a computer and a "double pump." Swift recognized defendant, who had a long pony tail. Swift shined his spotlight on defendant and observed a cellular telephone in defendant's T-shirt pocket. Swift knew that cellular telephones were a popular target of persons who break into automobiles.

Swift got out of his vehicle, pointed his gun at defendant and ordered defendant to get off the bicycle and lay on the ground. Defendant did as he was ordered. After Swift radioed to communications that he had a possible suspect, Lieutenant Hay arrived. Swift then handcuffed defendant, telling defendant that he was not under arrest but that he was being handcuffed for both their protection.

Swift had his gun on defendant from the time he (Swift) ordered defendant "out of the car [sic]" until Hay arrived and defendant was handcuffed, which was "maybe a minute, a minute and a half." Swift had pointed the gun at defendant so that he could protect himself if defendant turned on him and also for "an intimidation factor of don't hurt me, don't move . . . ." Swift did not believe that at the time he had probable cause to arrest defendant but believed that he was reasonable in securing defendant for his (Swift's) safety. Although defendant was not under arrest, Swift handcuffed defendant because he Swift believed that a felony had just been committed, defendant was "very close in proximity," Swift knew that defendant was a felon, and Swift did not want to be hurt or killed "by somebody who might try to escape a felony prosecution."

Shortly after defendant was handcuffed, Swift and Hay observed another man in the vicinity and ordered him over, at which point they "had him down and handcuffed him, too." Swift and Hay then requested another officer, who was at the scene of the possible larceny, to bring over the victim of the possible larceny for identification purposes. The victim identified the other man as the person who was

involved in the incident at the Charter Square Apartments. Because the other man was only looking into vehicles at the Charter Square Apartments and no crime had actually occurred, the other man was released. Swift also removed defendant's handcuffs and had defendant step out of "the car." (The record is not clear concerning when defendant was placed in "the car" and whose "car" it was, although we assume that it was Swift's.) Defendant had been handcuffed approximately ten minutes.

The other man left the scene. However, even though no crime had occurred at the Charter Square Apartments, Swift still suspected there was a crime involving defendant. Thus, Swift began questioning defendant about the bicycle for the purpose of establishing proof of ownership or guilty knowledge. Defendant explained that he had purchased the bicycle two weeks earlier for $190 from Joe Liddum of Madison Heights. Defendant further explained that Liddum had since moved away and that he did not know Liddum's whereabouts. Swift "flipped the bike over," observed the bicycle's serial number, which was on the "crank where the pedals go," and recorded this serial number on his note pad. Swift then ran the serial numbers of the bicycle and cellular telephone through his station's law enforcement computers to see if these items were stolen. The items came back with "no record," which meant that "at that time they weren't reported stolen."

Defendant was free to go at this point. However, because Swift still had "doubts," he approached and explained to defendant that he (Swift) would like to "hang on to" the bicycle and cellular telephone for proof of ownership and to make sure that Liddum had not sold defendant a stolen bicycle. Defendant had "[n]o objections at all," but rather stated "fine" and that he "had no problem." Defendant asked no questions except to inquire concerning how he could get the items back. The officer gave defendant the complaint number and told defendant to contact the detective bureau the following day.

Neither Swift nor Hay threatened or raised their voices when Swift asked defendant if he (Swift) could take the bicycle. Swift was not concerned about leaving defendant without transportation because Swift knew that defendant lived only approximately one-hundred yards away from the scene of the stop.

Swift later determined that the bicycle was stolen.

At the conclusion of the suppression hearing, the trial court granted defendant's motions to suppress and to dismiss. Specifically, the trial court noted that it would have found that there was reasonable suspicion to justify an investigatory stop had Swift simply stopped defendant. However, the trial court found that "[t]here was clearly an arrest of the defendant when guns were drawn and the defendant was handcuffed." The trial court found that "[t]here was no probable cause. In fact, the officer acknowledges there was no probable cause at the time he stopped the defendant." The trial court ruled that all evidence seized as a result of the illegal arrest of defendant, including the bicycle and bicycle's serial number, therefore had to be suppressed. The trial court rejected the prosecution's argument that the arrest ended when defendant was released from handcuffs and that the serial number was thus admissible. In this respect, the trial court noted that even after the handcuffs were removed a reasonable person under the circumstances would have still believed that he was under arrest.

The trial court also rejected the prosecution's argument that defendant consented to the seizure of the bicycle. In this respect, the trial court noted that Swift should have either advised defendant of his rights before interrogating him about the bicycle or let defendant go. The trial court concluded:

> And I don't find that this interrogation was such that it could warrant a voluntary statement by the defendant because the officer admitted under oath that he questioned the defendant. This was not an unsolicited statement by the defendant, but it was in response to the officer's questions as to whether or not he could keep the bike to check out if it was stolen. And it was in the company of two uniformed police officers, two police cars, having recently had a gun drawn on him and having been handcuffed by the same officer who was doing the questioning, in this Court's mind the defendant was still under arrest.
>
> Therefore, I am suppressing at this point after this hearing not only the bicycle itself but any information that was obtained as a result of the illegal arrest and seizure so that will include the serial number.
>
> Now, obviously the bike will not be returned to the defendant. He has no standing to claim the bike.

