

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARK LAVELL LEONARD,

Defendant-Appellee.

UNPUBLISHED

May 27, 2008

No. 270638

Wayne Circuit Court

LC No. 05-009123-01

Before: Davis, P.J., and Schuette and Borrello, JJ.

DAVIS, J. (*concurring*).

The People of the State of Michigan appeal as of right an order dismissing defendant's charge of armed robbery, MCL 750.529, after suppressing lineup evidence and in-court identification evidence. Judge Borrello has summarized the disparate conclusions reached by each of us: we are unanimous in reversing the trial court's suppression of the in-court identification, and I concur with Judge Borrello in affirming the suppression of the lineup identification, albeit for different reasons.

The facts of this case arise out of a wholly different robbery than the one charged in this case. On the night of August 25, 2005, the two victims of the uncharged robbery flagged down a Detroit Police officer at the corner of Schoolcraft and Virgil, which is located alongside I-96 in Wayne County, just East of Redford. They told the officer that they had been robbed by "two young black males wearing mostly black clothing" ten or fifteen minutes earlier, and the perpetrators fled on foot into a nearby gated apartment complex by climbing over the complex's six-foot chain-link fence. The officer requested backup, describing the perpetrators as "three black males" wearing "black shirt, pants, hat." A number of officers responded to the only vehicular gate to the complex and waited with their headlights, overhead lights, and spotlights on, "watching to see if there was anybody that fit the description pulling out of the complex."

Ten to fifteen minutes later, an older model Ford Explorer, occupied by three black males wearing dark clothing – to the extent officers could detect – drove out of the complex. The occupants acted suspiciously: an officer testified that people usually "gawk" at large groups of police, but these individuals instead looked straight ahead. An officer pulled the vehicle over "to

check it out, get some names;” he later explained that he “probably” would have stopped the vehicle if it had contained two or four individuals. The officer asked the driver for his driver’s license, proof of insurance, and registration. When the driver explained that he did not have a license,¹ the officer “pulled him out of the car,” ordered the passengers out, and searched all three of them. The officer then conducted a search of the vehicle. He discovered two credit cards under the back seat – the seat itself needed to be pulled up using a tag – where defendant had been sitting. The credit cards were unrelated to the robbery the officer’s were investigating, but another officer present recognized the name on the cards – Julian Jones – as belonging to another individual who had been robbed a few days earlier. At that time, the three individuals from the Explorer were placed in custody.

The police conducted a live lineup two days later. The lineup contained six men, including defendant. A defense attorney was present and made no objections. Julian Jones identified defendant after approximately thirty seconds. Defendant was charged with the robbery of Jones. At defendant’s jury trial, Jones identified defendant in court as the perpetrator. The jury hung, and defendant was not convicted. Defendant then moved to suppress evidence of the lineup and of the in-court identifications made by Jones. Defendant did not explicitly move to suppress the evidence of the credit cards themselves. However, he argued that the police lacked reasonable suspicion to stop the Explorer and illegally detained him after the stop, making all evidence flowing therefrom illegal. The trial court held a hearing and concluded that defendant lacked standing to challenge the stop, but that defendant’s subsequent detention had been illegal. On that basis, the trial court concluded that the proper remedy for this violation of defendant’s right to be free from unreasonable searches and seizures² was suppression of both identifications.

We review de novo a trial court’s decision whether to suppress evidence, *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005), but we review the trial court’s factual findings at the suppression hearing for clear error. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). We review de novo as a matter of law the application of the exclusionary rule to a Fourth Amendment violation. *Id.* We likewise review de novo whether a party has standing. *Lee v Macomb Co Bd of Comm’rs*, 464 Mich 726, 734; 629 NW2d 900 (2001).

A traffic stop constitutes a “seizure” under the Fourth Amendment of not only the driver, but also all passengers; those passengers are therefore entitled to challenge the constitutionality of the stop. *Brendlin v California*, ___ US ___, ___; 127 S Ct 2400, 2406-2408; 168 L Ed 2d 132 (2007). A passenger in a validly stopped vehicle lacks standing to challenge a search of the vehicle to which the driver consented³ or that is incident to a valid arrest. *People v LaBelle*, 478 Mich 891, 891-892; 732 NW2d 114 (2007). A search may be “incident to a valid arrest” even if

¹ The vehicle was owned by the driver’s father.

