

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD LUVERT TOLES,

Defendant-Appellant.

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UNPUBLISHED

July 2, 2002

Nos. 231699, 231784

Monroe Circuit Court

LC Nos. 00-30350 FH

00-30599 FH

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

These cases were consolidated before trial and tried before the bench. In case number 00-30350 FH, after denying defendant's motion to suppress evidence obtained pursuant to a traffic stop, defendant was convicted of: Possession with intent to deliver less than fifty grams of cocaine (MCL 333.7401(2)(a)(iv)); possession with intent to deliver less than fifty grams of heroin (MCL 333.7401(2)(a)(iv)); possession of marijuana (MCL 333.7403(2)(d)) and habitual offender fourth (MCL 769.12.) In case number 00-30599 FH, defendant was convicted of: Possession with intent to deliver marijuana (MCL 333.7401(2)(d)(iii)); possession of less than twenty-five grams of cocaine (MCL 333.7403(2)(a)(v)); possession of the controlled substance benzphetamine (MCL 333.7403(2)(b)(ii)); possession of the controlled substance diazepam (valium) (MCL 333.7403(2)(b)(ii)); keeping and maintaining a drug vehicle (MCL 333.7405(1)(d)); felon in possession of a firearm (MCL 750.224f); possession of a firearm during the commission of a felony (MCL 750.227b) and habitual offender fourth (MCL 769.12.) As a result of his convictions in both cases, the trial court imposed sentence which, in the aggregate, totaled eight to ninety-two years' imprisonment. Defendant appeals as of right. We affirm.

I. Basic Facts and Procedural History

On November 3, 1999, based on information from a confidential informant that defendant sold crack cocaine, the Office of Monroe Narcotics Investigations (OMNI) team sent a confidential informant to 328 Almyra Street in Monroe County to execute a controlled purchase of crack cocaine.

The informant approached the target residence and knocked on the door. Thereafter, the officers observed the informant walk to the side of the house. On the side of the house were two motor homes. OMNI surveillance officers observed the informant approach and enter the white

motor home with a blue stripe around it. Approximately two or three minutes later, the informant exited the motor home and returned with five rocks of crack cocaine advising that he purchased the drugs from a man known to him as "Burt Toles." After the successful controlled purchase and to avoid detection, the officers pulled out of the vicinity. Approximately forty to forty-five minutes later, the surveillance team returned with the informant to further their investigation by conducting a second controlled purchase. However, their attempt at a second controlled purchase was unsuccessful because the white motor home with the blue stripe previously parked on the side of the target residence was no longer there.

Shortly after the officers noticed that the motor home was gone, Detective Velliquette of the OMNI team observed the motor home driving down the street. After obtaining an exact description of the motor home involved in the controlled purchase, Velliquette followed the motor home to East Side Market where it pulled into an area in the rear, attempted to stop, and then turned around and proceeded in the opposite direction. When it left, Velliquette noticed a light blue Mercury Tracer following the motor home. The Tracer had only one occupant; the driver. Velliquette observed both vehicles proceed to an address located on a dead end street. After the Tracer left that address, the driver remained in the vehicle and defendant became a passenger.

Velliquette, along with other officers involved in the surveillance, followed the Tracer to a location in Detroit. At that time, defendant exited the vehicle, spoke to other subjects in the area, and then promptly re-entered the Tracer. The Tracer made its way to southbound I-75 toward Monroe.

Detective Lieutenant Luke Davis of the OMNI unit supervised the entire investigation. From his work in the OMNI unit, Davis was familiar with defendant and knew defendant as "Harold Toles" and "Burt Toles." When Davis learned that defendant left Detroit and was heading south on I-75 toward Monroe, based upon Davis' professional experience, Davis surmised that defendant went to Detroit, picked up more drugs, and was returning to Monroe to sell them.

After formulating this opinion, Davis contacted Detective McCormick and told McCormick to engage a fully marked Michigan State Police patrol unit containing uniformed officers and prepare to effect a traffic stop on the vehicle as it headed back toward Monroe County. Davis testified that in these situations, officers look for an objective reason to stop the vehicle<sup>1</sup>.