On appeal, the prosecution contends that Swift conducted a valid investigatory stop of defendant based on requisite reasonable suspicion and that the Swift's actions, i.e., pointing a gun at and handcuffing defendant, did not transform the valid stop into an illegal arrest without probable cause. The prosecution argues that the bicycle's serial number therefore should not have been suppressed.

The prosecution also contends that it was error to also suppress the bicycle itself because defendant validly consented to the seizure of the bicycle.

On appeal, this Court reviews the trial court's findings of historical fact concerning the events leading up to a search or seizure for clear error, giving "due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas v United States*, 517 US 690; 116 S Ct 1657; 134 L Ed 2d 911, 919-920 (1996); *People v Taylor*, 454 Mich 580, 595; 564 NW2d 24 (1997); *People v LoCicero (After Remand)*, 453 Mich 496, 500; 556 NW2d 498 (1996). However, the application of constitutional standards to uncontested facts is not entitled to the same deference. *People v Nelson*, 443 Mich 626, 631, n 7; 505 NW2d 266 (1993). In particular, the decision whether the historical facts satisfy the constitutional standards for reasonable suspicion or probable cause is a mixed question of law and fact that this Court reviews de novo. *Ornelas, supra* at 920; see also *LoCicero, supra* at 500-501.

The Fourth Amendment protects "the right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures . . . ." US Const, Am IV.[2] A person is seized within the meaning of the Fourth Amendment "if, in view of all the circumstances surrounding an encounter with the police, a reasonable person would have believed that the person was not free to leave." *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). In this case, there is no

dispute that defendant was not free to leave and was therefore seized within the meaning of the Fourth Amendment.

The general rule is that formal arrests and seizures resembling formal arrests must be supported by probable cause. *Michigan v Summers*, 452 US 692, 696; 101 S Ct 2587; 69 L Ed 2d 340 (1981); *United States v Perdue*, 8 F3d 1455, 1461 (CA 10, 1993). However, the United States Supreme Court has created certain limited exceptions for seizures that are "significantly less intrusive than an arrest." *Summers, supra* at 697; see also *People v Shabaz*, 424 Mich 42, 57; 378 NW2d 451 (1985). The classic example of such an exception is the investigatory stop, which may be made if the officer has "specific and articulable facts sufficient to give rise to a reasonable suspicion that the person detained has committed or is committing a crime." *Shankle, supra*; see also *Shabaz, supra*.

In this case, Swift observed defendant with a cellular telephone in the area where a suspect in a possible vehicle break-in at the Charter Square Apartments had allegedly just fled. Swift knew that cellular telephones were a popular target of persons who break into vehicles. Swift also had information from Emig that implicated defendant in a series of vehicle break-ins, including one a week earlier at the same apartments, involving, among other items, cellular telephones. A police officer's reasonable suspicion may be based on information obtained from another. *People v Chambers*, 195 Mich App 118, 122; 489 NW2d 168 (1992). As did the trial court, we conclude that Swift had specific and articulable facts sufficient to give rise to a reasonable suspicion that defendant was escaping from a possible or attempted vehicle break-in. Therefore, Swift was justified in briefly stopping defendant to investigate his (Swift's) suspicions in this regard.

Swift also had information from Emig that implicated defendant in a series of break-ins involving, among other items, bicycles. Emig's information likewise indicated that one week earlier defendant had abandoned a bicycle he had been using as his transportation. *Id*. However, Swift observed defendant riding an expensive, name-brand bicycle that appeared to be new. We conclude therefore that Swift had specific and articulable facts sufficient to give to a reasonable suspicion that defendant had recently stolen a bicycle. Therefore, Swift was also justified in briefly stopping defendant to investigate his (Swift's) suspicions in this regard. See, generally, *United States v Hensley*, 469 US 221; 105 S Ct 675; 83 L Ed 2d 604 (1985).

An investigatory stop must be "reasonably related in scope to the circumstances that justified interference by the police with the person's security." *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). More specifically, an investigative stop must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *Florida v Royer*, 460 US 491, 500 (White, J., with Marshall, Powell and Stevens, JJ.); 103 S Ct 1319; 75 L Ed 2d 229 (1983). The conduct of the officer should be no more intrusive than necessary to effectuate an otherwise authorized investigatory stop. *Id*. at 504 (White, J., with Marshall, Powell and Stevens, JJ.).

