

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RICHARD SMITH and JOSEPH SMITH,

Defendants-Appellees.

UNPUBLISHED

March 31, 2000

No. 212282

Recorder's Court

LC No. 97-002906

Before: Hood, P.J., Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's order granting defendants' motions to dismiss based upon illegal search and seizure. Defendant Richard Smith, was charged with carrying a concealed weapon, MCL 750.227; MSA 28.424 and defendant Joseph Smith, was charged with possession of more than 50 grams but less than 225 grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii), possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and carrying a concealed weapon, MCL 750.227; MSA 28.424. We reverse.

On March 31, 1997, Wayne County sheriff's deputy Rick Holme and Federal Bureau of Investigation agent Greg Brighton were patrolling the Greyhound bus station on Howard Street in Detroit to identify and arrest traffickers of weapons and narcotics. Holme testified that he and Brighton had defendants under surveillance and approached them when their bus arrived for boarding. Holme testified that he identified himself to defendant Joseph Smith as an officer, explained that he was at the bus station to identify those carrying weapons or narcotics, and that Joseph agreed to speak with him. After Joseph denied that he had weapons or narcotics, Holme asked if he could pat down Joseph to check for weapons or narcotics. Joseph asked Holme if he had a search warrant. Holme testified that after he told Joseph that he did not have a warrant, Joseph "thought about it for a second" and then said "okay, yeah, go ahead." During the subsequent search, Holme discovered a loaded handgun in the waist band of Joseph's pants and sixty-seven grams of cocaine in his jacket pocket.

Brighton testified and gave the following account. He approached defendant Richard Smith, identified himself as an FBI agent and asked if he could talk to Richard. In response, Richard shrugged his shoulders and said "okay." When Brighton asked for identification, Richard replied that he had

none, but verbally identified himself. When Brighton asked Richard where he was going, Richard handed him a bus ticket bearing the name of Mr. Johnson. Then, when Brighton asked Richard if he was carrying a weapon, Richard did not respond, but looked at the ground. Brighton told Richard that Richard's reaction to the question made him "a little bit nervous," and asked again if Richard had a weapon. Richard responded that he had a handgun in his backpack. Brighton searched the backpack and found a stolen forty-five caliber handgun.

At the suppression hearing in this case, the trial court addressed two separate issues. First, whether there was a seizure. Second, whether the seizure was based on a reasonable suspicion supported by articulable facts. After hearing the testimony, the trial court concluded that a seizure occurred and that the seizure was not based on reasonable suspicion:

At any rate, I don't believe that the officers had to have probable cause or even reasonable suspicion to talk to the Defendants, but they did not have the right to seize these Defendants, and they did by detaining them, by continuing to ask them questions, in the face of hesitancy, in the face of asking do you have a search warrant, in the face of, at first, a denial on the part of Mr. [Richard] Smith, in the face of taking Mr. [Richard] Smith's ticket and holding it while they continue to ask questions. In other words, the officers did not say specifically, nor did they convey the message that either of these Defendants were free to leave.

There was a seizure, and there was no reasonable suspicion based on [sic] articulable facts that criminal activity was afoot. The officers acted improperly and illegally in seizing the items seized. The Motions to Suppress the Evidence as to each of the Defendants is granted.

This Court will not disturb a trial court's ruling at a suppression hearing unless that ruling is clearly erroneous. *People v Faucett*, 442 Mich 153, 170; 449 NW2d 764 (1993). A decision is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *People v Howard*, 233 Mich App 52, 54; 595 NW2d 497 (1998). Here, we conclude that the trial court committed clear error in determining that the officers' actions constituted a seizure of defendants.

A seizure, as defined by the Fourth Amendment, occurs where, in view of all the circumstances surrounding the encounter with the police, a reasonable person would have believed that they were not free to leave. *Michigan v Chesternut*, 486 US 567, 573; 108 S Ct 1975; 100 L Ed 2d 565 (1988); *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). "When, however, an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there has been no restraint on the person's liberty and the person is not seized." *Shankle, supra* at 693. "[W]hen officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage – as long as the police do not convey a message that compliance with their requests is required." *Florida v Bostick*, 501 US 429, 435; 111 S Ct 2382; 115 L Ed 2d 389 (1991) (citations omitted). As long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and will not trigger Fourth Amendment scrutiny. *Id.* at 434. "Only when the

officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v Ohio*, 392 US 1, 19, n 16; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

Here, defendant Joseph Smith agreed to the search of his person. He was free to terminate the conversation and board the bus after he denied having weapons or narcotics. In addition, Holme's negative response to Joseph's question regarding the search warrant conveyed the message to Joseph that he was free to leave. Under these facts, a reasonable person would feel free to disregard officer Holme and go about his business. Joseph's subsequent agreement to be searched indicated his consent to a warrantless search of his person. In reaching our conclusion, we are mindful that the potential intrusiveness of the officer's conduct must be judged from the viewpoint of an *innocent* reasonable person. *Bostick, supra* at 437-438, citing *Florida v Royer*, 460 US 491, 519, n 4; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (Blackmun, J, dissenting). The fact that Joseph may have known the search was likely to reveal contraband is irrelevant. See *id.*

In regard to defendant Richard Smith, we conclude that the trial court mischaracterized officer Brighton's actions, specifically that Brighton took Richard's bus ticket. At the motion hearing, officer Brighton testified in pertinent part:

Q. What did you talk to him about?

A. I asked Mr. [Richard] Smith if he was traveling alone, and at that time he said that he was. I asked Mr. [Richard] Smith for some identification, and he indicated that he had no identification but he verbally identified himself as Richard Smith and gave me a date of birth.

Q. And, what else?

A. At that time I asked Mr. [Richard] Smith where he was traveling to, and he produced a Greyhound bus ticket with the final destination Akron, Ohio, bearing the name Mr. Johnson.

* * *

Q. You said you viewed his bus ticket. How did you do that?

A. He handed it to me.

Q. That was after you asked him where his destination was; isn't that correct?

A. That's correct.

We find no evidence to support the trial court's determination that Brighton took the ticket from Richard. On the contrary, Brighton's testimony established that Richard voluntarily gave him the ticket. The fact that Brighton held the ticket while questioning Richard does not establish that Richard was

detained or seized. Brighton's conduct did not constitute the physical force or showing of authority sufficient to establish that he seized Richard.

Finally, we reject defendants' contention that the outcome of their case is controlled by this Court's opinion in *People v Bloxson*, 205 Mich App 236; 517 NW2d 563 (1994). In *Bloxson*, this Court held that a seizure occurred where officers approached and questioned the defendant on a bus. In concluding that the encounter involved a restraint on the defendant's liberty sufficient to become a seizure, this Court considered the defendant's confinement on the bus and "the fact that the detective was standing over the defendant and between the defendant and the bus door." *Id.* at 244-245. This Court noted that the officers' conduct under these circumstances communicated to the defendant that he was not free to decline the officers' requests. *Id.* at 244. However, *Bloxson* does not control the outcome here, because defendants were not questioned while confined in a bus. See, e.g., *Bostick*, *supra* at 434 ("[t]here is no doubt that if this same encounter had taken place before [the defendant] boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure"). Because we conclude that no seizure occurred, we find it unnecessary to address the trial court's determination that the seizure was not based on reasonable suspicion.

Reversed.

/s/ Harold Hood

/s/ Michael R. Smolenski

/s/ Michael J. Talbot