² See US Const, Am IV; Const 1963, art 1, § 11. In the absence of a compelling reason to impose a different interpretation, Michigan’s constitutional prohibition against unreasonable searches and seizures provides the same protection as that guaranteed by the Fourth Amendment to the United States Constitution. *People v Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991).

³ The driver did not consent in this case.

it precedes the actual arrest, so long as there was already probable cause to make the arrest that ensued, and so long as the arrest was not based on the fruits of the search.⁴ *People v Arterberry*, 431 Mich 381, 384-385; 429 NW2d 574 (1988); *People v Champion*, 452 Mich 92, 115-117; 549 NW2d 849 (1996). Where a mere passenger in a stopped vehicle has standing to challenge the constitutionality of an illegal stop, the only rational inference is that a passenger likewise has standing to challenge the constitutionality of an *illegal* search.

Therefore, whether defendant may challenge the stop or the search depends on whether each was legal. Under the circumstances of this case, I find both to be close questions. But when the situations are viewed in their entirety, I conclude that, on balance, the stop was legal, but the search was not.

A Fourth Amendment “seizure” occurs whenever the totality of the circumstances would cause a reasonable person to believe that he or she may not leave. *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). As a general matter, the Fourth Amendment prohibits law enforcement officers from subjecting citizens to *any* seizure, no matter how brief, unless that seizure is justified by probable cause. *People v Shabaz*, 424 Mich 42, 52; 378 NW2d 451 (1985). However, where the police have a reasonable, articulable suspicion that criminal activity is afoot, a brief investigatory detention just to dispel that suspicion, and a minimal search for dangerous weapons for the officer’s own self-protection, will be considered reasonable under the Fourth Amendment. *Id.*, 51-58; *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Although the officer must base that reasonable suspicion on objective observations, nervous and evasive behavior, and the officer’s own experience and expertise and common sense, may suffice; furthermore, all of the circumstances must be considered together. *People v Oliver*, 464 Mich 184, 192-198; 627 NW2d 297 (2001).

Here, the police certainly knew that a crime had, in fact, just been committed. Although the description of the perpetrators was minimal – two or possibly three black males wearing dark clothing – that description is nevertheless sufficient to at least restrict the number of possible suspects. More importantly, the police knew that the suspects fled into a gated complex from which vehicles could only emerge at one point. The fact that a vehicle occupied by three black males in dark clothing emerged a short time after the perpetrators fled into the complex might not be enough to warrant a *Terry* stop. However, critically, the occupants of that vehicle acted in a way that the officers’ experience and expertise told them was suspicious. Although a close call, when *all of these factors* are considered together, I believe the totality of the circumstances provided enough reasonable suspicion to justify the traffic stop.

It is well-established “that, when a person is taken into official custody, it is reasonable to search for weapons, instruments of escape, and evidence of crime,” and although “the search must be strictly tied to, and justified by, the circumstances that rendered its initiation permissible,” it extends not only to the arrestee but also “the area within the arrestee’s immediate

⁴ “[I]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification.” *Smith v Ohio*, 494 US 541, 543; 110 S Ct 1288; 108 L Ed 2d 464 (1990), quoting *Sibron v New York*, 392 US 40, 63; 88 S Ct 1889; 20 L Ed 2d 917 (1968).

reach.” *People v Houstina*, 216 Mich App 70, 75; 549 NW2d 11 (1996). However, “there must be a lawful arrest in order to establish the authority to search.” *Id.* As discussed, that lawful arrest need not necessarily precede the search, but if the arrest follows the search, it may not be *based on* anything revealed by the search. Thus, I am troubled by the fact that, although the police certainly had probable cause to arrest the driver of the vehicle for failure to produce a driver’s license, the driver *and the other occupants* of the vehicle were actually arrested on the basis of the discovery of the credit cards. On the facts present in this case, I conclude that the search exceeded the scope permitted for a search incident to an arrest.