The classic investigatory stop involves brief questioning limited to the purpose of the stop and, if the officer has reasonable suspicion that the individual stopped is armed and thus poses a danger to the officer, a limited patdown for weapons. *Royer, supra* at 498 (White, J., with Marshall, Powell and Stevens, JJ.); *Perdue, supra* at 1462, 1464; *Champion, supra* at 99. In addition to questioning, other

techniques that a police officer may utilize during the course of an investigatory stop may include (1) communicating with other officers or citizens in an effort to verify a detainee's information or to determine whether a person of that identity is otherwise wanted; (2) checking certain premises or locating and examining objects abandoned by the suspect, or (3) allowing the suspect to be viewed by witnesses to the alleged crime. *Summers, supra* at 700, n 12.

As a general rule, investigative stops must be fairly nonintrusive. *Perdue, supra* at 1462. Thus, in the name of investigating a person who is no more than suspected of criminal activity, the police may not seek to verify their suspicions by means that approach the conditions of arrest. *Royer, supra* at 499 (White, J., with Marshall, Powell and Stevens, JJ.); *Shabaz, supra* at 57-58. When actions by the police exceed the bounds of reasonable suspicion or go beyond the limits of an investigative stop, the seizure becomes an arrest and must be justified by probable cause. *Perdue, supra* at 1461; *United States v Richardson*, 949 F2d 851, 856 (CA 6, 1991); *United States v Wall*, 807 F Supp 1271, 1275 (ED Mich, 1992). It does not take formal arrest or booking at a police station to complete an arrest. *Richardson, supra* at 856. Rather, in determining whether a seizure constituted an arrest requiring probable cause, courts look to whether there was a restraint on freedom of movement of the degree associated with or "in important respects indistinguishable from" a formal arrest. *Richardson, supra* at 857; *United States v Hardnett*, 804 F 2d 353, 356 (CA 6, 1986).

Thus, in *People v Tebedo*, 81 Mich App 535, 537; 265 NW2d 406 (1978), a grocery store was robbed. Three days later, two officers received a report that a suspicious person had been spotted in the area of store. *Id*. After driving to the area and seeing no one, the officers drove to a nearby apartment complex. *Id*. There they saw the defendant standing behind the last row of building approximately ten feet from the door of his apartment. *Id*. When the officers approached defendant, he ran. *Id*. After chasing defendant for two blocks, one of the officers drew his gun and ordered the defendant to halt. *Id*. The officer laid the defendant on his stomach and handcuffed him. *Id*. The defendant then uttered an incriminating statement. *Id*. Defendant was subsequently convicted of armed robbery. *Id*. at 536. The defendant appealed, contending that his statement was the fruit of an unlawful arrest. *Id*. at 537.

This Court agreed and reversed the defendant's conviction. *Id*. at 541. In determining whether the officers' actions had constituted an investigative stop or an arrest, this Court stated:

> Moreover, an investigative stop—if the police action is so characterized—must be justified at its inception and must be reasonably related in scope to the circumstances which justified the interference in the first place. . . . The justification in this case was a radio report that a suspicious person had been seen in the vicinity of the [grocery] store. A stop of even limited scope in such a situation is of dubious propriety. The "stop" in this case was not, however, limited in scope nor strictly tied to and justified by circumstances which rendered its initiation permissible. Rather, the police actions constituted an arrest, as the trial court aptly explained to the jury. Laying one who has been detained on his stomach on the ground and then handcuffing him are not the elements of an investigative stop. [*Id*. at 539 (citations omitted).]

Because the defendant had been arrested without probable cause, this Court ruled that his statement should have been suppressed. *Id*. at 541.

And, in *Taylor, supra* at 584, an officer approached a vehicle occupied by five males and made contact with the driver. When the driver rolled down the window, the officer smelled the order of burnt marijuana coming from inside the vehicle. *Id*. The officer asked the men for identification and whether they had been smoking marijuana. *Id*. The men stated that they did not have identification and accused the officer of harassment. *Id*. The officer called for backup and another officer was on the scene approximately thirty seconds later. Our Supreme Court held that the officer's level of intrusion upon the defendants "escalated to a seizure requiring probable cause" when the officer called for backup. *Id*.[3]

However, although "[t]here is no doubt that at some point in the investigative process, police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments," the United States Supreme Court has declined to establish a bright line rule to distinguish when [an investigative] stop becomes an arrest. *Hayes v Florida*, 470 US 811, 816; 105 S Ct 1643; 84 L Ed 2d 705 (1985); *Richardson, supra* at 856; *Wall, supra*. Rather, the issue has been left to the courts to decide on a case-by-case basis. *Richardson, supra*; *Wall, supra*. "[C]ommon sense and human experience must govern over rigid criteria." *United State v Sharpe*, 470 US 675, 685; 105 S Ct 1568; 84 L Ed 2d 605 (1985). Thus, a brief but complete restriction of liberty, if not excessive under the circumstances, is permissible during an investigatory stop and does not necessarily convert the stop into an arrest. *United States v Bautista*, 684 F2d 1286, 1289 (CA 9, 1982).