Michigan State Police Trooper Lesterisa Moss and Trooper Leon Baker were selected to make the stop. Davis told McCormick to "look for a reason" to stop the vehicle. In preparation to make the traffic stop, Troopers Moss and Baker met with Detective McCormick at a location along I-75, at which time McCormick entered the back seat of the police cruiser, quickly and briefly advised that he and other officers from the OMNI team had the vehicle under surveillance

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<sup>1</sup> Davis explained that if an officer stops a vehicle because of a traffic violation as opposed to stopping it because it is carrying contraband, the occupants in the vehicle are less likely to attempt to dispose of the drugs.

and that they believed the passenger in the vehicle was the individual from whom their informant purchased drugs and that the officers wanted to make a traffic stop.

Eventually, the blue Tracer came into sight and the fully marked patrol car pulled right in behind. At that time, Trooper Moss noted that the vehicle had an air freshener dangling from the rearview mirror which constitutes a vision obstruction. McCormick did not observe the air freshener right away, but when he advised that he saw it, Trooper Moss stated that she was going to make the stop, turned on the overhead lights, and pulled the vehicle over to the side of the highway. In an unmarked surveillance car, Detective Lieutenant Davis, the leader of the investigation, and Detective Schimke, another officer involved in the surveillance, pulled in behind the police cruiser so that they could watch the events as they unfolded.

Trooper Moss approached the driver's side of the vehicle and Trooper Baker approached the passenger's side. Upon advising the driver of the reason for the stop, the driver promptly removed the air freshener from the rearview mirror. Trooper Moss asked the driver for his driver's license, registration and proof of insurance and also requested that the driver exit the vehicle. The driver complied and Trooper Moss asked if she could pat him down to which the driver responded in the affirmative. The patdown did not reveal any weapons. Thereafter, Trooper Moss asked the driver if she could search the vehicle and the driver gave his permission.

To accomplish the search, Trooper Moss asked defendant to exit the vehicle and defendant complied. However, before Trooper Moss undertook to search the vehicle, she asked defendant if she could pat him down and defendant gave his consent. According to Trooper Moss, a concern that defendant may be concealing a weapon prompted the pat down. During the pat down, Trooper Moss located a "foreign object" in defendant's groin area. The object was round and approximately the same size as a baseball. This caused Trooper Moss to become suspicious. Trooper Moss' suspicion heightened when, in response to her request to remove the object, defendant "jerked" away from her, began "moaning" and continued to struggle with her.

From the back of the police cruiser, Detective McCormick observed defendant pull away from Trooper Moss, bend over at the waist and grab at his waistband. McCormick opened the backseat door and positioned himself to take action if necessary. McCormick observed defendant stand up and begin to shake his pants up and down. Eventually, the item fell from defendant's pant leg and onto the shoulder of the road whereupon defendant promptly attempted to kick it away. The object was round, beige in color and enclosed in plastic. Based upon her experience, Trooper Moss surmised that the substance was crack cocaine.

When the object dropped from defendant's pants, McCormick left the police cruiser and went to assist Trooper Moss who was in the process of handcuffing defendant. Detective Lieutenant Davis and Detective Schimke left their unmarked surveillance vehicle and also came onto the scene. At this point, defendant was in custody and thus not free to leave. Trooper Moss, along with Detective Lieutenant Davis, continued searching defendant's person and discovered additional drugs and drug paraphernalia. Detective Schimke searched the vehicle and therein discovered approximately fourteen "bindles" of what was later confirmed as heroin.

In a three count complaint, defendant was charged with: Possession with intent to deliver less than fifty grams of cocaine (MCL 333.7401(2)(a)(iv)); Possession with intent to deliver less

than fifty grams of heroin (MCL 333.7401(2)(a)(iv)); Possession of marijuana (MCL 333.7403(2)(d))<sup>2</sup>.

After the trial court denied defendant's motions to suppress the physical evidence both cases were consolidated and tried. After a bench trial, defendant was convicted on all counts. Defendant only appeals of right the trial court's decision denying his motion to suppress the physical evidence seized pursuant to the traffic stop.