A search incident to an arrest “only allows for a search of the area immediately surrounding the arrestee and, thus, does not allow for the officer to routinely search ‘any room other than that in which the arrest occurs [or] through all the desk drawers or other closed or concealed areas in that room itself.’” *People v Mungo*, 277 Mich App 577, 581; ___ NW2d ___ (2008), quoting *Chimel v California*, 395 US 752, 763; 89 S Ct 2034; 23 L Ed2d 685 (1969). There is a reduced expectation of privacy in a vehicle. On that basis the interior of a vehicle may be searched incident to an arrest, even if the arrestee is merely a passenger and even in the absence of probable cause to believe the vehicle contains contraband or evidence of illegality. *Id.* The search may extend to the passenger compartment and “containers,” essentially meaning any object capable of containing another object, within the passenger compartment, but not to the trunk. *People v Eaton*, 241 Mich App 459, 463-465; 617 NW2d 363 (2000); *Mungo*, *supra* at 581-582.

A panel of this Court has recently observed that there is a need for a bright line rule in this area for the benefit and safety of the police. *Mungo*, *supra* at 584-587. But it is equally important not to lose sight of the purposes behind the Fourth Amendment and the narrowness of the exceptions thereto. Any analysis under the Fourth Amendment is always a balancing test between competing interests. People have a reduced expectation of privacy in vehicles, but they nevertheless have *some* expectation of privacy therein, even in vehicles in which they are mere passengers. The purposes of the “search incident to an arrest” exception to the normal warrant requirement are to protect law enforcement officers by discovering any potential weapons that might be accessible to the arrestee and to preserve evidence for trial. *Eaton*, *supra* at 462. The touchstone is the fact of the arrest. *Mungo*, *supra* at 588. Clearly, therefore, the search should extend to places from which a person who discerns an imminent arrest or who is, in fact, being arrested could retrieve a weapon; or where such a person could attempt to dispose of evidence. But any other location is not sufficiently likely to pose a threat to an officer or to trial evidence to justify invading any person’s privacy – even if there is only a minimal expectation of privacy – without a warrant. As has been well established, the Fourth Amendment’s warrant requirement, and the exceptions thereto, depend on reasonableness.

On balance, I conclude that the search here that uncovered the credit cards went beyond what was permitted. The area under the seat was apparently not readily accessible to a passenger sitting on it, making it more akin to a trunk than to a glove box, or even a removable radio or gearshift boot. The “search incident to an arrest” exception applies even to “containers” that might not be able to hold a weapon or evidence relevant to the crime that prompted the arrest. *Eaton*, *supra* at 463-464. The purposes to be served by the warrant requirement of the Fourth Amendment, and the “search incident to an arrest” exception thereto, would be thwarted if the container searched was not feasibly accessible to the arrestee at the time law enforcement

personnel initiated contact with the arrestee. If a container cannot readily be opened or accessed by an arrestee at the time of the arrest, the contents of that container cannot realistically be within the arrestee's "immediate control" at the time of the arrest.

None of us have had the benefit of an examination of this particular vehicle. None the less, I question Judge Schuette's observation concerning the ease with which one can lift up the back seat of a vehicle to access something beneath it, particularly if one is attempting to do so in the immediate presence of several police officers who are at the time focusing on one's activities, if one is actually sitting on the seat at the time, or both. I do acknowledge that the record here suggests that almost immediately following the stop, upon learning that the driver did not have an operator's license, the police ordered all occupants out of the vehicle, but that simply creates another scenario where it is improbable that one would gain easy – or, indeed, any – access to the area under the car's seats. Further, at that point no one was going anywhere until the police had concluded their purposes, so the officers had ample opportunity to follow proper procedures to obtain a warrant. There was no longer any exigency under the circumstances.