Accordingly, the courts have held that the use of a gun to effectuate an investigatory stop does not automatically transform a stop into an arrest. See *Perdue, supra* at 1462; *Hardnett, supra* at 357; *People v Sangster*, 123 Mich App 101, 103; 333 NW2d 180 (1983). This is because in making an investigatory stop a police officer is authorized to take such steps as is reasonably necessary to protect his personal safety and maintain the status quo if the circumstances reasonably warrant such measures. *Hensley, supra* at 235; *Perdue, supra*. For the same reason, and again contrary to the trial court's determination in this case, the courts have held that use of handcuffs does not automatically transform a stop into an arrest. *Perdue, supra* at 1463. Finally, the courts have found that police confinement, such as placing a detainee in a police vehicle, does not automatically transform an investigatory stop into an arrest. Cf. *Richardson, supra* at 857-858 with *Rueckert v City of Flint*, 997 F Supp 856, 863-864 (ED Mich, 1998), and *People v Marland*, 135 Mich App 297, 302-307; 355 NW2d 378 (1984).

For example, in *Perdue, supra* at 1458, law enforcement officers discovered weapons and drugs during an authorized search of a building on property in a rural location. Other law enforcement officers stopped a vehicle driven by the defendant on a road leading to the property. *Id*. Aware that weapons had been found in the building, the officers, with guns drawn, ordered the defendant to get out of the car and lie face down on the ground. *Id*. The officers then handcuffed the defendant. *Id*. After being convicted of various offenses, the defendant appealed. *Id*.

On appeal, the court considered whether the officers' use of force had transformed the stop of defendant into an arrest. *Id*. at 1462-1463. In this respect, the court noted that where circumstances reasonably indicate that a suspect may be armed and dangerous the recent trend in the federal courts of appeal has been to allow the police to use measures of force more traditionally associated with arrest, i.e., weapons, handcuffs or placing suspects on the ground or in police vehicles, during an investigatory stop as a precautionary measure. *Id*. at 1463-1464. The court thus held as follows:

> In short, the officers conducted a reasonable [investigative] stop. Although bordering on an illegal arrest, the precautionary measures of force employed by the officers were reasonable under the circumstances. The Fourth Amendment does not require that officers unnecessarily risk their lives when encountering a suspect whom they reasonably believe to be armed and dangerous. [*Id*. at 1463.]

Conversely, in *Washington v Lambert*, 98 F3d 1181, 1183 (CA 9, 1996), the police were on the lookout for two suspects in nineteen armed robberies that had primarily occurred in the western part of the Los Angeles metropolitan area. One of the suspects was described as a black male, approximately six-foot to six-foot-two-inches tall and 150 to 170 pounds, while the other suspect was described as a black male, five-foot-five-inches to five-foot-seven-inches tall and 170 to 190 pounds. *Id*. 1183-1184. The suspects had driven a variety of getaway vehicles, including a white Oldsmobile Cutlass, and were considered armed and dangerous. *Id* at 1184.

Approximately six days after the most recent robbery, the two plaintiffs, both black males, stopped at a restaurant in Santa Monica during a visit to the Los Angeles area from New York. *Id*. at 1183. One of the plaintiffs, a picture editor with Sports Illustrated, was six-foot-four-inches tall and weighed 235 pounds while the other plaintiff, a senior program analyst with the Bank of New York, was approximately five-foot-seven-inches tall and weighed 135 to 140 pounds. *Id*. at 1183-1184. Even though the plaintiffs did not fit the specifics of the descriptions of the armed robbery suspects and even though none of the armed robberies had occurred in Santa Monica, Santa Monica Police Officer Skystone Lambert, who was also visiting the restaurant, thought that the plaintiffs resembled the description of the armed robbery suspects. *Id*. at 1183-1184. Lambert also thought that one of the plaintiffs appeared nervous. *Id*. at 1183. Lambert called for backup and followed the plaintiffs out of the restaurant. *Id*. at 1184. The plaintiffs entered a white Plymouth Dynasty bearing a rental car company sticker on the back bumper and drove away. *Id*. Lambert followed the plaintiffs and was soon joined by a second police car. *Id*. One of the plaintiffs looked back several times, which Lambert found suspicious. *Id*.

