STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2001
v	No. 217478 Grand Traverse Circuit Court
KEVIN CARTER HOLTZER, Defendant-Appellant.	LC No. 98-007655-FH

Before: Collins, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced as a second habitual offender, MCL 769.10, to ten to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

In January 1998, the complainant, a young woman, was assaulted while sitting alone in her truck behind her friend's home. She did not recognize her attacker and had difficulty providing a description of him. At the crime scene, photographs were taken of footprints made in the snow by a distinctive double-S (SS) tread pattern. The investigating officer, a Traverse City police detective, sent photographs of the SS imprint to the Federal Bureau of Investigation (FBI) and was informed that the tread pattern corresponded to the Tektite model shoe made by K-Swiss. K-Swiss informed the detective that none of that particular model shoe had been shipped to the Traverse City area, and that they stopped producing that model sometime in 1997. The assault investigation stalled.

Approximately a month later, a young woman was murdered at the condominium complex where she worked in the Traverse City area. Defendant became a suspect and on February 26, 1998, Grand Traverse County sheriff deputies executed a search warrant at his condominium. Also present were laboratory technicians from the state police and Sergeant Michael Imhoff, a laboratory technician from the sheriff's department. The warrant authorized seizure of, among other things, blood and trace evidence. Once the search was completed and the deputies had seized everything they intended to seize pursuant to the warrant, condominium employees asked Sergeant Robert Monroe what they should do with the items remaining in defendant's condominium. They were told that they should do whatever they normally would do with such property. The condominium employees asked Monroe if he would remove the property, because they were afraid that defendant would return for it and they had no appropriate

place to store it. Monroe declined, but the employees persisted. Monroe testified at the hearing on defendant's motion to suppress that he contacted the prosecutor, who told him that the sheriff detectives should take the property if the condominium employees were not going to keep it, with the understanding that such action was to be taken for safekeeping purposes, and that they were to inventory and secure the property. The sheriff detectives inventoried and bagged the property, and then placed it in the locked property room at the sheriff's department.

About a month later, Detective Daniel Hill, the lead investigating officer in the assault case that is the subject of this appeal, was shown a photograph of K-Swiss tennis shoes that was taken during the execution of the search warrant at defendant's condominium.[1] Hill learned from Sergeant Imhoff that the shoes were in the sheriff department's property room and asked to see them. Although Hill recognized that the shoes were not the Tektite model, he turned them over and observed that the pattern on the soles of the shoes was similar to the footprints made at the assault scene. He and Sergeant Monroe then took the shoes across the hall to be examined by Imhoff. After examining the shoes with a magnifying device, Imhoff discovered what he believed was a blood stain on the stitching of one of the shoes. Hill obtained a search warrant and the section of shoe with the blood stain and a sample of the complainant's blood were sent to a laboratory for DNA testing. Comparison of the blood samples showed that the probability that the blood on defendant's shoe belonged to someone other than the complainant was 1 in 17.5 million.

Defendant filed a motion to suppress the shoes and DNA evidence on the basis that the removal of the shoes from defendant's condominium was an unconstitutional seizure and that the warrantless inspections of the shoes at the sheriff department property room and laboratory were unconstitutional searches. In denying defendant's motion, the trial court concluded that defendant had abandoned the property he left in his condominium and so retained no reasonable expectation of privacy in that property; that the removal of defendant's property from his condominium was not a seizure for Fourth Amendment purposes because the property had been removed as an accommodation to the landlord and not as part of a criminal investigation; and, in any event, the exclusionary rule did not apply because the shoes inevitably would have been discovered.

Defendant argues on appeal that the trial court erred in denying his motion to suppress the shoes and subsequent blood tests, key evidence at his trial, on the basis that they were obtained in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. To the extent that a lower court's decision on a motion to suppress evidence is based on an interpretation of the law, appellate review is de novo. *People v Kaslowski,* 239 Mich App 320, 323; 608 NW2d 539 (2000). We review for clear error the court's factual findings regarding a motion to suppress. *Id.*

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[1] The record shows that the city police department and the county sheriff department are housed in the same building. An officer familiar with the assault investigation was present in the room where sheriff detectives were viewing pictures of defendant's condominium and discussing the murder investigation. That officer contacted Hill when he realized that one of the pictures showed a pair of K-Swiss shoes.

The Fourth Amendment is not a guarantee against all searches and seizures, but only against those that are unreasonable. *People v Shabaz*, 424 Mich 42, 52; 378 NW2d 451 (1985); *People v Rasmussen*, 191 Mich App 721, 724; 478 NW2d 752 (1991). Accordingly, the key inquiry in a Fourth Amendment analysis is always whether the government's invasion of the citizen's personal security was reasonable under all the circumstances. *Id.*, citing *Michigan v Long*, 463 US 1032, 1051; 103 S Ct 3469; 77 L Ed 2d 1201 (1983). The Michigan Constitution does not impose a higher standard of reasonableness for searches and seizures than that imposed by the United States Constitution. *Rasmussen, supra.* The test for determining whether a search has occurred is whether police activity violated a person's legitimate expectation of privacy. *People v Whalen*, 390 Mich 672, 677; 213 NW2d 116 (1973), citing *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967). An expectation of privacy is legitimate if the individual has exhibited an actual, subjective expectation of privacy, and that actual expectation is one that society recognizes as reasonable. *People v Collins*, 438 Mich 8, 17-18; 475 NW2d 684 (1991), citing *Katz, supra* at 361 (Harlan, J., concurring).

Defendant first contends that the trial court erred in finding that he abandoned the property in his condominium such that he retained no reasonable expectation of privacy in his tennis shoes to warrant Fourth Amendment protection. We need not determine whether defendant abandoned the property in question, however, because we conclude that in any event, the removal and storage of defendant's property that was not seized pursuant to the warrant was not an unreasonable seizure within the meaning of the Fourth Amendment. Rather, given the particular circumstances of this case, the sheriff department deputies reasonably took possession of the property for safekeeping.

In *People v Lacey*, 530 F2d 821 (CA 8, 1976), during a search of an apartment after the defendant's valid arrest pursuant to a warrant, federal drug enforcement agents found cash that the defendant claimed was his. *Id.* at 822. Because the agents had broken down the door to the apartment and it could no longer be secured, the agents removed the currency from the apartment and took it to the local police station where the defendant was held. Before depositing the money in the property room, one of the agents recorded the serial number of each bill on an inventory slip. After the money had been returned to the defendant when he was released on bond, the agents learned from the inventory slip that serial numbers of two of the bills taken matched those of "buy money" that had been given to an informant to purchase heroin from the defendant. The defendant sought suppression of the inventory slip on the basis that the removal and retention of the currency and warrantless recording of the serial numbers constituted an unreasonable search and seizure. *Id.* at 822-823. The court denied the motion. In affirming the defendant's conviction on drug charges, the Eighth Circuit stated:

> Once the currency was validly exposed to the view of the agents and [the defendant] had indicated that it belonged to him, the warrantless removal of the currency into protective custody cannot be typified as a "seizure" for Fourth Amendment purposes. As the District court properly found, the evidence clearly established that the currency was not removed from the apartment for evidentiary purposes or as contraband. The money was lawfully taken into custody for the sole purpose of safekeeping, since the apartment door could not be secured after it had been forced during entry. [*Id.* at 823; citations omitted.]

The court further noted:

> There was no evidence that [the defendant] protested this safekeeping procedure. Moreover, there is no suggestion anywhere in the record that the action of the agents was pretextual or anything other than a reasonable procedure calculated to safeguard the currency as well as protect the agents from potential future claims should the money later "disappear" from [the] apartment. [*Id.* at 823 n 3.]

