STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 3, 2002
v	No. 231291 Oakland Circuit Court
MARK SCOTT VIANO, Defendant-Appellee.	LC No. 00-173412-FH

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Defendant was charged with possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v). He moved to suppress the evidence and, following an evidentiary hearing, the trial court granted the motion, finding that defendant was in custody when a police officer questioned him about whether he had drugs on his person and that defendant had not been advised of his *Miranda*[1] rights, which were required under the circumstances. The trial court subsequently entered an order dismissing the case. The prosecutor appeals as of right. We affirm, although for different reasons than that of the trial court.

Defendant moved to suppress the evidence of two rocks of crack cocaine found by a police officer in his pants pocket following a patdown, contending that the police officer's questions whether he had any weapons or drugs on him required *Miranda* warnings. Under *Miranda*, before conducting a custodial interrogation, the police are required to advise a suspect that he has the right to remain silent, that anything he says may be used against him, and that he has the right to an attorney during questioning. *People v Dennis*, 464 Mich 567, 572-573; 628 NW2d 502 (2001).

A hearing was held at which Hazel Park Police Officer Joseph Lowry was the only witness. Lowry's testimony indicated that he was on routine patrol in a marked police vehicle on July 5, 2000, at about 5:20 p.m. He was in the vicinity of Eight Mile Road and the I-75 service drive when he noticed defendant loitering in the area and then crossed westbound traffic on Eight Mile, forcing traveling vehicles to brake or maneuver around him. Lowry then stopped

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

defendant, who was dragging a bicycle with him. Defendant was stopped for impeding traffic, a civil infraction. See MCL 257.676b. Lowry did issue a ticket to defendant for impeding traffic.

Upon making contact with defendant, Lowry escorted him out of traffic "to a safe, level portion of the roadway and then conducted a . . . pat down search for weapons." Lowry explained that he conducted the patdown because of the area where defendant was. Lowry described the area as having a high concentration of drug activity and other criminal activity. Defendant stood against the patrol vehicle with his hands on the vehicle during the patdown. While conducting the patdown, Lowry noticed a rock-like or pebble-like object in defendant's front left pants pocket. Lowry admitted, however, that he had no idea what the object was in defendant's pants pocket and he did not know if it might be drugs. As he was completing the patdown, Lowry asked defendant if he had any weapons or drugs on him.[2] Defendant replied that he had crack cocaine on him and motioned to his front left pocket. Lowry then asked defendant if he could retrieve the crack cocaine, and defendant stated that he could. Lowry retrieved two rocks of crack cocaine from defendant's left pants pocket.

Based on this testimony, the trial court found that defendant was in custody for purposes of *Miranda* and that the police officer was required to give defendant his *Miranda* warnings before asking the questions concerning weapons or drugs. Because the police officer failed to give defendant his *Miranda* warnings, the trial court ordered that the evidence be suppressed, and later dismissed the drug charge. The prosecutor appeals from the trial court's ruling, arguing that the trial court erred in finding that defendant was in custody for purposes of *Miranda.*

A trial court's factual findings when ruling on a motion to suppress evidence are reviewed for clear error. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). A finding is clearly erroneous when, after reviewing the entire record, we are left with a definite and firm conviction that a mistake has been made. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). To the extent the trial court's ruling involves the interpretation of the law or the application of a constitutional standard to undisputed facts, the standard of review is de novo. *Attebury*, *supra*, p 668.

The meaning of "custodial interrogation" was discussed in *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999), explaining:

> It is well settled that *Miranda* warnings need be given only in situations involving a custodial interrogation. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). The term "custodial interrogation" means '"questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."' *People v Hill*, 429 Mich 382, 387; 415 NW2d 193 (1987), quoting *Miranda*, *supra* at 444. To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether

[2] Lowry explained that the patdown and questioning occurred "all basically within the same moment."

the accused reasonably could have believed that he was not free to leave. *People v Roark*, 214 Mich App 421, 423; 543 NW2d 23 (1995). The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned. *Stansbury v California*, 511 US 318, 323; 114 S Ct 1526; 128 L Ed 2d 293 (1994).

Custody can mean that an individual '"has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with a formal arrest."' *People v Kulpinski*, 243 Mich App 8, 24-25; 620 NW2d 537 (2000), quoting *People v Peerenboom*, 224 Mich App 195, 197-198; 568 NW2d 153 (1997). The key question in deciding if a defendant was in custody for purposes of *Miranda* is whether the defendant reasonably believed that he was not free to leave. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997).