After the plaintiffs had entered their hotel's underground parking garage and were preparing to get out of their vehicle, the officers arrived. *Id*. The officers shone spotlights on and pointed guns at the plaintiffs. *Id*. Using a speaker system, Lambert ordered the plaintiffs to get out of their vehicle, interlock their fingers behind their heads and face a wall. *Id*. Lambert then handcuffed each plaintiff, patted them down and placed them in separate police vehicles. *Id*. The plaintiffs complied with all orders and offered no resistance. *Id*. The officers searched the rental vehicle. *Id*. The officers obtained the plaintiffs' identification by searching a fanny-pack carried by one of the plaintiffs and by retrieving the other plaintiff's wallet from his pants. After looking at the plaintiffs' identification and

possibly running a computer check, which did not reveal any problems, the officers concluded their investigation and released the plaintiffs. *Id*. A total of three or four police cars and four to seven police officers, including a K-9 officer with dog in tow, had gathered in the garage to assist in the plaintiffs' detention. *Id*.

The plaintiffs filed suit against Lambert under 42 USC 1983, alleging a violation of their Fourth Amendment rights. *Id.* On the third day of trial, the district court granted a directed verdict for the plaintiffs on the issue of liability, concluding that on the undisputed facts the plaintiffs had been arrested without probable cause. *Id*. Lambert appealed the directed verdict, contending that the detention of the plaintiffs was a valid investigatory stop. *Id*. at 1185.

The appeals court affirmed the directed verdict, holding that under established law the plaintiffs had clearly been arrested. *Id*. at 1185, 1192. In reaching this holding, the court noted that the question whether police action constitutes an investigatory stop or an arrest is decided "by evaluating not only how intrusive the stop was, but also whether the methods used were reasonable given the specific circumstances," keeping in mind not only the risk posed to the officers by the particular situation but also every citizen's liberty interest in being free from unreasonable searches and seizures. *Id*. at 1185, 1187. The court noted that the police may not use guns or handcuffs or force people to lie face down on pavement every time they have an articulable basis for believing that someone may be a suspect in a crime and that under ordinary circumstances the use of such force or restraints during an investigatory stop will violate the Fourth Amendment. *Id*. at 1187. The court further explained:

> In determining whether the use of intrusive techniques turns a stop into an arrest, we examine the reasonableness of the police conduct in light of a number of factors. Despite the absence of a bright-line rule, our cases make clear that we have only allowed the use of especially intrusive means of effecting a stop in special circumstances, such as 1) where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight; 2) where the police have information that the suspect is currently armed; 3) where the stop closely follows a violent crime; and 4) where the police have information that a crime that may involve violence is about to occur. Clearly, some combination of these factors may also justify the use of aggressive police action without causing an investigatory stop to turn into an arrest.
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> Further, in a case like the one before us, we consider the specificity of the information that leads the officers to suspect that the individuals they intend to question are the actual suspects being sought . . . as well as the specificity of the information that the persons actually being sought are likely to forcibly resist police interrogation. The more specific the information in both these regards, the more reasonable the decision to take extraordinary measures to ensure the officers' safety. . . . .
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> An additional factor courts consider in analyzing the reasonableness of the use of aggressive investigatory tactics as part of [an investigatory] stop is the number of police officers present. . . . . [*Id*. at 1189-1190.]

In applying these factors to the case before it, the court noted that the only basis for linking the plaintiffs to the armed robberies was the alleged general similarity of their physical characteristics to the vague descriptions of the actual suspects, i.e., one tall black male and one short black male. *Id*. at 1190. The court noted that there were no specific similarities between the plaintiffs and the suspects sought and that there was no specific information that the plaintiffs were armed. *Id*. The court noted that the plaintiffs had been completely cooperative and had done nothing to justify Lambert's "use of a complete battery of intrusive and threatening procedures in the context of [an investigative] stop." *Id*. the court noted that there had been no violent crime in the vicinity shortly before the stop and there was no reason to believe that the plaintiffs were about to commit any crime. *Id*. Finally, the court rejected Lambert's contention that his actions had been justified because the plaintiffs were in a white vehicle,[4] the stop took place at night[5] and that one or both of the plaintiffs appeared nervous.[6] *Id*. at 1191-1192. In affirming the directed verdict in favor of the plaintiffs, the court stated that even viewing the facts in the light most favorable to Lambert, "[t]his case is not a close one; any reasonable juror would be compelled to find on these facts that the stop was an arrest."

In this case, Swift received information that a possible or attempted vehicle break-in had just occurred at the Charter Square Apartments. There was no indication that this property crime involved any violence or threat of violence. Swift did not receive a description of the alleged suspect or any indication that the suspect was armed or dangerous. Rather, Swift was only told of the direction that the suspect had fled. Upon proceeding to that location, Swift encountered defendant. Swift recognized defendant as a felon suspected of being involved in a series of residential and vehicle break-ins, including a vehicle break-in one week earlier at the Charter Square Apartments at which time defendant had abandoned a bicycle while fleeing the scene of that crime. Although it is a close question, we believe that Swift, who was by himself at 4:00 a.m., was justified in ordering defendant, a known felon, to get off the bicycle and onto the ground at gunpoint. Swift held the gun on defendant only briefly, i.e., sixty to ninety seconds, and only until Hay arrived. And, in so doing, Swift ensured that a suspected felon would not attempt to flee, either on the bicycle or on foot, or obtain any weapons that might be on his person. Cf. *Perdue, supra* at 1463.