Here, the record strongly supports the trial court's finding that the sheriff department deputies did not take possession of the items remaining in defendant's condominium, after the search conducted pursuant to the warrant was complete, for evidentiary purposes. There is no evidence that the sheriff department detectives took possession of those items as a pretext for further investigation. Indeed, the detectives did not offer to take the property and initially declined the request to do so. The detectives took possession of the property only after they were asked repeatedly by condominium personnel, who expressed fear that defendant would return to retrieve the property and indicated that they had no appropriate place to store it. The prosecution has acknowledged that the condominium personnel had no right to give defendant's possessions to anyone or to otherwise dispose of them. However, given the extreme reticence expressed by the condominium employees regarding the retention of defendant's possessions, it was not objectively unreasonable for the officers to be concerned about the safekeeping of defendant's belongings and to agree to take them. Further, although Sergeant Morgan acknowledged at the hearing on defendant's motion to suppress that it was not department policy to take possession of property in such a situation, the deputies did follow procedure in inventorying the items and placing them in a locked property room at the sheriff's department.

Moreover, as in *Lacey*, there is no indication in the record that defendant protested the sheriff's possession of his property. When defendant was told that the property not seized pursuant to the warrant was in the possession of the sheriff's department, he expressed no concern, nor did he request immediate return of the property. Rather, the record shows that he simply indicated that he would leave it to his family to retrieve the property. When defendant's brother first attempted to retrieve the property, he was unable to do so because Morgan wanted to do a more specific inventory than had been done when the property was removed from defendant's condominium. When defendant's father later inquired about retrieving defendant's property, he was told that there was a hold on the property because sheriff department detectives were seeking another warrant to do further testing for blood evidence that may not have been observed during the first search.[2] Again, however, the record does not show that defendant or his family indicated any concern about the police department's retention of defendant's property; rather, their concern was with the logistics of obtaining and transporting the items. Further, there

[2] In the interim, the police received information that defendant had washed some of his clothing shortly after the murder. The day after defendant's father was told about the "hold," sheriff department detectives obtained a warrant to search the remaining clothing using a chemical that causes blood trace evidence to "luminesce." The warrant was not executed immediately, however, because the detectives were waiting for delivery of the chemical. It was after the warrant was obtained by the sheriff's department, but before it was executed, that Hill removed the shoes from the property locker.

was no suggestion that Morgan's decision to complete a more specific inventory was a pretext for further investigation. We conclude, therefore, that under the circumstances, the removal and storage of defendant's property by the county sheriff's department was not an unreasonable seizure within the meaning of the Fourth Amendment.

Defendant next contends that the trial court erred in finding that the warrantless inspection of his shoes by Traverse City police detectives was not an unconstitutional search. Again, the test for determining whether a search has occurred is whether police activity violated a person's legitimate expectation of privacy. *Whalen, supra.* The determination whether a person has a reasonable expectation of privacy is made considering the totality of the circumstances. *People v Perlos,* 436 Mich 305, 317-318; 462 NW2d 310 (1990).

Although this Court has not addressed whether property that has been lawfully viewed by law enforcement and is being held for safekeeping under the circumstances presented in this case may subsequently be examined without a warrant, we have addressed whether property viewed at the time of a lawful arrest and held for safekeeping is subject to a "second look" by law enforcement officers. In *People v Rivard,* 59 Mich App 530; 230 NW2d 6 (1975), a sapphire ring that the defendant was wearing when he was arrested for robbery was inventoried and stored in a personal property locker. After reviewing a list of property taken in the robbery with which the defendant was charged, a detective realized that the ring could be stolen property. The detective obtained the ring from the defendant's personal property locker without a warrant. The trial court denied the defendant's motion to suppress the ring. *Id.* at 532. In affirming the defendant's conviction, this Court concluded that

> [o]nce the ring had been exposed to police view under unobjectionable circumstances and lawfully taken by the police for safekeeping, any expectation of privacy with respect to that item had at least partially dissipated so that no reasonable expectation of privacy was breached by [the detective] taking a "second look." [*Id.* at 533-534, citing *United States v Grill,* 484 F2d 990, 991 (CA 5, 1973).]

