STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED February 23, 2001
v	No. 225884 St. Clair Circuit Court
DENNIS CHARLES ITRICH, Defendant-Appellee.	LC No. 98-003025-FH

Before: Hood, P.J., and Doctoroff and K. F. Kelly, JJ.

PER CURIAM.

The prosecutor appeals as of right from an order dismissing the charge of possession with intent to deliver fifty grams or more, but less than 225 grams, of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). We affirm.

In February or March of 1998, police received three anonymous tips[1] that defendant was selling drugs. The tips provided that defendant would travel I-94 to Roseville in his pickup truck. Within the area of 12 Mile in Roseville, the tips alleged that defendant would make contact with his supplier. There was no specific information given regarding the supplier, only that the person was a black male. As a result of the tips, police began surveillance of defendant on April 14, 1998. During the period of surveillance, police observed vehicles with "out of county" license plates stop at defendant's residence for short periods of time. Some of the visits were made by "known drug dealers." There was no foundation presented in the record to substantiate that the visitors included known drug dealers. Police acknowledged that defendant resided in the home with his grandmother, girlfriend, and children. Therefore, the nature of the short visits and to whom the visits were paid was unknown. Police also acknowledged that defendant made "short trips," but acknowledged that those trips could involve defendant's pressure washing business.

On two occasions, police attempted to verify the anonymous tips. That is, police followed defendant to the area of 12 Mile in Roseville, but lost sight of defendant and were

[1] In the record, there is no indication whether the tips were provided by the same anonymous source.

unable to corroborate any exchange of drugs between defendant and his supplier. On May 21, 1998, Deputy Warren Head, with St. Clair County's Drug Task Force, followed defendant to the area of 12 Mile and Gratiot in Roseville. Deputy Warren observed defendant in his truck in the parking lot from three or four parking rows away. Defendant moved his vehicle to within twenty feet of Deputy Head. Defendant's vehicle was parked facing east while Deputy Head was parked facing west and found himself looking right at defendant. Defendant was parked for two to three minutes when a "big white truck" driven by a black male pulled in and stuck his arm out the window. Deputy Head was unable to observe any additional activity because his view was obstructed by the truck. The vehicles were parked for a maximum of fifty seconds. Then, both the driver of the white truck and defendant left the parking lot.

Deputy Head followed defendant out of the parking lot. He ordered a marked unit to stop and search defendant. Defendant was stopped by police and advised that his vehicle may have been involved in a hit and run accident. A pat-down search of defendant occurred, and he was placed in the back of the patrol car while his pickup truck was searched. The search of the vehicle did not lead to the production of evidence. Defendant was walking back to his car when baggies containing cocaine fell from his shorts. An evidentiary hearing was held regarding defendant's motion to suppress evidence. Deputy Head testified that defendant was suspected of drug dealing for a five year time period, but failed to provide specific information regarding the foundation for that conclusion. Additionally, Deputy Head failed to name the "known drug dealers" who had been to defendant's residence in order to protect continuing investigations. Although a log was kept of the out of county plates that visited defendant's residence, the specific plate numbers were not presented on the record in open court or otherwise revealed to defendant. Instead, Deputy Head went into chambers with the trial court, and a separate record was made.[2] The trial court found that police lacked reasonable suspicion of criminal activity to support the traffic stop.

The prosecutor argues that the trial court committed error requiring reversal when it concluded that the factual basis for the stop and search of defendant's vehicle was not based on reasonable suspicion. We disagree. When examining a motion to suppress evidence, we review the trial court's factual findings to determine if they are clearly erroneous, but review conclusions of law de novo. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000). A trial court's findings are clearly erroneous if, after a thorough review of the entire record, we are left with a definite and firm conviction that a mistake has been made. *People v Thenghkam*, 240 Mich App 29, 43; 610 NW2d 571 (2000). The Fourth Amendment of the United States Constitution, US Const, Am IV, protects against unreasonable searches and seizures, *People v LoCicero*, 453 Mich 496, 501; 556 NW2d 498 (1996), and the Michigan Constitution, Const 1963, art 1, § 11, contains an analogous provision. *LoCicero, supra*, at 501 n 8. A search, in law, is good or bad at the time of commencement, and its character does not change based on its success. *Id*. at 501. A police officer, to effectuate a valid traffic stop, must have an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation

[2] The prosecutor, as the appellant, has the duty to file the full record on appeal, and our review is limited to what is presented on appeal. *Band v Livonia Associates*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). This separate record was not provided on appeal.

of law. *People v Williams*, 236 Mich App 610, 612; 601 NW2d 138 (1999). Fewer facts are necessary to establish reasonable suspicion when the suspect is found in a moving vehicle as opposed to a home. *LoCicero, supra,* at 502. Nonetheless, a minimum threshold of reasonable suspicion must be established to justify an investigatory stop of a person in a vehicle. *Id*.

In *LoCicero, supra* at 498-500, undercover police officers in unmarked vehicles observed a Trans Am occupied by the defendant, the driver, and a passenger in the parking lot of a hotel. The Trans Am looped through the parking lot and met, for a moment, a Ford vehicle. The two vehicles drove out of the parking lot onto a main road then, less than a mile from the hotel parking lot, proceeding to an unlit area by a theater marquee. The vehicles stopped three parking spaces apart, and the passenger of the Trans Am got in the passenger side of the Ford. The defendant exited the Trans Am and looked around for a minute. The defendant returned to his vehicle and continued to look around as he waited. The passenger of the Trans Am conversed with the driver of the Ford for two to three minutes. Police did not observe any exchange between the two. The passenger returned to the Trans Am and drove off. Police opined that the conduct observed suggested a possible drug transaction and ordered a stop of the Trans Am. A pat-down search of the vehicle occupants did not reveal the presence of narcotics, but marijuana was discovered under the passenger seat. *Id.*

Our Supreme Court held that the evidence must be suppressed:

> LoCicero [the defendant] and Mueller's [the passenger's] conduct might have given rise to a hunch that they were engaged in criminal activity, but a hunch is not sufficient to give rise to reasonable suspicion. A hunch might provide a reason to observe the persons under surveillance further, or to run the license plates of their vehicles. An officer testifying that he inferred on the basis of his experience and training is obliged to articulate how the behavior that he observed suggested, in light of his experience and training, an inference of criminal activity.
>
> In *Nelson*, *Champion*, and *Yeoman*[3] the officers explained how the inferences they drew from their observations were based on their training and experience in similar circumstances and with similarly situated defendants generally, or with respect to their experience with the particular defendants in those cases.
>
> In this case, however, there was no articulation of how LoCicero and Mueller's conduct translated into potential criminal behavior other than the bald assertion by an officer that the situation looked like a drug transaction may be occurring.
>
> The officers had no prior experience with LoCicero and Mueller. It is not contended that the Tel-Ex Plaza is a high crime area or a known scene of drug

[3] *People v Nelson*, 443 Mich 626; 505 NW2d 266 (1993), *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996), and *People v Yeoman*, 218 Mich App 406; 554 NW2d 577 (1996).

> activity, as in *Champion*. LoCicero and Mueller did not act evasively or engage in furtive gestures upon encountering the police, as in *Champion* and *Yeoman*. [*LoCicero, supra* at 505-506.]

In the present case, Deputy Head gave conclusions regarding defendant, but failed to support the conclusions with a foundation. For example, Deputy Head indicated that he was "aware" of defendant, and others involved in the drug task force were aware of defendant for a five year period. Yet, Deputy Head failed to delineate whether this awareness for such an extensive period was based on prior arrests, prior police observations, prior anonymous tips that could not be corroborated, or defendant's association with other criminal offenders. While Deputy Head relied on "out of county" plates and defendant's association with "known drug dealers," he declined to reveal the plate numbers such that defendant could testify regarding the nature of the visits and declined to name the known drug dealers because of continuing investigations involving those dealers. While we recognize the desire of police to keep pending investigations confidential, the net result of the failure to divulge the information in this case precluded the trial court from finding a foundation to establish reasonable and articulable suspicion. Consequently, the police merely observed a big white truck pull into a parking space near where defendant was parked. The driver of the truck moved his arm. However, police were unable to observe any exchange or furtive gestures between defendant and the driver. This area was not a "known drug area." Rather, the police assumed that there was an exchange based on an alleged "short meeting." The observations of police on the date in question did not rise to the level of a reasonable and articulable suspicion, but rather comprised a hunch that a transaction had occurred. *LoCicero, supra*. We cannot conclude that the trial court's factual findings were clearly erroneous based on the evidence presented at the evidentiary hearing. *Snider, supra*.[4]