Where defendant complied with Swift's orders and Hay almost immediately arrived on the scene, it is likewise a close question concerning the need to handcuff defendant. However, again Swift knew that defendant, a felon, had previously fled the scene of another crime. In addition, Swift and Hay soon became busy when they encountered another potential suspect in the vicinity. Accordingly, we believe that Swift was justified in handcuffing defendant. In so doing, Swift was able to exercise some control where the stop now involved two potential suspects. Cf. *Marland, supra* at 306.

Finally, where defendant was already in handcuffs, it is also a close question concerning the need to further confine defendant in a vehicle. However, defendant was not questioned during his brief confinement. Cf. *Richardson, supra* at 857, 859. Rather, during defendant's confinement Swift was diligently pursuing his investigation by seeing to it that the victim of the vehicle break-in was brought to the scene of the stop. Cf. *Marland, supra*. Thus, we believe that Swift was justified in securing defendant in the vehicle until Swift's suspicions concerning the vehicle break-in were dispelled. *Id*. at 305-307. Once Swift's suspicions concerning the vehicle break-in were dispelled, Swift released

defendant from the vehicle and removed the handcuffs. With defendant still detained, Swift then conducted a brief investigation concerning his suspicions with respect to the bicycle. During this investigation, Swift, contrary to the trial court's conclusion, briefly and permissibly questioned defendant about the bicycle. When Swift was unable to resolve his suspicions about the bicycle, defendant was free to go.

In summary, Swift was justified in stopping defendant for investigatory purposes because Swift had specific and articulable facts sufficient to give to a reasonable suspicion that defendant was not only presently escaping one crime but also had possibly committed another crime. The stop was temporary and lasted no longer than necessary to effectuate the dual purposes of the stop. Swift's investigative methods during the entire stop (bringing the victim to the scene of the stop for identification purposes, briefly questioning defendant, examining the bicycle's exterior and calling in its serial number) were unintrusive means reasonably calculated to verify or dispel his suspicions in a short period of time. Finally, under the totality of the circumstances, Swift's brief use of force, although significantly intrusive, was no more intrusive and lasted no longer than necessary to effectuate the stop of what Swift reasonably believed was a known felon and serial thief who was currently escaping the commission of a larceny and who would likely attempt to flee. Likewise, Swift's use of confinement, again although significantly intrusive, was no more intrusive and lasted no longer than necessary to complete Swift's investigation of the suspected immediate crime. Once Swift's suspicions concerning the immediate crime were dispelled, the confinement ceased and Swift proceeded to conduct his remaining investigation into the bicycle as a typical investigative stop. Thus, we conclude under the totality of the circumstances that Swift's use of force and confinement did not transform an otherwise justified investigatory stop of defendant into an arrest.

However, defendant contends that Swift lacked probable cause to search the bicycle for its serial number.[7] The prosecution appears to implicitly assume that Swift could properly obtain the bicycle's serial number because defendant was lawfully seized.

It is true that generally a seizure of personal property is "per se unreasonable within the meaning of the Fourth Amendment unless it was accomplished pursuant to a judicial warrant issued upon probable cause." *United States v Place*, 462 US 696, 701; 103 S Ct 2637; 77 L Ed 1d 110 (1983). However, in *Place, supra* at 702, the United States Supreme Court held that the principles applicable to investigative stops could be applied to seizures of personal property. See also *People v Christopher Rice*, 192 Mich App 512, 518; 482 NW2d 192 (1992). Thus, where the police have reasonable and articulable suspicion that personal property may contain contraband or evidence of a crime, the police may briefly detain the property for investigative purposes. *Place, supra*; *Rice, supra*.

In this case, Swift, knowing that defendant had been implicated in a series of thefts involving bicycles and knowing that defendant had abandoned a bicycle only one week earlier, observed defendant with an expensive, name-brand bicycle that appeared to be new. Upon questioning, defendant gave Swift an explanation concerning how he obtained the bicycle that could not be verified. We conclude that Swift had specific and articulable facts sufficient to give rise to a reasonable suspicion that the bicycle was evidence of a crime. Thus, we conclude that Swift was justified in briefly detaining not only defendant but also the bicycle for investigatory purposes. *Place, supra*; *Rice, supra* at 519.

