STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 10, 2002
v	No. 230983 Wayne Circuit Court
WINSTON C. ROBINSON, Defendant-Appellee.	LC No. 00-002363

Before: Holbrook, Jr., P.J., and Cavanagh and Gribbs*, JJ.

PER CURIAM.

Defendant was charged with possession of marijuana, MCL 333.7403(2)(d), third-degree fleeing and eluding, MCL 750.479a(3), and two counts of resisting and obstructing a police officer, MCL 750.479. Following a trial that ended with a hung jury, defendant filed a motion to suppress evidence and dismiss the charges. The trial court granted the motion, dismissing all of the pending charges. The prosecution now appeals as of right, arguing that the trial court erred by dismissing the charges of fleeing and eluding and of resisting and obstructing a police officer. The prosecution does not appeal the dismissal of the possession charge. We affirm.

The prosecution argues that the trial court abused its discretion in dismissing the resisting arrest and fleeing and eluding charges. We disagree. We review a trial court's decision on a motion to dismiss for an abuse of discretion. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). The prosecution contended below that the police were justified in attempting to stop defendant because they had observed defendant run a stop sign. However, concluding that much of the officers' testimony was incredible, the trial court specifically found that defendant did not fail to obey the stop sign, and thus the police did not have probable cause to stop defendant. Defendant asserts that the prosecution does not contest this finding on appeal. We agree, but not for the reasons set forth by defendant.

Defendant asserts that the prosecution indicates in footnote 2 of its brief on appeal that it is not challenging this legal conclusion by the trial court. This is not the point being made by the prosecution in that footnote. Rather, the prosecution is indicating that it is not going to argue whether the procedures that needed to be followed at the evidentiary hearing held on defendant's motion to suppress are governed by *People v Talley*, 410 Mich 378; 301 NW2d 809 (1982), or *People v Kaufman*, 457 Mich 266; 577 NW2d 466 (1998)(overruling, in part, *Talley*). The

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Talley Court specifically prohibited "the practice [by trial courts] of relying exclusively on preliminary examination transcripts in the conduct of suppression hearings." *Talley, supra* at 382. Looking to MCR 6.110(D), which was adopted after *Talley* was decided, the *Kaufman* Court "overrule[d] *Talley* insofar as it has been understood to mean that counsel cannot agree to have a motion to suppress decided on the basis of the record of the preliminary examination." *Kaufman, supra* at 276. The prosecution in the case at hand contends that although it was entitled to an evidentiary hearing pursuant to *Talley*, because the prosecution could stipulate to the use of trial testimony pursuant to *Kaufman*, given its lack of objection to the reliance on trial testimony, the prosecution would not "quibble" about any distinguishing characteristics between the case at hand and *Kaufman*.

Preliminarily, we note that we do not accept the prosecution's characterization of its posture at the evidentiary hearing. The prosecution did more than fail to object to the reliance on trial testimony when deciding defendant's motion. Indeed, the prosecutor specifically stated that it was not requesting an evidentiary hearing:

> *Defense Counsel*: . . . And on the motion I would certainly—I don't see that we need anymore testimony than what we have heard already in trial. I would be duplicating that at an evidentiary hearing. . . .
>
> *Court*: Oh, I don't think you need an evidentiary hearing. I agree.
>
> *Prosecutor*: No, Your Honor, at this time we are not—I am not requesting one. I am only saying that because of the disadvantage, if there is some discrepancy that comes up I am only asking that the Court consider the circumstances of my departure.
>
> But I am not at this time asking, and having spoken with [the assistant prosecutor who would be taking over the case subsequent to this hearing,] we are not at this time seeing any need for an evidentiary hearing.

The prosecutor did make clear that because that was her last day on the case, she hoped that if her successor later requested an evidentiary hearing, the trial court would consider the fact that her successor had not been involved with the trial. The successor prosecutor never made a request for an evidentiary hearing on defendant's motion.

Nonetheless, we conclude that the prosecution has waived any challenge to the trial court's finding that because defendant did not run the stop sign, the police did not have probable cause to stop him. Nowhere in the prosecution's brief does it argue that this finding was erroneous. Rather, the prosecution argues that the court must have necessarily gone beyond this finding of a lack of probable cause, and improperly turned to the merits of the case, thereby invading the province of the jury. The prosecution argues that the only thing the court had the authority to do once it found no probable cause for the stop, was to suppress the evidence seized as a result of that arrest, i.e., the marijuana that formed the basis of the possession charge.[1] In

[1] The fact that the prosecution does not appeal the dismissal of the possession charge also supports our conclusion that the probable cause finding has been waived. If the prosecution did (continued…)

other words, the prosecution's argument on appeal is not that the trial court erred in finding no probable cause for the stop, but that dismissal of the resisting arrest and fleeing and eluding charges was an inappropriate remedy.[2]

