STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 13, 2001
v	No. 217110 Oakland Circuit Court
PAUL MARSHALL PIERCE, Defendant-Appellant.	LC No. 98-159697-FH

Before: Hoekstra, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of possession with intent to distribute an imitation controlled substance, MCL 333.7341(3). He was sentenced as a fourth habitual offender, MCL 769.12, to one to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Two Pontiac police officers were patrolling the area of Ferry and South Sanford in the evening February 11, 1998 and the early morning February 12, 1998. Both officers testified below that they noticed defendant at least two or three times between 6:00 and 7:00 p.m., standing by himself in area known for drug trafficking. The officers believed defendant's behavior was suspicious given that it was a cold night. One of the officers advised defendant regarding loitering and told him not to remain in the area. However, at approximately 1:30 a.m., the officers again observed defendant standing alone in the same area. The officers testified that they exited their patrol car intending to stop, investigate and arrest defendant for loitering. The officers approached defendant and for safety reasons, ordered him to remove his hands from his pockets. Defendant eventually complied and the officers observed that defendant's right hand was in a closed-fist position. The officers placed defendant's hands on the hood of the patrol car near the windshield in order to perform a precautionary pat down for weapons. After completing the pat down, the officers observed a small plastic bag on the car's windshield near where defendant's hands had been placed. The bag contained a white substance, which the officers believed was crack cocaine. Based on the amount of the substance, the officers inferred that the substance was intended for distribution, as opposed to personal consumption. Defendant was placed under arrest. The substance in the bag field-tested negative for cocaine. While en route to

the police station, defendant was advised of his *Miranda*[1] rights. Defendant indicated his understanding of those rights and agreed to talk to the arresting officers. Thereafter, one of the officers asked defendant why he was selling an imitation substance. Defendant responded that he was doing so to support his drug habit. Defendant further stated that he obtained the substance from a person named "Spike" to sell on the street. According to the arresting officers, defendant provided a false name at the time of his arrest and provided a home address that was approximately three miles from the place of arrest.

Prior to trial, defendant moved to suppress his statements to the police and quash the information on the basis that his arrest was illegal. The trial court determined that the officers had "sufficient cause to believe that defendant was engaged in criminal activity well before defendant made the alleged incriminatory statement[s]," and denied defendant's requests to suppress the statements. The evidence found subsequent to the search of defendant's person and defendant's statements were admitted at trial and a jury convicted defendant.

On appeal, defendant argues that his conviction must be reversed because the evidence against him was obtained as the result of an illegal search. We disagree.

The United States and Michigan constitutions protect individuals from unreasonable searches and seizures. US Const, Am IV and XIV; Const 1963, art 1, § 11. The remedy for violation of an individual's right to be free of unreasonable searches and seizures is suppression of the unlawfully obtained evidence. *People v Cartwright*, 454 Mich 550, 557-558; 563 NW2d 208 (1997), citing *Weeks v United States*, 232 US 383; 34 S Ct 341; 58 L Ed 652 (1914).

This Court reviews a trial court's findings at a suppression hearing for clear error. *People v LoCicero (After Remand)*, 453 Mich 496, 500; 556 NW2d 498 (1996). However, we review constitutional issues and issues of law de novo. *Id*. at 500-501; *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997).

Both parties present argument regarding whether defendant could be said to have violated Pontiac's loitering ordinance[2] so as to have given the officers probable cause to search defendant.

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

[2] That ordinance provides, in pertinent part:

> No person shall loiter, loaf, wander, stand or remain idle either alone and/or in consort with others in a public place in such a manner as to:
>
> (1) Obstruct any public street, public highway, public sidewalk or any other public place or building by hindering, impeding, or attempting to hinder or impede the free and uninterrupted passage of vehicles, traffic or pedestrians.
>
> (2) Commit in or on any public street, public highway, public sidewalk or any other public place or building any act or thing which is an obstruction or interference to the free and uninterrupted use of property or with any business lawfully conducted by anyone in or on or facing or fronting on any public street,

(continued…)

Defendant claims that because the officers' testimony does not establish that he violated the loitering ordinance, his arrest was illegal and the evidence against him should have been barred under the exclusionary rule.

We make no determination whether defendant's conduct as observed by the two officers violated the plain language of the loitering ordinance so as to provide the officers probable cause to arrest and search defendant incident to that arrest. See *People v Eaton*, 241 Mich App 459, 463; 617 NW2d 363 (2000).[3] We instead look to the totality of the circumstances that led to the search of defendant in order to determine whether defendant was subject to an unreasonable search and seizure.

Our Supreme Court recently discussed the constitutional standards regarding searches and seizures in *People v Oliver*, __ Mich __ ; __ NW2d __ (Docket Nos. 112341 and 115064, issued 6/12/01). The Supreme Court stated, in part:

> In *LoCicero, supra* at 501-502, this Court summarized the requirements for the police to make a valid investigatory stop based on reasonable suspicion consistently with constitutional protections:
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> > The brief detention of a person following an investigatory stop is considered a reasonable seizure if the officer has a "reasonably articulable suspicion" that the person is engaging in criminal activity. The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances. "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."
> >
> > Although this Court has indicated that fewer facts are needed to establish reasonable suspicion when a person is in a moving vehicle than in a house, some minimum threshold of reasonable suspicion must be established to justify an investigatory stop whether a person is in a vehicle or on the street. [*Oliver, supra* at slip op pp 8-9.]

We conclude that the circumstances of the present case were such as to raise a reasonable suspicion that defendant was engaging in criminal activity involving the sale of banned substances. Defendant was observed standing alone on a cold evening in an area known for drug

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(…continued)

> public highway, public sidewalk, or any other public place or building, all of which prevents the free and uninterrupted ingress, egress and regress therein, thereon and thereto. [Pontiac Code, art. 4, § 86-141(b).]

[3] We note, however, that one of the arresting officers testified: "[Defendant] was in [the] same area loafing, wandering. He was impeding traffic. Even though there - - it wasn't busy at the time, he's still impeding anybody that may have come along by standing in the same spot."

trafficking. Despite being warned by one officer regarding loitering, defendant was seen again several hours later in the early morning standing alone in the same area. These experienced patrol officers who had made several prior drug-related arrests in the area, found defendant's conduct suspicious and determined it necessary to approach defendant and investigate.[4] Defendant initially refused to comply with the officers' order to remove his hands from his pockets. When defendant eventually removed his hands, his right hand was in a closed-fist position. It was at that time that the officers elected to perform the precautionary search of defendant's person that led to the discovery of the imitation cocaine.

There was reasonable suspicion to support this investigatory stop independent of whether defendant had violated the loitering ordinance. Defendant's presence over a period of hours in the cold weather in an area known for drug trafficking, coupled with his conduct of initially refusing to remove his hands from his pockets and then holding his hand in a tight fist so as to indicate that he was concealing something in this hand are sufficient circumstances to give rise to the suspicion that defendant was engaging in the sale of banned substances. As recognized by our Supreme Court in *Oliver*:

> In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. [*Oliver, supra* at slip op p 15, quoting *Illinois v Wardlow*, 528 US 119, 124-125; 120 S Ct 673; 145 L Ed 2d 570 (2000).]

Under the circumstances of this case, the officers acted reasonably in stopping defendant and performing a precautionary search of his person. *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *Oliver, supra* at slip op p 19. The fact that the officers originally approached defendant regarding their belief that defendant was loitering does not change our conclusion. As stated by our Supreme Court:

> "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." [*Oliver, supra* at slip op p 18, quoting *People v Arterberry*, 431 Mich 381, 384; 429 NW2d 574 (1988), quoting *Scott v United States*, 436 US 128, 138, 98 S Ct 1717, 1723, 56 L Ed 2d 168 (1978).]

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[4] One of the arresting officers testified below that he and his partner approached defendant to "find out who he was, what he was doing there." That officer acknowledged that when they approached defendant, they intended to arrest him for loitering. As stated prior, we make no determination regarding whether the officers had probable cause to arrest defendant for loitering, but instead base our conclusion that the search of defendant was reasonable on the totality of the circumstances that gave rise to a reasonable suspicion.

Accordingly, the evidence of the substance obtained as a result of the search of defendant and the statements defendant made to the police subsequent to his arrest were not obtained as a result of an illegal search.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Brian K. Zahra