## II. Standard of Review

In a suppression hearing, this Court reviews a trial court's factual findings for clear error and will affirm unless left with a definite and firm conviction that a mistake was made. *People v Custer*, 242 Mich App 59, 64; 618 NW2d 75 (2000), rev'd in part on other grounds 465 Mich 319; 630 NW2d 870 (2001). However, we consider de novo, the trial court's ultimate ruling on defendant's motion to suppress. *Id.*

## III. Traffic Stop Pursuant to MCL 257.709(1)(c)

The statute at issue provides in pertinent part that: "A person shall not drive a motor vehicle with any of the following: . . . (c) A dangling ornament or other suspended object that obstructs the vision of the driver of the vehicle, except as authorized by law." MCL 257.709(1)(c). Defendant contends that to justify a traffic stop predicated upon MCL 257.709(1)(c), the prosecution must establish that the "dangling ornament" actually obstructed the driver's vision. We do not agree.

First, we note that the object dangling from the mirror must actually obstruct the driver's vision in order to find that a defendant violated the statute and is thus guilty of a misdemeanor. This is distinct from whether or not the requisite probable cause exists to effect a traffic stop and allow the officer to investigate further. Thus, the issue is not one of statutory interpretation as defendant posits. Rather, the issue is whether an air freshener dangling from the rearview mirror in and of itself constitutes sufficient probable cause to believe that the driver is in violation of MCL 257.709(1)(c) sufficient to justify an investigatory stop. We find that it is.

At the suppression hearing, Trooper Moss testified that the presence of the air freshener suspended from the rear view mirror coupled with her belief that the object could obstruct the driver's vision, is what prompted her to pull the vehicle over to the side of the road. Indeed, the presence of an air freshener dangling from the rear view mirror created probable cause to believe that the driver was in violation of MCL 257.709(1)(c) thus validating the initial stop for purposes of conducting further investigation. Accordingly, we find the investigative stop was valid at its inception.<sup>3</sup>

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<sup>2</sup> In lower court case number 00-30599-FH, defendant confronted seven additional drug-related charges relating to contraband discovered pursuant to an inventory search of defendant's motor home.

<sup>3</sup> Also see *People v Davis*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 220087, issued, (continued...))

#### IV. Probable Cause Based on Objective Facts

Even if the presence of the air freshener suspended from the rear view mirror alone did not provide the requisite probable cause sufficient to justify the traffic stop, that does not necessarily vitiate the validity of the stop in this particular case. Here, there were numerous objective facts, known to all of the officers involved, which provided the requisite probable cause to believe that defendant was couriering drugs. As our Supreme Court recognized in *People v Oliver*, 464 Mich 184, 196; 627 NW2d 297 (2001):

[I]n analyzing the totality of the circumstances, the law enforcement officers are permitted, if not required, to consider `the modes or patterns of operation of certain kinds of lawbreakers. From [this] data, a trained officer draws inferences and makes deductions – inferences and deductions that might well elude an untrained person.’ (Citations omitted.)

Our de novo review of the record demonstrates that: (1) defendant was the target of a surveillance operation under the direction of Detective Davis of the OMNI team; (2) the OMNI team orchestrated a controlled purchase which resulted in an informant purchasing crack cocaine from defendant out of a motor home with a blue stripe around it; (4) defendant was observed driving that motor home, proceeding to East Side Market whereupon a light blue Mercury Tracer began to follow; (5) thereafter, officers observed defendant drive the motor home onto a dead end street; (6) officers observed defendant exit the motor home and become a passenger in the Tracer; (7) the Tracer proceeded toward Detroit; (8) upon arriving in Detroit, defendant existed the Tracer, spoke to others in the area, quickly re-entered the Tracer which thereafter headed south on I-75 back toward Monroe.

After officers followed defendant from Monroe to Detroit and back toward Monroe again, Detective Lieutenant Davis, the officer in charge of the entire investigation, thereupon determined that defendant picked up more drugs from Detroit and was returning to Monroe County to sell them. Once Davis gave the order to execute a traffic stop, Detective McCormick met with Troopers Moss and Baker, got into the backseat of the police cruiser, and quickly appraised them of the situation before Trooper Moss pulled the vehicle over. When Trooper Moss made the traffic stop, by virtue of all of the information obtained through the surveillance, the officers had probable cause to believe that defendant was engaged in criminal activity, that being drug couriering, sufficient to justify the investigative stop. Consequently, the initial stop was indeed “justified at its inception”. See *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). We find no violation of the Fourth Amendment.

