

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE CITY OF ROMULUS,

Plaintiff-Appellant,

v

CHAD DARYL SCHAFER,

Defendant-Appellee.

UNPUBLISHED
September 7, 1999

No. 214372
Wayne Circuit Court
LC No. 98-804757 AR

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty of assault and battery, MCL 750.81; MSA 28.276, and resisting and obstructing an officer in the discharge of his duty, MCL 750.479; MSA 28.747. The prosecution appeals by leave granted the circuit court order reversing defendant's convictions and remanding defendant's case to the district court. We reverse the circuit court order and remand to the trial court for sentencing.

This case arises from a stop by Romulus police officers of a vehicle in which defendant was a passenger. The officers received a dispatch informing them that there was a fight on the front lawn of a home known for drug activity and that there was the possibility that guns were involved. The dispatch specified that subjects were in a van and another vehicle. Officer Huggins, the first officer to reach the scene, arrived within about three minutes of the dispatch. She observed two vehicles, a van and a Ford Tempo, leaving the scene at a rate of speed in excess of the posted speed limit, which was twenty-five miles per hour. Huggins prevented these vehicles from leaving by positioning her vehicle at the open end of the dead-end street. Both vehicles stopped. Huggins exited her vehicle, drew her weapon, took cover behind her vehicle, and instructed the occupants of the vehicles to remain inside and keep their hands where she could see them. Within another minute, two more officers arrived. One of these officers, Officer Czernik, approached the Tempo, which contained three passengers: the driver, defendant, who was the front seat passenger, and another male in the back seat. At the same time, Huggins approached the van, which contained two occupants. Shortly thereafter, two more officers arrived at the scene. Both Huggins and Czernik instructed the occupants of the vehicles to place their hands in plain view. There was conflicting testimony by police officers at trial with regard to whether the

occupants complied with that request. There was also testimony that the driver of the Tempo was laughing at the officers, that she refused to comply with Officer Czernik's instruction to exit the vehicle, and that as he forcibly removed her, she resisted.

After Officer Czernik secured the driver of the Tempo in the police vehicle, he ordered defendant out of the Tempo. Czernik testified that as defendant began to exit the vehicle, Czernik pulled him out, laid him on the ground, and placed him in handcuffs behind his back. He then placed defendant on the side of the road with passengers from the van. There was no testimony that defendant resisted the officers at this point. Another officer removed the backseat passenger from the Tempo. Once the Tempo was empty, Czernik searched it and found a plastic bag containing what was later confirmed to be marijuana, under the front passenger seat. Defendant was arrested based on the discovery of the marijuana. As Czernik walked defendant to a patrol car, defendant became combative and verbally abusive. This behavior continued on the way to the police station and after their arrival there. Defendant's behavior resulted in charges of resisting arrest and assault and battery, in addition to the charge of possession of marijuana.

Defendant was convicted of assault and battery and resisting arrest, but was acquitted on the possession charge. He made a motion for a new trial, arguing that his arrest was illegal and his resistance, therefore, lawful. The trial court denied the motion. On appeal, however, the circuit court reversed defendant's convictions and remanded to the district court for a new trial. The circuit court found that there did exist reasonable suspicion to support an investigatory stop. However, the court also found that the handcuffing of defendant constituted an arrest and that under the totality of the circumstances, that arrest was without probable cause. The court concluded that defendant's arrest was illegal and because a citizen has a right to resist an illegal arrest, defendant was entitled to a new trial.

The prosecution argues on appeal to this Court that the circuit court erred in reversing defendant's convictions because the stop, detention, search of the Tempo, and arrest of defendant were lawful. This Court reviews a lower court's factual findings with regard to law enforcement's suspicion of criminal activity for clear error. *People v Bloxson*, 205 Mich App 236, 245; 517 NW2d 563 (1994). However, whether such suspicion was reasonable under the Fourth Amendment is a question of law subject to review de novo. *Id.* To the extent that a trial court's decision is based on an interpretation of the law, appellate review is de novo as well. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999).

In Michigan, a person's right to be free from unreasonable searches and seizures is guaranteed by both the state and federal constitutions. US Const, Am IV; Const 1963, art 1, § 11; *People v Champion*, 452 Mich 92, 97; 549 NW2d 849 (1996); *Zahn, supra* at 446. The lawfulness of a search or seizure depends on its reasonableness. *People v Armendarez*, 188 Mich App 61, 66; 468 NW2d 893 (1991). "Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions." *Champion, supra* at 98. A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that the individual committed the felony. MCL 764.15(c); MSA 28.874(c); *Champion, supra* at 115; *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). To

determine whether probable cause existed, this Court must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony. *Id.*

We agree with the circuit court that, under the totality of the circumstances, law enforcement officers in this case did not have probable cause to arrest defendant at the time he was removed from the Tempo and placed in handcuffs. Czernik acknowledged that defendant had done nothing wrong at the point at which he was removed from the Tempo and that Czernik was attempting to discover if defendant had done anything wrong. Furthermore, the radio dispatch simply identified a possible fight involving guns and subjects in two vehicles, one being a van. No specific descriptions of subjects or the vehicle in which defendant was an occupant were provided. We find that these facts are not sufficient for a fair-minded individual of average intelligence to believe that defendant had committed a felony.