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[4] We note that Deputy Head testified that the surveillance of defendant commenced based on three anonymous tips. However, the testimony regarding the information provided by the tips varied. At the evidentiary hearing, Deputy Head testified that the anonymous calls were received in February or March 1998, but surveillance did not commence until April 14, 1998, despite an alleged history of reports of illegal activity by defendant. The anonymous tips indicated that defendant would travel I-94 to 12 Mile and "within the area" would make contact with the dealer or supplier. Deputy Head later testified that the tips provided that defendant would meet his supplier, a black male, within "a 1/2 mile radius" of 12 Mile and Gratiot. However, at the preliminary examination, Deputy Head testified that the tips indicated that defendant would go to the Roseville area "on Tuesday, go once a week" and travel I-94 to the Roseville area then proceed to "either - it was numerous restaurants." Despite the fact that the tips allegedly provided that defendant would meet his supplier on Tuesday and continue once a week, the police did not commence surveillance immediately to observe that Tuesday, but waited a period of time before beginning surveillance. Furthermore, while police had defendant under surveillance for six weeks prior to the stop, defendant did not travel weekly to the area. Rather, in the six week surveillance period, this was only the third trip to this particular area, and it is unclear where defendant went on the first two trips after his exit off I-94 at 12 Mile because police lost surveillance of defendant following his exit. Furthermore, on the third surveillance trip that resulted in the stop, defendant did not stop at a restaurant in accordance with the preliminary examination version of the tips, but went to a business called the Jewelry Exchange. This third trip did not occur on a Tuesday, as alleged by the tipster, but occurred on a Thursday. The trial court's opinion noted the disparity between the conduct on the day of the stop and the

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The prosecutor also argues that the trial court erred because police had probable cause to believe defendant was in possession of an illegal controlled substance. We disagree. Reasonable suspicion entails more than a hunch, but is less than the level of suspicion required for probable cause. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). The trial court's conclusion, that a reasonable and articulable suspicion was not present, was not clearly erroneous. Accordingly, the trial court did not err in concluding that the higher standard of proof was not established. *Id.*

Affirmed.

/s/ Harold Hood
/s/ Martin M. Doctoroff
/s/ Kirsten Frank Kelly

(…continued)

information provided in the tips before concluding that there was no reasonable suspicion of criminal activity to justify stopping defendant. A tipster's information must be examined under the totality of the circumstances to determine if it carries with it a sufficient indicia of reliability to provide reasonable suspicion to justify an investigative stop. *People v Faucett*, 442 Mich 153, 172; 499 NW2d 764 (1993). Special deference is given to a trial court's findings when based on witness credibility. *People v Sherman-Huffman*, 241 Mich App 264, 267; 615 NW2d 776 (2000). We cannot conclude that the trial court's findings were clearly erroneous in light of the circumstances that included conflicting testimony about the tips. *Snider*, *supra*. Finally, we note that the prosecutor's brief on appeal indicates that the transcript contains a typographical error when it refers to the "big white truck" as an "Expedite" instead of an Expedition. Review of the preliminary examination transcript reveals that there is no typographical error. Rather, at the preliminary examination, Deputy Head testified that it was a white truck containing the *company* name "Expedite." Deputy Head testified that, during the six week surveillance period, defendant was observed on company business. In light of the fact that this alleged "short meeting" was with a company truck, Deputy Head failed to explain why he believed that this meeting, though unobserved due to the obstruction of the truck, was a drug transaction as opposed to legitimate company business. A foundation or explanation is crucial because defendant's conduct did not mirror the terms of the tips where the "meeting" did not occur on a Tuesday at a restaurant as alleged by the source.