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(...continued)

03/08/02), slip op p 4 (stating that testimony establishing the presence of an air freshener dangling from the rear view mirror indicated to the police officer that “defendant *may have been* in violation of MCL 257.709(1)(c)” thus providing the requisite probable cause to justify the traffic stop.) (Emphasis added.)

## V. The Extent of the Pat Down Search

Defendant also argues that the police officer's patdown search exceeded the scope of his initial consent. The issue thus presented for our review is whether Trooper Moss, while performing a patdown search authorized by *Terry* pursuant to defendant's express consent, exceeded that which is necessary to discover weapons. *Champion, supra* at 100. We find that it did not.

It is axiomatic that an officer who executes a valid investigative stop is entitled to perform a limited patdown search for weapons provided that the officer has a reasonable suspicion that the individual is armed and thus poses a threat to the officer's safety. *Id.* at 99. As our Supreme Court observed, *Terry, supra* "strictly limits the permissible scope of a patdown search to that reasonably designed to discover guns, knives, clubs, or other hidden instruments that could be used to assault an officer." *Id.* Indeed, for a patdown search to pass constitutional muster, the officer need not be absolutely certain that the individual is armed; rather the issue is whether a "reasonably prudent [officer] in the circumstances would be warranted in the belief that [the officer's] safety or that of others was in danger." *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001). Under the totality of the circumstances, to demonstrate reasonable suspicion, the officer must have objective, particularized facts, along with rational inferences drawn therefrom, which "reasonably warrant the intrusion." *Id.* (Citation omitted.)

In this case, defendant was a passenger in a car which the police had probable cause to believe was transporting contraband. When Trooper Moss pulled the vehicle over, she asked the driver to exit the vehicle. Thereafter, she asked the driver if she could perform a patdown search for weapons to which the driver consented. The pat down search did not produce any weapons. Trooper Moss then asked for the driver's consent to search the vehicle and once again, the driver gave his consent.

However, before she undertook the search, she asked defendant to exit the vehicle as well and asked if she could perform a patdown search for weapons for which defendant provided his consent. During that patdown search, Trooper Moss discovered a "foreign object" in defendant's groin area and asked him to remove it. Trooper Moss testified that she suspected that the object was "narcotics" and thus held onto the object through defendant's clothing.

In response to Trooper Moss' request to remove the object, defendant pulled away from her, bent over at the waist, grabbed at his waistband and started to groan. Trooper Moss testified that defendant struggled with her which caused additional concern for her safety. In fact, Trooper Moss testified that defendant's movements and jerking away from her gave her reason to suspect that defendant may have a weapon on his person considering that in her experience, it was not at all unusual to find weapons in the area of an individual's groin. Eventually, during the struggle, the object fell from defendant's pant leg and onto the ground whereupon defendant attempted to kick it out of the way. When the object dropped from defendant's pants during the struggle, Trooper Moss identified it as crack cocaine. Her search did not exceed the scope of a patdown search authorized by *Terry*. *Champion, supra* at 105. Thus, at this point in time, Trooper Moss could seize the object without running afoul of the Fourth Amendment:

If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass *makes its identity immediately apparent*, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context. *Id.* at 104 (quoting *Minnesota v Dickerson*, 508 US 366, 375-376; 113 SCt 2130; 124 Led2d 334 (1993)) (Emphasis in original.)

Furthermore, when Trooper Moss grabbed the object through defendant's clothing and asked him to remove it, defendant pulled away, bent over at his waist and grabbed at his waistband. Thus, defendant's conduct gave rise to an additional, independent reasonable, articulable suspicion that defendant was possibly concealing a weapon further justifying the continued search of his person. At no time did Trooper Moss reach into defendant's pants and retrieve the object. It was defendant who shook his pants causing the object to drop out of his pant leg followed by a failed attempt to kick the item out of view. When the object fell to the ground, Trooper Moss recognized it as contraband whereupon she placed defendant under arrest which lead to the eventual discovery of the contraband on defendant's person and in the vehicle.

On the facts herein presented, we find that Trooper Moss did not exceed the scope of a valid *Terry*-type pat down search. Accordingly, we find no error in the trial court's ultimate decision denying defendant's motion to suppress.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Christopher M. Murray