We also agree with the circuit court that the officers in this case did, however, have reasonable suspicion to justify a *Terry*¹ investigatory stop. *People v Shabaz*, 424 Mich 42, 59; 378 NW2d 451 (1985); *People v Shields*, 200 Mich App 554, 557; 504 NW2d 711 (1993). Although such a stop constitutes a seizure, such seizure is not unreasonable if, under the totality of the circumstances, the police possess a particularized suspicion “that the person stopped has been, is, or is about to be engaged in criminal wrongdoing.” *Id.*; *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). An investigatory stop of a vehicle may be based on an anonymous tip if, under the totality of the circumstances, there are sufficient indicia of reliability to support reasonable suspicion of criminal activity. *People v Faucett*, 442 Mich 153, 168-169; 499 NW2d 764 (1993). “A valid investigatory stop must be justified at its inception and must be reasonably related in scope to the circumstances that justified interference by the police with a person’s activity.” *Champion, supra*.

Upon her arrival at the scene, Officer Huggins observed two vehicles that roughly matched the description of those identified in the dispatch, leaving the scene identified in the dispatch, a known drug house, at an excessive speed. These facts justified an investigatory stop. Because the stop was valid, and because the officers possessed a reasonable belief that the subjects of the stop could be armed, the officers were justified in conducting a limited protective search of the passenger compartment of the vehicle for concealed weapons. *Michigan v Long*, 463 US 1032, 1049-1050; 103 S Ct 3469; 77 L Ed 2d 1201 (1983); *People v Gewarges*, 176 Mich App 65, 69-70, 72-73; 439 NW2d 272 (1989).² Furthermore, as the Court explained in *Long, supra*:

If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances. [*Long, supra* at 1050; citations omitted.]

Because the marijuana discovered under the seat in the Tempo that had been occupied by defendant was sufficient to justify a fair-minded individual of average intelligence to believe that defendant had committed a felony, the police had probable cause at that point to arrest defendant.

Defendant contends, however, that when the police handcuffed him, they exceeded the bounds of a *Terry* stop, transforming the stop into an arrest, and since there was no probable cause at that point to arrest him, the arrest was illegal. The prosecution vigorously contests this point, citing numerous federal cases in which the use of handcuffs during a *Terry* stop was found to be reasonable when concern for officer safety was an issue. Indeed, in *United States v Perdue*, 8 F3d 1455 (CA 10, 1993), the court noted that “[n]ine courts of appeals, including the Tenth Circuit, have determined that such intrusive precautionary measures do not necessarily turn a lawful *Terry* stop into an arrest under the Fourth Amendment.” *Id.* at 1463.

We need not decide whether the handcuffing of defendant constituted an illegal arrest, rather than permissible conduct pursuant to a valid *Terry* stop, because even assuming that defendant was illegally arrested when removed from the Tempo, it does not follow from the facts of this case that defendant’s conviction for resisting arrest must be reversed. Defendant argues that because the handcuffing constituted an illegal arrest, the search of the Tempo was “the fruit of the poisonous tree,” see *Wong Sun v United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963), “and its results should have been suppressed as a matter of law.” Defendant seems to argue by implication, then, that his subsequent arrest based on the discovery of the marijuana was tainted “fruit,” and was also, therefore, illegal. Because a citizen has the right to resist an illegal arrest, *People v Krum*, 374 Mich 356, 361; 132 NW2d 69 (1965), defendant contends that the circuit court correctly reversed his conviction.

In order for evidence to be subject to suppression under the fruit of the poisonous tree doctrine, it must “ha[ve] been come at by exploitation” of a defendant’s Fourth Amendment rights. *Wong Sun*, *supra* at 488. In other words, there must exist a causal link between the Fourth Amendment violation and the seizing of the evidence. See *People v Stevens*, ___ Mich ___; ___ NW2d ___ (Docket No. 110866, issued 7/20/99) slip op p 13. An illegal arrest does not per se require suppression. *Kelly*, *supra* at 634. “It is only when an ‘unlawful detention has been employed as a tool to directly procure any type of evidence from a detainee’ that the evidence is suppressed under the exclusionary rule.” *Kelly*, *supra*, quoting *People v Mallory*, 421 Mich 229, 240-241, 243, n 8; 365 NW2d 673 (1984).

Here, the police had justification to conduct a protective search of the interior of the Tempo prior to defendant’s alleged illegal arrest; the discovery of the marijuana was not achieved by exploitation of illegal police activity. This is not a case where the police attempted to justify a search of defendant’s person as incident to a lawful arrest, or where the police obtained a statement from defendant after he was handcuffed that defendant seeks to suppress, or where police obtained consent to search the vehicle from defendant after he was handcuffed. In this case, there existed no *causal* link between the alleged unlawful seizure of defendant and the discovery of the marijuana. We note further that absent such a link, there is nothing requiring that defendant be released from the alleged unlawful seizure before he could be arrested on the charge of possession. As this Court noted in *Kelly*, *supra*, in situations where a custodial confession follows an illegal arrest, but the police uncover evidence that establishes probable cause to arrest the defendant before he gives the “tainted” statement, “one could question the wisdom of requiring police to go through the formality of releasing [the defendant], only to rearrest him outside the jailhouse door.” *Id.* at 635. We find such reasoning applicable in this case.

In sum, we find that the circuit court erred in reversing defendant's convictions for resisting arrest and assault and battery. The discovery of the marijuana during a legitimate search of the Tempo provided probable cause to arrest him. The record shows that he did not begin to resist until after he was arrested for possession of marijuana. Because that arrest was legal, defendant could properly be found guilty of resisting arrest and assault and battery.

Reversed and remanded to the trial court for sentencing. We do not retain jurisdiction.

/s/ Jeffrey G. Collins

/s/ Kathleen Jansen

/s/ Helene N. White

¹ *Terry v Ohio*, 392 US 1, 27; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

² We note that defendant has not asserted that the police exceeded the scope of what is permissible in searching a vehicle for weapons incident to a *Terry* stop.