We now turn to the crimes themselves. In order to convict a defendant of the offense of resisting and obstructing a police officer, there must be proof that the arrest was lawful. *People v Freeman*, 240 Mich App 235, 236-237; 612 NW2d 824 (2000); *People v Reed*, 43 Mich App 51, 53; 203 NW2d 756 (1972). The prosecution argues that the lawfulness of the arrest is a question of fact that must be left to the trier of fact. In support of this assertion, the prosecution cites the following passage from *People v Dalton*, 155 Mich App 591, 598; 400 NW2d 689 (1986):

> Indeed, a lawful arrest is an element of the offense of resisting arrest, MCL 750.479; MSA 28.747; *People v Landrie*, 124 Mich App 480, 482; 355 NW2d 11 (1983). Thus, when a suspect is tried for resisting arrest, the lawfulness of an arrest, which is generally a question of law decided by the trial court, becomes a question of fact to be decided by the jury. *People v Reed*, 43 Mich App 51, 53; 203 NW2d 756 (1972).

We believe that the prosecution misunderstands the meaning of *Dalton* and *Reed*. In *Reed*, the defendant argued that the trial court erred in failing to instruct the jury that in order to convict the defendant of resisting arrest, the arrest must be lawful. *Id.* The *Reed* Court examined closely the following comments made by the trial court:

> ". . . Gentlemen, the only thing that we have to determine is whether or not there was a valid arrest and probable cause for arrest. I am going to hold that the arrest is valid.
>
> "The fact of whether or not they are guilty of loitering [the crime in issue], is not a question we should determine here. The only thing that we have to determine is the legality of the arrest and I say that the arrest was valid." [*Id.*]

The *Reed* Court concluded that the trial court had erred:

> [I]t was necessary for the jury to pass upon the legality of defendant's arrest in order to convict him of resisting arrest. While we find no explicit statement in the

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(…continued)

believe that probable cause had been established for the stop, then it is reasonable that it would have been arguing before us that the possession charge was wrongly dismissed. We do not treat the prosecution's failure to raise this argument as a mere oversight.

[2] In its review of the trial court's ruling, the dissent emphasizes that the court found "the officers' testimony about events *after* the alleged failure to stop" to be incredible. *Post* at 1. It is true that the court did not immediately conclude that the officers' testimony about the failure to stop was incredible. However, it is clear from the context of the court's reasoning that it evaluated the credibility of the officers' testimony about the alleged failure to stop in light of the credibility of their testimony about subsequent events. This is an entirely legitimate method of evaluating testimony.

> law of this state, we feel it is nevertheless clear that the legality of the arrest is an element of the offense of resisting arrest. [*Id.*]

However, while the legality of the underlying arrest in a prosecution for resisting arrest is properly left to the trier of fact, the threshold issue of probable cause remains a legal question for the trial court. This is the mistake that was made by the trial court in *Reed*, i.e., instead of limiting itself to the issue of probable cause, it jumped to the issue of the legality of the arrest, effectively usurping the fact finder's role.

If in a prosecution for resisting arrest a trial court concludes that no probable cause for the underlying arrest existed, then the court must necessarily conclude that one of the essential elements of the crime was not established. *Pennsylvania v Biagini*, 540 Pa 22, 32-33 (1995). However, if the court concludes that there was probable cause for the underlying arrest, then the ultimate issue of the legality of the arrest must be left to the trier of fact. *Dalton*, *supra*; *Reed*, *supra*.

At first blush, it may seem inconsistent to say that while the issue of legality is one for the trier of fact, the court can nonetheless dismiss a charge of resisting arrest upon a finding that no probable cause existed for the underlying arrest. However, this bifurcated process is firmly rooted in both the constitutional guarantees of the Fourth Amendment[3] and the respective burdens of proof that attach to each inquiry. See *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). The issue of the constitutionality of a warrantless arrest is clearly a matter for the judiciary to decide. If no probable cause for an arrest exist, then the arrest is constitutionally invalid. See *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963).

Further, while each element of crime must be established beyond a reasonable doubt, the standard in a probable cause inquiry is much less. *People v Mason*, 247 Mich App 64, 71; 634 NW2d 382 (2001). As the United States Supreme Court stated in *Brinegar v United States*, 338 US 160, 175-176; 69 S Ct 1302; 93 L Ed 1879 (1949):

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' And this 'means less than evidence which would justify condemnation' or conviction, as Marshall, C.J., said for the Court more than a century ago . . . . Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a

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[3] US Const, Am IV.

> man of reasonable caution in the belief that' an offense has been or is being committed. [Citations omitted.]

In other words, "'[t]here is a large difference between the two things to be proved (guilt and probable cause) . . . and therefore a like difference in the quanta and modes of proof required to establish them.'" *Draper v United States*, 358 US 307, 312; 79 S Ct 329; 3 L Ed 2d 327 (1959), quoting *Brinegar, supra* at 173.

