

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DONALD ANDREW SWANSON,

Defendant-Appellee.

UNPUBLISHED

September 21, 2001

No. 233730

Oakland Circuit Court

LC No. 00-007412-AR

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

PER CURIAM.

By order of the Supreme Court, we consider the prosecutor's application for leave to appeal as on leave granted.¹ We reverse.

On August 30, 1999, Officer Ernest Combs was stopped at a red traffic signal in Clarkston. In the left turn lane, two large trucks went through the red light. A red Toyota pickup truck, driven by defendant, was the third vehicle that followed the two trucks through the red light. All three vehicles turned into a muffler shop. Officer Combs activated his overhead lights, went through the intersection, and parked his fully marked patrol car off the highway. Officer Combs approached defendant, who exited his truck, left the door open, and began to walk towards the rear of his truck. Officer Combs explained that defendant had just driven through a red light. Defendant did not appear to comprehend what Officer Combs said. Officer Combs asked defendant to produce his driver's license. Defendant gave Officer Combs a peculiar look, said, "Noooo," shook his head, and began to walk backwards toward the street.

Officer Combs later testified that he thought that defendant might try and flee. He walked around defendant, reached in the open door, and removed the keys from the ignition. Officer Combs radioed dispatch for backup assistance because of defendant's strange manner. Officer Combs requested the production of defendant's license, and he complied. Defendant then opined that he was stopped because he was driving a Japanese vehicle. Defendant continued to act strangely. Defendant moved his head and observed the traffic on the street. He walked backwards and shifted from side to side. Defendant continued to make incoherent statements. He stated that the police had stopped either his father or his friend. Because of the

¹ *People v Swanson*, 463 Mich 993; 625 NW2d 783 (2001).

peculiarity of the contact, Officer Combs decided to immobilize defendant in his patrol car. After Officer Combs told defendant to get in the back of the patrol car, defendant said, “Noooo,” and shook his head.

Officer Combs stated that he felt that flight by defendant was imminent and feared that defendant would be hit by a car if he ran into traffic. Officer Combs told defendant to get in the patrol car, but defendant continued to move backwards. The officer grabbed defendant’s arm and directed him to the patrol car. Defendant jerked away from Officer Combs and clawed him in the face. Defendant was unable to gouge Officer Combs in the eye because Combs was wearing sunglasses. Officer Combs told defendant that he was under arrest, and a struggle ensued. Defendant continued to try to gouge Officer Combs in the eye, causing the officer to move backwards in an attempt to get away. The struggle ended up in the middle of Clarkston Road where a van was in the left turn lane. Defendant slammed the officer against the side of the van and tried to choke him. Officer Combs punched defendant in the face which caused defendant to release his choke hold. A man from the muffler shop came and immobilized defendant’s arms. Then, Officer Combs was able to place handcuffs on defendant. Officer Combs was treated for multiple lacerations to his face, neck, and arm.

On cross-examination, Officer Combs acknowledged that three vehicles had traveled through the red light. He further testified that he could not stop all three vehicles, and defendant’s violation was the most flagrant because he was the last offender. Officer Combs denied stopping defendant because of the make of his vehicle. He also denied that the stop was based on defendant’s long hair. Officer Combs testified that the intent underlying placement of defendant in the back of the patrol car was to protect defendant, who was displaying odd behavior and exhibiting signs of fleeing. He acknowledged that he would not have arrested defendant for issuance of a civil infraction. However, Officer Combs also testified that defendant’s failure to produce his driver’s license on demand was a misdemeanor offense. Following the arrest, tests revealed that defendant was not intoxicated at the time of the assault.

At the close of proofs, the district court asked the parties to file briefs regarding the propriety of an arrest for a civil infraction. Following the receipt of briefs, the district court held that any type of restraint, “moral or physical,” was an arrest. Furthermore, sitting in the back of a police vehicle constituted an arrest. Consequently, the district court refused to bind defendant over for resisting a lawful arrest causing injury, MCL 750.479a(6), and resisting a police officer engaged in lawful acts, MCL 750.479. On appeal, the circuit court reversed the district court’s failure to bind defendant over on the charge of resisting a police officer engaged in lawful acts, MCL 750.479. However, the circuit court affirmed the district court’s failure to bind defendant over on the resisting a lawful arrest causing injury charge, MCL 750.479a(6). The circuit court held that defendant was stopped for a civil infraction, and the police officer could not arrest defendant for a civil infraction. The circuit court held that the prosecutor could not establish the element of lawful arrest required to support the conviction. The prosecution appeals as on leave granted from this decision.

The prosecutor argues that the district court erred in failing to bind defendant over on the charge of resisting a lawful arrest causing injury, MCL 750.479a(6). We agree. Appellate review of a bindover decision is for an abuse of discretion. *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997). However, the disputed issue involves the legality of an arrest. The legality of an arrest presents a question of law. *Sitz v Dep’t of State Police*, 443 Mich

744, 768; 506 NW2d 209 (1993); *People v Keskinen*, 177 Mich App 312, 319; 441 NW2d 79 (1989). Questions of law and the application of the law to the facts are reviewed de novo. *People v Barrera*, 451 Mich 261, 269, n 7; 547 NW2d 280 (1996). The proofs presented at the preliminary examination must only establish probable cause to believe that a crime was committed and probable cause to believe that the defendant committed the crime. *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). Some evidence of each element of the crime must be presented, or evidence from which an element may be inferred must be presented. *Id.* Where the evidence conflicts or raises a reasonable doubt of the defendant's guilt, it is not the function of the examining magistrate to discharge the accused because that is the assigned task of the jury. *Id.* at 469-470. However, an examining magistrate may weigh the credibility of witnesses. *People v Laws*, 218 Mich App 447, 452; 554 NW2d 586 (1996); *People v Coons*, 158 Mich App 735, 738; 405 NW2d 153 (1987).