See also *People v Robinson,* 37 Mich App 115, 120-121; 194 NW2d 537 (1971) (Levin, J., concurring).

Here, the shoes in question had already been viewed and photographed by law enforcement officers and were legitimately in the sheriff department's property room. As in *Rivard,* the evidence at issue was "not first seen because of an unjustified invasion of defendant's right of privacy," *id.* at 532-533, but was viewed during the execution of a valid search warrant, albeit a warrant issued to search for evidence related to the murder, not the assault. Federal case law indicates, however, that the analysis does not change where the person taking the "second look" belongs to a different law enforcement agency than the person who first viewed the item, or where the "second look" is taken as part of an investigation of a different crime than that which initially caused the item to be exposed to police view.

In *People v Thompson,* 837 F2d 673 (CA 5, 1988), the court held that where property was properly taken from a person by county jail officials pursuant to a lawful arrest, a later examination of that property by a federal law enforcement officer was not an unreasonable search

within the meaning of the Fourth Amendment. *Id.* at 674. In *Thompson,* the defendant was arrested on a state drug charge and, incident to his arrest, jail officials inventoried and stored his personal property. A friend of the defendant who subsequently was arrested under a federal statute for dynamite theft gave information to federal agents that implicated the defendant in the theft. He also indicated that the dynamite was in a locked storage unit and that the defendant had the keys. Without obtaining a warrant, the federal agent examined the defendant's property being held at the county jail and found a set of keys with the same label as the storage facility. The agent obtained warrants to seize the keys, unlock the storage facility, and seize the dynamite. *Id.* at 674-675.

On appeal, the defendant argued that because the federal agent's search "went beyond the scope of the justification for the initial search and inventory incident to his arrest on the state drug charge" and his "subsequent search was to look for evidence of a crime unrelated to [the defendant's] initial arrest," the search was invalid. *Id.* at 675. Relying, in part, on *Grill*, *supra*, the Fifth Circuit rejected this argument, stating that "the police had earlier, at the time of the inventory, lawfully viewed the ABUS keys and it cannot be said that another look at them by the federal agent unduly intruded upon Thompson's expectation of privacy." *Id.* The court also noted that the federal agent was not searching the defendant's property on "mere hunches that something of evidentiary value might be found." *Id.* at 676. Rather, the officer who arrested the defendant had told the federal agent that the defendant's personal effects included keys. *Id.*

Similarly, here, Hill knew of the shoes from the photograph; he did not ask to see defendant's property on the "mere hunch" that something of evidentiary value was in the locker. Further, the Traverse City police detectives' examination of the shoe did not exceed the scope of the search authorized by the warrant executed at defendant's condominium. The warrant authorized a search for, among other things, blood and trace evidence. If the detectives had noticed the blood on the shoe during execution of the warrant, they could have seized them pursuant to that warrant. See also *United States v Johnson,* 820 F2d 1065, 1072 (CA 9, 1987) (where defendant arrested by state authorities for driving under the influence, subsequent warrantless inspection by federal authorities of serial numbers on currency taken from defendant at time of arrest and placed in sealed envelope not a Fourth Amendment violation, even though serial numbers not recorded when currency originally seized); *United States v Jenkins*, 496 F2d 57, 73-74 (CA 2, 1974) (where defendant arrested by state authorities for carrying concealed weapon, subsequent inspection by federal agent of serial numbers on money taken from defendant and held for safekeeping determined not to require warrant).

We conclude that because any reasonable expectation of privacy defendant had in his tennis shoes was significantly dissipated after they were viewed and photographed during the execution of the valid search warrant, Hill and Imhoff's subsequent warrantless inspection of, or "second look" at, the shoes did not violate defendant's Fourth Amendment rights.

In light of our determination that defendant's Fourth Amendment rights were not violated by the removal and storage of his tennis shoes and subsequent inspection by Traverse City police

detectives, we need not address his argument that the trial court erred in finding that the tennis shoes were subject to the inevitable discovery exception to the exclusionary rule.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Hilda R. Gage

Collins, P.J. did not participate.