Swift's actions in flipping over the bicycle and observing its exterior entailed no physical intrusion in addition to or apart from the limited detention of the bicycle he was authorized to make. This action likewise did not expose something that defendant had concealed or that would otherwise have remained hidden from public view. Rather, Swift simply examined what was already in public view on the exterior of the bicycle. In this respect, Swift's actions were analogous to a canine sniff of lawfully detained luggage that is suspected of containing drugs. See *Royer, supra* at 707. Because Swift's actions in flipping over the lawfully-detained bicycle and observing its exterior produced no additional invasion of whatever privacy interest defendant had in the bicycle,[8] we conclude that Swift's actions did not constitute a "search" of the bicycle within the Fourth Amendment. See LaFave, Criminal Procedure, § 3.2, p 133. Alternatively, even assuming that Swift's actions did constitute a search, we conclude that this search was such a minimal invasion of whatever privacy interest defendant had in the bicycle[9] that the on-the-spot brief search of the transitory object could be justified on reasonable suspicion. See LaFave, p 133. Finally, we conclude that Swift's action in recording the serial number on a notepad did not constitute a "seizure." *Arizona v Hicks*, 480 US 321, 324; 107 S Ct 1149; 94 L Ed 2d 347 (1987).

In summary, we conclude that Swift lawfully detained the bicycle for brief investigative purposes and lawfully obtained the bicycle's serial number. However, Swift was unable to resolve his suspicions because a computer check of the serial number revealed that the bicycle had not been reported stolen. At this point, even though Swift still had his "doubts," we cannot say that Swift had specific and articulable facts sufficient to give rise to a reasonable suspicion that the bicycle was stolen. Thus, after the computer check, Swift was no longer justified in detaining the bicycle for investigatory purposes. See *Place, supra* at 706. Alternatively, even if it could be said that Swift still possessed the requisite suspicion that the bicycle was stolen, detaining the bicycle as Swift did following the computer check was beyond the scope of and therefore could not be justified as an investigatory detention of the bicycle. *Place, supra* at 709-710.

The prosecutor contends on appeal that defendant validly consented to the seizure of the bicycle by the officer. Not surprisingly, defendant contends that he did not so consent.

The consent exception to the warrant requirement allows a search and seizure when consent is unequivocal, specific, and freely and intelligently given. *People v Marsack*, 231 Mich App 364, 378; 586 NW2d 234 (1998). The validity of the consent depends on the totality of the circumstances. *Id*.

In this case, the trial court found that Swift's use of force and illegal seizure of defendant rendered defendant's subsequent consent involuntary. It is true that an illegal seizure can taint the validity of a consent. *Royer, supra* at 507 (White, J., with Marshall, Powell and Stevens, JJ.). However, we have already determined that defendant was not illegally arrested without probable cause in this case, but rather was legally seized pursuant to a valid investigatory stop. The fact that a defendant has been lawfully detained by the police pursuant to an investigatory stop or is lawfully in police custody pursuant to an arrest warrant is not sufficient, by itself, to make consent involuntary. *United States v Gilbert*, 829 F Supp 900, 905 (ED Mich, 1993); *People v Acoff*, 220 Mich App 396, 400; 559 NW2d 103 (1996).

Moreover, contrary to the trial court's conclusion, the use of guns or handcuffs to effect a seizure does not necessarily render a consent invalid. Specifically, in *Gilbert, supra* at 902, ten to twelve federal officers executed an arrest warrant for the defendant by using a battering ram to break down the door to the defendant's home. Three to five officers entered the defendant's bedroom and ordered the naked defendant at gunpoint to get face down on the floor with his hands behind his back, whereupon he was handcuffed. *Id*. After conducting a protective sweep of the defendant's home, the officers holstered their guns, which had been drawn for approximately one to two minutes. *Id*. at 902-903. The defendant was allowed to dress and then removed to the living room by two officers where he was placed in a chair. *Id*. at 903. The officers read defendant his *Miranda*[10] rights and asked whether he would consent to a search of the residence. *Id*. The defendant orally agreed. *Id*. The officers then read a consent-to-search form to defendant, who thereafter signed the form approximately five minutes after the officers had entered his home. *Id*.

The court found that under the totality of the circumstances the defendant voluntarily consented to the search of his residence. *Id*. at 906. In so holding, the court found that no threat of force had been used to secure the defendant's consent where all guns had been holstered and only two agents were present when the defendant signed the form. *Id*. The court also noted that that there was no evidence to suggest that the officers had used threats concerning adverse consequences that might occur if the defendant refused to consent. *Id*. The court noted that the fact that defendant was in custody or had not been advised of his right to refuse consent was insufficient to indicate that his consent had been coerced. *Id*. The court concluded that the defendant's consent had not been fraudulently obtained where the officers had given defendant his *Miranda* rights and read the consent form to him, and defendant had affirmatively stated that he understood those rights. *Id*. Finally, the court noted that the defendant was a college educated correctional officer employed at a medium security prison. *Id*.

In this case, at the time defendant gave his consent to the seizure of the bicycle Swift's gun had been holstered for some time, defendant had been released from the handcuffs and defendant was free to leave. Neither Swift nor Hay threatened or raised their voices with defendant. Like *Gilbert*, we conclude that no threats or force, either express or implied, were used to coerce defendant's consent to the seizure of the bicycle. The fact that defendant was not apprised of his right to refuse consent is insufficient to find his consent involuntarily obtained. There is no indication that Swift demanded that defendant give him the bicycle where Swift testified that he explained to defendant that he (Swift) would like to hang on to the bicycle for proof of ownership. Cf. *People v Davis*, 189 Mich App 468, 474; 473 NW2d 748 (1991), rev'd on other grounds 442 Mich 1 (1993). And, defendant "never indicated any reluctance or that he was pressed into cooperating or consenting" to the seizure of the bicycle. *Marsack, supra* at 378. In summary, in applying the constitutional standard to the undisputed facts, we conclude that defendant voluntarily consented to the seizure of the bicycle.

In summary, applying the constitutional standard to the undisputed facts, we conclude that Swift's detention of defendant was a lawful investigative stop, that Swift lawfully detained the bicycle and obtained its serial number and that defendant validly consented to Swift's seizure of the bicycle. The trial court erred in determining otherwise. Accordingly, we vacate the trial court's suppression

ruling and its order dismissing this case, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Vacated and remanded.

/s/ Michael R. Smolenski
/s/ Henry William Saad

[1] But see *People v Kaufman*, 457 Mich 266; 577 NW2d 466 (1998) (the parties may agree to have a motion to suppress evidence decided on the basis of the record of the preliminary examination).

[2] The Michigan Constitution protects an analogous right. Const 1963, art 1, § 11. However, defendant does not contend that the Michigan constitutional protection against unreasonable searches and seizures should be interpreted differently than the United States Constitution. Accordingly, our inquiry begins and ends with an analysis of the Fourth Amendment. *Nelson*, *supra* at 631, n 8.

[3] However, we note that in *Taylor* our Supreme Court did not consider the specific issue whether the officer's seizure of the defendants could be justified as an investigatory stop. See *id*., generally.

[4] The court stated:

> That a stolen white car of a different make and model was used in one of the numerous robberies does not lend any credence to the argument that the police reasonably suspected that they had found the serial robbers." The culprits had also used a number of other vehicles, none of which was reported to be white. There is no reason in this case therefore (or undoubtedly any other) to believe that the wrong-doers had a particular affinity for vehicles that were colored white. [*Id*. at 1191.]

[5] The court stated:

> If [the plaintiffs] had been lingering near a supermarket at night, the fact that the supermarket robberies had all occurred at night-time might make the time of their lingering relevant. But we see no connection whatsoever between the fact that the robberies had taken place at night, and the fact that [the plaintiffs] stopped for dinner at night, or turned into the parking garage of a hotel where guests sleep at night. In fact, the only significance we can attach to the fact that the two black men were observed out together at night is that the officers may have thought that they were in the wrong place at the wrong time, that there was no legitimate reason for them to be at a restaurant in that neighborhood at night-time. [*Id*. at 1191.]

[6] The Court stated:

> This fact is wholly unpersuasive given Lambert's other testimony that the two men resembled the supermarket robbers in that they appeared to be "casual and not . . . too nervous." In any event, Lambert's testimony that [one of the plaintiffs] looked at

> him and looked away a few times inside a restaurant did not make it more likely that [this plaintiff] was a criminal. [*Id*. at 1191-1192.]

[7] We assume without deciding for purposes of analysis only that a possessory interest in a stolen bicycle on a public street gave defendant a legitimate expectation of privacy in the bicycle so as to confer standing to challenge the admissibility of evidence obtained as a result of any search or seizure of the bicycle. *People v Smith*, 420 Mich 1, 11, 25-26; 360 NW2d 841 (1984) *People v Lombardo*, 216 Mich App 500, 504; 549 NW2d 596 (1996); but see *United States v Salvicci*, 448 US 83, 92; 100 S Ct 2547; 65 L Ed 2d 619 (1980) (declining to use possession alone as an acceptable measure of Fourth Amendment interests); *Smith*, *supra* at 28 (noting that the United States Supreme Court has disparaged the idea that a person present in stolen vehicle could object to the lawfulness of a search of the vehicle). This issue was not raised by the prosecution below and has been raised by the prosecution on appeal without any citation to authority. Thus, we decline to address it further.

[8] See note 6, *supra*.

[9] See note 6, *supra*.

[10] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).