Thus, a conclusion that probable cause has been established does not necessarily establish that the arrest was legal beyond a reasonable doubt. Conversely, however, it is logically inconsistent to state that while no probable cause existed for the underlying arrest, the state may still be able to satisfy the higher standard of proof applicable to the issue of legality in a prosecution for resisting arrest. Accordingly, in such a case as the latter, one of the essential elements of the crime of resisting arrest cannot be established.

Our examination of probable cause for the arrest in the case in hand necessitates an examination of whether probable cause existed for the stop of defendant. We are not aware of, nor has either party to this appeal pointed out, any Michigan case that states that in a prosecution for fleeing and eluding the issue of the legality of the stop is a jury question. This Court held in *People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999), that one of the essential elements of the crime of third-degree fleeing and eluding is that the officer from whom the defendant is fleeing must have been in the lawful performance of his or her duties at the time of the alleged infraction. MCL 750.479a(1) reads in pertinent part:

> A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visible or audible signal by a police or conservation officer, *acting in the lawful performance of his or her duty*, directing the driver to bring his or her motor vehicle to a stop, shall not willfully fail to obey that direction by increasing the speed of the vehicle, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude the police or conservation officer. . . . [Emphasis added.]

In context, lawful does not mean simply that the officer was a duly authorized police or conservation officer. Rather, the essence of this element of the crime is that the attempted stop of the defendant must have been lawful.

Therefore, for the reasons set forth by *Reed* regarding the crime of resisting arrest, we hold that in a prosecution for fleeing and eluding, the lawfulness of the stop is a question for the trier of fact. However, as with a prosecution for resisting arrest, the issue of probable cause remains a question of law for the court. See *Biagini*, *supra* at 32. If the court concludes that probable cause existed for the stop (i.e., that the stop was not pretextual), then the issue of whether the stop was legal beyond a reasonable doubt is one for the trier of fact. Conversely, if the court concludes that no probable cause existed for the stop (i.e., the stop was pretextual), then one of the essential elements of the crime cannot be established, and the charge is properly dismissed.

In the context of this case, a lawful stop of defendant requires that the police have probable cause to stop him for running a stop sign. As we have already concluded, the

prosecution has waived any challenge to the trial court's finding that no probable cause existed for the stop. Assuming that the prosecution had made such a challenge, we do not believe the court, having been better situated than this Court to assess the credibility of the witness, erred in finding no probable cause for the stop.

Without probable cause for the stop, an essential element of the crime of fleeing and eluding cannot be established, and consequently the police had no probable cause to arrest defendant for the crime of fleeing and eluding. With no probable cause for the arrest, then the legality of the resisting arrest charges cannot be established. See *Freeman, supra* at 236. In these circumstances, the court correctly dismissed both the resisting arrest and fleeing and eluding charges.

We respectfully disagree with the dissent's assertion that the trial court erred by allowing the issue of guilt to enter the hearing on defendant's motion. *Po*st at 1. The court did not, as characterized by the dissent, "conduct a spontaneous 'bench trial,'" on the charges in issue. *Id.* For this assertion the dissent cites two decisions of this Court that dealt with a trial court's consideration of the voluntariness of a confession. *People v Drew*, 26 Mich App 337; 182 NW2d 566 (1970); *People v Hummel*, 19 Mich App 266; 172 NW2d 550 (1969). Setting aside the clear factual differences between these cases and the case at hand, we do not believe the essence of the *Drew* and *Hummel* holdings was violated in the case at hand. In both of these cases, this Court held that when reviewing the voluntariness of a confession, it is error for a trial court to examine the trustworthiness of the confession by considering the innocence or guilt of a defendant. *Drew, supra* at 339; *Hummel, supra* at 271-272. In the case before us, there is no evidence that the court considered the guilt or innocence of defendant when deciding the issue of probable cause. For example, the court did not say that the evidence established that defendant indeed did not commit the crimes in issue, and thus the police could not have had probable cause for the stop. Further, we note that the voluntariness inquiry is significantly different than an examination of probable cause. When considering whether the police had probable cause to arrest, the court is required to consider whether under the circumstances a reasonable person would believe that a crime had been committed and that the defendant committed it. *People v Shabaz*, 424 Mich 42, 58; 378 NW2d 451 (1985).

The trial court did "find that [defendant] did not flee and elude the police." This was not, however, evidence that it had impermissibly considered defendant's guilt. Rather, as we have just stated, it is the nature of the inquiry to determine whether probable cause exists to believe a crime had been committed and that defendant committed it. *Id.*

In conclusion, because the officers did not have probable cause to stop defendant's vehicle, the attempted stop was unlawful. Accordingly, the prosecution cannot prove an essential element of the crime of fleeing and eluding. As a result, because the prosecution cannot prove the legality of the arrest, a necessary element of the crime of resisting and obstructing is lacking. We therefore hold that the court properly dismissed the charges.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh