STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL E. DICKER, MICHAEL R. WALKUSKI, WILLIAM B. HOUSTON, JAMES D. EARLEY, DEAN E. HERRON, MICHAEL J. REILLEY and LOUIS J. PIERFELICE,

Defendants-Appellees.

UNPUBLISHED
November 9, 1999

No. 215173
Oakland Circuit Court
LC No. 96-416604 AR

Before: O'Connell, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendants were each charged with conspiracy to commit malicious destruction of personal property over $100, MCL 750.157a; MSA 28.354(1); MCL 750.377a; MSA 28.609(1), conspiracy to throw dangerous objects, MCL 750.157a; MSA 28.354(1); MCL 750.493a; MSA 28.761(1), and conspiracy to molest or disturb workers, MCL 750.157a; MSA 28.354(1); MCL 750.352; MSA 28.584. The prosecutor appeals by leave granted a circuit court order affirming a district court order dismissing the charges against defendants. We reverse and remand.

On appeal, the prosecutor argues that the district court erred in suppressing the evidence and in dismissing the felony charge against defendants on the basis that the evidence found in the Dodge Aries was seized pursuant to an invalid arrest.[1] We agree and hold that the police officer's initial search of the vehicle in question was not pursuant to an arrest, but rather, constituted a valid investigatory stop and weapons search.[2] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

This Court reviews de novo the district court's decision whether to bind a defendant over to determine if that court abused its discretion. *People v Flowers*, 191 Mich App 169, 174; 447 NW2d 473 (1991). While we review a lower court's findings of fact in deciding a motion to suppress evidence for clear error, we review the lower court's application of the facts to constitutional standards de novo. *People v Steven*, 460 Mich 626, 631; 597 NW2d 53 (1999); *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999).

It is well-settled that a brief investigatory stop short of arrest is permitted where, based on the totality of the circumstances, the officer has a reasonable articulable suspicion that the person stopped has been, is, or is about to engage in criminal activity. *People v LoCicero (After Remand)*, 453 Mich 496, 501-502; 556 NW2d 498 (1996); *People v Shabaz*, 424 Mich 42, 59; 378 NW2d 451 (1985); *People v Shields*, 200 Mich App 554, 557; 504 NW2d 711 (1993). In analyzing the circumstances, due weight must be given "to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience," *LoCiero*, *supra* at 502, quoting *Terry*, *supra* at 27, and to the officer's assessments of criminal modes or patterns. *People v Nelson*, 443 Mich 626, 636; 502 NW2d 266 (1993). When the stop is of a vehicle, the reasonable and articulable suspicion must be directed at the vehicle and fewer foundational facts are required to establish that suspicion. *People v Yeoman*, 218 Mich App 406, 410; 554 NW2d 577 (1996).

In 1995, the Teamsters Union and the Graphics Communication International Union were engaged in a labor dispute with the Detroit Newspaper Agency ("DNA"). Between July 22 and August 3, 1995, several DNA vehicles were damaged by nails, which had been scattered around the driveway leading to the DNA distribution center in Farmington Hills. Police Officer Michael Farley routinely patrolled the area around the DNA and was familiar with the illegal strike activity occurring there, including the destruction of vehicles entering and exiting the premises. On August 3, 1995, at approximately 12:20 a.m., Farley saw three men in a Dodge Aries drive slowly past the distribution center, turn around and drive past the center again. He became suspicious because it was late at night, there were no commercial business in the area, all other industries in the area were closed except the DNA, the occupants did not exit the vehicle to join an established picket line, and he had never before observed three men enter the center in one vehicle to pick up newspapers. Accordingly, Farley followed the vehicle as it speeded in a direction that would have led back to the DNA. Under these circumstances, we conclude that Farley's decision to stop the Aries was supported by a reasonable, articulable suspicion that the occupants might be engaged in, or were about to engage in, criminal activity.

We further hold that Farley's subsequent search of the occupants and the passenger compartment of the Aries was a valid search incident to a *Terry* stop. An officer may search an individual during an investigative stop, provided the search "is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry*, *supra* at 26. A search of the passenger compartment of a vehicle to uncover weapons is also permissible where the officer possesses an articulable and objectively reasonable belief that the suspect is potentially dangerous. *People v Gerwages*, 176 Mich App 65, 69-70; 439 NW2d 272 (1989), citing *Michigan v Long*, US 1032, 1051; 103 S Ct 3469; 77 L Ed 2d 1201 (1983). The question is whether a reasonably prudent person in the particular circumstances would reasonably fear for his safety or the safety of others. *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993).