While the district court held that an arrest occurs by the placement of an individual in the back of a police car, the circuit court held that a lawful arrest could not occur based on the civil infraction. Both decisions ignore the sequence of events that transpired during the investigation. Officer Combs testified that he stopped defendant for failing to obey a red traffic signal. When he approached defendant, defendant acted strangely and defied his request for production of a driver's license. Additionally, Officer Combs testified that defendant kept moving backwards. This caused Officer Combs to remove defendant's keys from the ignition because defendant appeared to be a flight risk. However, even after the confiscation of the keys, Officer Combs testified that defendant continued to walk backwards and kept checking traffic conditions, as if defendant intended to run into the highway to flee. Additionally, defendant spoke incoherently, causing Officer Combs to question defendant's ability to comprehend what was transpiring. Consequently, Officer Combs asked defendant to enter the patrol car for defendant's safety as well as the officer's own. The mental health code, specifically MCL 330.1427, provides that an officer may take an individual into protective custody and transport the individual when it is suspected that the person may require treatment. There was no evidence presented at the preliminary examination or credibility finding to dispute the testimony that Officer Combs believed that defendant was impaired in some regard.

Additionally, the decision of *People v Otto*, 91 Mich App 444, 446; 284 NW2d 273 (1979), should be noted. In that case, a police officer found the defendant, a hitchhiker, on the freeway in violation of MCL 257.679a. The defendant and a female companion explained that they were trying to make it to Eight Mile Road, an area approximately two miles north of their present location. The officer determined that there was no outstanding warrants for the defendant, but there was an outstanding traffic warrant for his companion. The officer had two options. He could issue the citation and leave the defendant on the freeway. However, the danger of hitchhiking on the freeway was still present. The officer decided to transport the couple to Eight Mile Road in his patrol vehicle. Neither individual was placed under arrest. Before putting the defendant in the patrol car, a pat-down search of defendant occurred and a .25 caliber Galles automatic pistol with one round in the magazine was recovered. *Id.* at 446-449.

This Court examined the officer's decision to place the defendant in his vehicle and concluded that it did not constitute an illegal seizure:

In the instant case it was the officer's decision to transport the defendant to the next exit and thereby take him off the freeway, which led to the pat-down.

Employing the rationale of *Mimms* [*Pennsylvania v Mimms*, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977)] and *White* [*People v White*, 84 Mich App 351; 269 NW2d 598 (1978)] we inquire whether the officer's decision was reasonable under the circumstances. We find that it was. Trooper McCord had no authority to arrest the defendant and could have only issued a citation. This being so, the trooper's decision was limited to issuing a citation or to transporting the offenders off the freeway to the next exit. We believe the officer wisely chose the latter course of action; for had a citation been issued, the hitchhikers would continue on the freeway in violation of the law. As such, defendant and his female companion could either be the prey of individuals stranded or walking along the highway or could themselves be suspect of criminal conduct on the highway. Recently, several instances of suspected foul play by hitchhikers or pedestrians on the interstate highways have received wide attention. [*Id.* at 450-451.]

This Court then upheld the pat-down search of the defendant prior to entering the patrol vehicle as reasonable and justified for the officer's own protection. *Id.* at 451-452. Likewise, in the present case, we cannot conclude that the officer's mere request that defendant enter the patrol vehicle was an improper arrest or seizure. Officer Combs testified that he feared that defendant posed a flight risk and might become involved in a high speed chase. Therefore, he removed the keys from the ignition. However, defendant continued to walk backwards away from the officer, checked the traffic volumes, and shifted from side to side. Defendant disobeyed the initial request to see his license and continued to speak incoherently. Based on the only evidence available, we cannot conclude that the officer's *request* constituted an illegal arrest.²

However, we note that irrespective of Officer Combs' motive in requesting that defendant enter the patrol car, defendant allegedly provided a basis for his arrest. That is, after the officer placed his hand on defendant's arm, defendant did not merely pull away and continue to move away from the officer. Rather, defendant allegedly struck the officer by attempting to gouge his eye. Then, defendant was advised that he was under arrest. However, defendant did not cease his contact, but rather continued to attempt to gouge at the officer's face, then allegedly began to choke the officer. "An arrest is legal if an officer has reasonable cause to believe that a crime was committed by the defendant." *People v Freeman*, 240 Mich App 235, 236; 612 NW2d 824 (2000). Reasonable cause is present when the information available leads an ordinarily careful person to think that the defendant committed a crime. *Id.* In the present case, the officer's cause to arrest was based on the alleged assault directed at him. Accordingly, the circuit court erred in concluding that the element of lawful arrest could not be established.³

² While the district court stated that placement in a police car is tantamount to an arrest, we note that there is no indication that defendant got close to, let alone was placed in, the patrol car.

³ We express no opinion regarding the propriety of both charges pending against defendant or any double jeopardy violation. Although there was one transaction of events with one victim, the parties have not raised or addressed this issue on appeal.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Harold Hood

/s/ Brian K. Zahra