The prosecutor argues that the encounter in this case was similar to a roadside stop of a motorist, which does not rise to the level of "custody" for purposes of *Miranda*. In *People v Edwards*, 158 Mich App 561, 563-564; 405 NW2d 200 (1987), this Court stated:

> In *Berkemer v McCarty*, 468 US 420; 104 S Ct 3138; 82 L Ed 2d 317 (1984), the Supreme Court ultimately ruled that the safeguards required by *Miranda* applied where the defendant had allegedly committed a misdemeanor traffic offense. 468 US at 429, 434. However, the Supreme Court also held that a motorist detained pursuant to a routine traffic stop is not taken into "custody" for *Miranda* purposes. 468 US at 442. A routine traffic stop was found to be analogous to a "*Terry* stop," rather than a formal arrest, because of the noncoercive aspects of both. 468 US at 439-440.
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> Defendant argues that *Berkemer* is distinguishable from the instant case because here the police officer asked defendant whether he had a gun in the car. This, defendant argues, escalates the situation to a "custody" situation requiring that defendant be given *Miranda* rights. Defendant reasons that the question concerning the gun goes beyond the investigation of a routine traffic offense. We cannot agree with defendant's argument.
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> Defendant was detained for a routine traffic violation. A short amount of time elapsed between the time of the stop and the arrest for the gun violation. The police officer's question concerning the gun did not create the sort of coercive atmosphere where *Miranda* warnings are required to protect the free exercise of the right against self-incrimination and the question legitimately related to the officer's concern for his safety and the safety of others.
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> In summary, we hold that where an officer makes a routine stop of a vehicle for a traffic offense which is a civil infraction, there is no obligation to give *Miranda* warnings where the questions asked relate to the existence of weapons in the vehicle.

As will be explained, while we agree with the prosecutor that defendant's detention was consistent with a roadside detention that did not rise to the level of "custody," we find that adequate justification for the seizure of the drugs has not been shown. Initially, there is no question that defendant was lawfully detained by the police officer since defendant committed a civil infraction in the officer's presence. Further, it is clear that the roadside questioning of a motorist detained pursuant to a routine traffic stop does not require *Miranda* warnings because the motorist is not in custody for purposes of *Miranda*. *Berkemer, supra,* p 440; *United States v Purcell,* 236 F3d 1274, 1277 (CA 11, 2001) (Because a routine traffic stop is only a limited form of a seizure, it is more analogous to an investigative detention than a custodial arrest and the legality of the stop is analyzed under *Terry*[3] standards).

This Court's decision in *Edwards* would permit questioning a detained individual about the presence of weapons pursuant to a routine traffic violation. Here, however, the officer conducted a patdown of defendant to search for weapons. It was during the patdown that the officer felt the rock-like or pebble-like object in defendant's pocket. While *Edwards* permits the police to question a detainee about the presence of weapons during a roadside detention, any further action by the police, such as a search for weapons, must be justified under standards announced in *Terry*. Under *Terry*, the police may conduct "a limited patdown search for weapons if the officer has a reasonable suspicion that the individual is armed, and thus poses a danger to the officer or to other persons." *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001).

Here, the prosecution did not show that the patdown search for weapons or the question asked in conjunction with the patdown were justified under *Terry*. The police officer did not articulate reasonable suspicion that defendant was armed and dangerous to justify a patdown search for weapons. Although the police officer testified that defendant was in a high crime area, this alone does not justify a stop under *Terry* as a reasonable basis for suspecting criminal activity. *People v Nelson*, 443 Mich 626, 636; 505 NW2d 266 (1993). Thus, this same evidence, by itself, would not establish a reasonable basis for believing that defendant was armed and dangerous. Because the police officer did not perform a legitimate patdown search for weapons and he did not have probable cause to believe that the object was contraband by his admission that he did not know what the object was, his discovery of the two rocks of cocaine in defendant's pants cannot be justified under the plain-feel exception. *Custer*, *supra,* p 331.

Moreover, the police officer's question concerning whether defendant had any weapons or drugs on him was similarly not supported by reasonable suspicion. In *Terry, supra,* p 29, the Supreme Court noted that the stop and inquiry must be reasonably related in scope to the justification for their initiation. Therefore, a police officer may ask the detained person a moderate number of questions to determine identity and to try to obtain information confirming or dispelling the officer's suspicions. *Berkemer, supra,* p 439; and see *Florida v Royer,* 460 US 491, 500; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (It is the government's burden to show that the seizure it seeks to justify on the basis of a *reasonable suspicion* is sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure); *United States v Brignoni-*

[3] *Terry v Ohio*, 391 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

Ponce, 422 US 873, 881-882; 95 S Ct 2574; 45 L Ed 2d 607 (1975) (Where an officer's observations lead to reasonable suspicion of criminal activity, a brief detention and investigation are permissible to investigate the circumstances that provoked the suspicion, but any further detention or search must be based on probable cause or consent). Here, the police officer had no suspicions about defendant and, in fact, testified, in response to whether the officer was concerned about defendant having been engaged in some drug or criminal activity, "That's hard to fathom at that time." Consequently, because the police officer did not have reasonable suspicion that defendant had any drugs on his person, the officer exceeded the permissible inquiry related to the initial stop for impeding traffic. See also, *People v Burrell*, 417 Mich 439, 441; 339 NW2d 403 (1983) ("a person may not be detained for roadside questioning beyond the scope of a stop, absent at least an articulable basis for suspecting other criminal activity").

Accordingly, the trial court did not err in granting defendant's motion to suppress the evidence. The police officer did not have reasonable and articulable suspicion to conduct a patdown search of defendant or to question defendant regarding whether he had any drugs on him.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.