When Officer Farley approached the Aries to speak to the driver, he immediately observed a Motorola CB radio bearing the number six on the side and that one of the occupants was wearing a Teamsters' jacket. Farley also saw two new baseball bats with the price tags still affixed. Observing no other baseball equipment, and receiving inconsistent, incredible responses to his questions, Farley

suspected that the occupants were involved in illegal strike activity and were carrying the baseball bats as weapons. Farley then removed the occupants from the vehicle for his own safety, whereupon he noticed, in plain view, a finishing nail set and a ski mask where two defendants had been seated. As defendants were being monitored by Sergeant Monti, who had arrived as backup, Farley conducted a limited search of the passenger compartment to look for additional weapons. Underneath the front passenger seat, Farley found "star tacks" and a bag containing roofing nails and an awl (an instrument for piercing small holes). Based on this evidence, Farley determined that defendants were involved in strike-related malicious destruction of property and placed them under arrest.[3] Given these circumstances, we hold that a reasonably prudent person in Farley's position could reasonably conclude that either his safety or the safety of non-striking DNA employees was in danger. Accordingly, the evidence seized from the Aries was properly obtained, and the district court erred in suppressing it.[4]

Because the district court determined that the search of the Aries was invalid, it did not decide below, nor do defendants contest on appeal, the validity of Sergeant Monti's subsequent search of two trucks occupied by the four remaining defendants.[5] Nevertheless, we conclude that the search of the trucks, which was based in part on information Sergeant Monti received during the search of the Aries, was proper under the plain view and inventory search exceptions to the warrant requirement. See *Champion*, *supra* at 101 (plain view); *People v Toohey*, 438 Mich 265; 475 NW2d 16 (1994) and *People v Houstina*, 216 Mich App 70, 77-78; 549 NW2d 11 (1996) (inventory search).

Having determined that the district court erred in suppressing the evidence, we must now decide whether the evidence was sufficient to bind defendants over on the felony charge. A defendant must be bound over for trial if the evidence presented at the preliminary examination establishes that there is probable cause to believe that a felony has been committed and that the defendant committed it. MCL 766.13; MSA 28.931; MCR 6.110(E); *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). Probable cause is established by evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997). A prosecutor need not establish guilt beyond a reasonable doubt, but must present evidence of each element of the crime charged or evidence from which the elements may be inferred. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). When evidence conflicts or raises a reasonable doubt concerning guilt, the defendant should be bound over because there are questions for the trier of fact. *Id.*

The elements of conspiracy are: (1) an agreement, express or implied, between two or more persons to commit an unlawful or criminal act, and (2) the specific intent to combine with others to accomplish the unlawful or criminal act. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993); *People v Weathersby*, 204 Mich App 98, 111; 514 NW2d 498 (1993). For intent to exist, the defendant must know of the conspiracy, know of the objective of the conspiracy, and intend to participate cooperatively to further that objective. *People v Turner*, 213 Mich App 558, 558, 570; 540 NW2d 728 (1995). The existence of an agreement and the requisite intent may be established through circumstantial evidence and reasonable inferences drawn therefrom. *Justice*, *supra* at 347-348; *People v Barajas*, 198 Mich App 551, 554; 499 NW2d 396 (1993). The crime of conspiracy is

complete upon the formation of the agreement; no overt act in furtherance of the conspiracy is necessary. *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991)

The predicate felony of malicious destruction of property over $100 requires proof that (1) property of another was either destroyed or injured, (2) the damage resulting from the injury exceeded $100, (3) the specific intent to either injure or destroy the property. MCL 750.377a; MSA 28.609(1); *People v Ewing*, 127 Mich App 582, 584-585; 339 NW2d 228 (1983). Thus, to establish conspiracy to commit malicious destruction of property over $100, the prosecutor had to show that each defendant agreed to commit the predicate offense and possessed the specific intent to combine with others to commit the predicate offense.

In the present case, the evidence established the following: a recent history of strike-related violence and property destruction at the DNA; roofing nails and star nails were found in the driveway leading to the DNA between July 22 and August 3, 1995; defendants, who were all members of the striking unions, were present in vehicles near the distribution center late at night; defendants possessed matching numbered radios rented by a Teamsters' local; the radios were part of a ten-unit set designed to function together and privately; star nails or roofing nails were found in all three vehicles; two trucks contained pieces of cereal box cardboard impaled with nails; a radio message from "number 4" (the number on the radio in one truck) to "number 6" (the number on the radio in the Aries) stating, "we have one coming out right now, it looks like a flatbed, go ahead and take it"; and, that the cost of replacing the five tires damaged during the dates in question ranged from $65 to $105 per tire. We conclude that this circumstantial evidence was sufficient to allow a person of ordinary prudence and caution to entertain a reasonable belief that all seven defendants were involved in a mutual agreement and were acting with the specific intent to combine with each other to commit malicious destruction of property over $100. Therefore, the district court abused its discretion in denying the prosecutor's motion to bind defendants over on the charged offenses, and the circuit court erred in affirming the district court's order of dismissal.

The prosecutor also argues that the district court erred in dismissing the misdemeanor charges against defendants at the preliminary examination. We agree. In addition to felonies, a district court has jurisdiction to conduct preliminary examinations for misdemeanors punishable by imprisonment in excess of one year; however, there shall not be a preliminary examination for misdemeanors punishable by imprisonment not exceeding one year. MCL 600.8311(a),(d); MSA 27A.8311(a),(d); *People v Barbara*, 390 Mich 377, 382c-382d; 212 NW2d 14 (1973). Here, the misdemeanors of conspiracy to throw dangerous objects and conspiracy to molest or disturb workers carry a prison term of less than one year. By dismissing the misdemeanors for lack of sufficient evidence, the district court appears to have conducted a preliminary examination on the misdemeanor charges. Because the district court lacked authority to make a bindover determination concerning the misdemeanors, the district court erred in dismissing those charges.

For these reasons, we reverse the district court's dismissal of the charges, order all charges reinstated, and remand to the district court to enter an order binding each defendant over on the felony charge. The misdemeanor charges shall be assigned to the circuit court with the

felony charge. *People v Bidwell*, 205 Mich App 355, 358; 522 NW2d 138 (1994). We do not retain jurisdiction.

Reversed and remanded.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Brian K. Zahra

[1] The district court apparently determined that the search of the Aries was invalid because it was conducted pursuant to an invalid arrest, since there was no evidence that defendants had committed a misdemeanor in Officer Farley's presence. See MCL 764.15(1)(a); MSA 28.874(1); *People v Lyon*, 227 Mich App 599, 604; 577 NW2d 124 (1998).

[2] Officer Farley and Sergeant Monti were the only witnesses to testify regarding the seizure of evidence. In concluding that the evidence should be suppressed, the district court did not question the honesty or basic accuracy of the officers' testimony, but rather accepted their version of the events. Accordingly, we accept the officers' testimony as credible in reviewing the issues before us.

[3] At this point, we conclude that Farley had probable cause to arrest defendants. See *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998).

[4] Although not contested on appeal, we further find that evidence of the radio transmissions discovered in the Aries after the occupants had been validly arrested and the vehicle ordered impounded was obtained during a valid inventory search of the vehicle. The inventory search exception to the warrant requirement allows inventory searches of arrested persons or impounded vehicles without a warrant or probable cause when conducted in accordance with established departmental procedures. See *People v Toohey*, 438 Mich 265, 285; 475 NW2d 16 (1994); *People v Houstina*, 216 Mich App 70, 77-78; 549 NW2d 11 (1996). Here, both Officers Monti and Farley testified that after the suspects had been arrested and the vehicle ordered impounded, they conducted an inventory search pursuant to established department policy. There is no indication that the search was unreasonable or that it was used as a pretext for criminal investigation. *Toohey*, *supra* at 272, 276, 284-285.

[5] After Sergeant Monti left the Aries, he spotted two pickup trucks with the same type of antenna as the Aries parked in a Taco Bell parking lot, approximately 150 yards from the DNA distribution center. When Monti pulled his squad car in the parking lot, the remaining defendants exited the trucks and told Monti that they were on a break from strike duty. In both trucks, Monti noticed the same type of operating Motorola radio as that observed in the Aries, and in one truck, he saw several pieces of cereal box cardboard impaled with roofing nails. At that point, Monti determined that the four men were working in conjunction with the three occupants of the Aries, placed them under arrest, impounded the vehicles pursuant to department policy, and searched the vehicles. One truck contained a Motorola radio bearing the number four, four "star nails", binoculars, a container of epoxy, skunk scent, and printed strike materials. In the other truck, he found four pieces of cereal box cardboard impaled with nails, a metal coffee can containing nails, and two large ratchet handles.