Some additional light is shed on the instant situation by the fact that the police described the search here as an *inventory search*. An inventory search is a particular type of search. A proper inventory search does indeed permit the police to conduct an exhaustive search of a vehicle pursuant to standardized and neutral procedures intended to protect the vehicle owner's property and to protect the police from potential dangers or from assertions of theft or loss. *People v Green*, 260 Mich App 392, 412-413; 677 NW2d 363 (2004), overruled on other grounds *People v Anstey*, 476 Mich 436; 719 NW2d 579 (2006). But such a vehicle must have actually been lawfully impounded, and the search may not be a pretext for obtaining evidence. *People v Poole*, 199 Mich App 261, 265-266; 501 NW2d 265 (1993). This could not have been a valid inventory search. We presume that the Detroit Police Department had in place standardized procedures governing a true inventory search that likely would have been conducted after the vehicle was impounded, possibly showing that, pursuant to those procedures, the credit cards would inevitably have been discovered anyway. If so, the "inevitable discovery" exception to the warrant requirement would obviate the illegality of the instant search. See *People v Stevens (After Remand)*, 460 Mich 626, 637; 597 NW2d 53 (1999). However, there is no evidence in the record of any such procedures being employed.

The rather elaborate and lengthy discussion of the circumstances of the initial stop and the subsequent search of the vehicle in this case is important and necessary to set the stage for the necessary analysis of the facts as they existed to the applicable law for the purpose of determining the correctness of the trial court's ruling on the suppression motion. The exclusionary rule applies not only to evidence directly obtained through police illegality, but also to much evidence that was derivatively obtained as a consequence of that illegality. *People v Frazier*, 478 Mich 231, 247 n 17; 733 NW2d 713 (2007). For the reasons stated, I conclude that the initial stop was legally permissible but that the investigatory search of the area under the rear passenger seat of the vehicle was not. With that conclusion in mind, I turn to an evaluation of the two opportunities for eyewitness identification of the defendant as a perpetrator of the first armed robbery that were suppressed by the trial court. Turning first to the lineup identification, Judge Borrello and I agree that it should have been suppressed, albeit on the basis of different findings of police illegality, and that the inevitable discovery exception does not apply thereto.

The inevitable discovery exception to the exclusionary rule requires the prosecution to “establish by a preponderance of the evidence that the information ultimately or inevitably would be discovered by lawful means.” *People v Kroll*, 179 Mich App 423, 429; 446 NW2d 317 (1989). The prosecution cannot: at most, the prosecution speculates that the police “undoubtedly learned defendant’s name during the initial phase of the investigatory stop” and would have had probable cause to arrest him after discovering the credit cards. We decline to engage in such speculation in the absence of record evidence that the police actually *did* learn defendant’s name prior to the illegal search, that the police would necessarily have arrested the driver and impounded the car in the absence of the illegal search, and that the police would then have discovered the credit cards pursuant to a valid inventory search.⁵ Furthermore, the prosecution misunderstands the nature of the evidence to be suppressed: defendant’s *identity* is not in dispute, nor is it, strictly speaking, evidence, given that the police may require an individual to identify him- or herself under a wide array of circumstances. The evidence to be suppressed is *Jones’ lineup identification of defendant as Jones’ assailant*, which the prosecution has simply not shown would inevitably have occurred without the illegal search. I believe the trial court correctly suppressed the lineup identification.

However, we are unanimous in finding that the trial court erred in suppressing Jones’ *in-court* identification of defendant. The exclusionary rule will not apply if the causal connection between the evidence and the misconduct becomes sufficiently attenuated. *People v LoCicero*, 453 Mich 496, 508-509; 556 NW2d 498 (1996). In *United States v Crews*, 445 US 463, 477-478; 100 S Ct 1244; 63 L Ed 2d 537 (1980), a majority of the Justices of the United States Supreme Court agreed that “an in-court identification of the accused by the victim of a crime should not be suppressed as the fruit of the defendant’s unlawful arrest.” According to the Justices, even if a defendant was illegally arrested, the in-court identification will be admissible *if* the victim had an independent recollection of the defendant that antedated and was unaffected by the unlawful police misconduct. Similarly, this Court has held that when a victim’s in-court identification of an illegally arrested defendant is a product of the victim’s opportunity to observe the defendant at the time of the offense, that identification is made independent of the police taint, so it is admissible. *People v Jackson*, 46 Mich App 764, 771; 208 NW2d 526 (1973).

Jones testified at trial that when defendant robbed him, the two were face-to-face and less than a foot away from each other, and Jones could see what defendant looked like. Although Jones did not look at defendant for the entire duration of their encounter, Jones had the opportunity to observe his assailant for five to ten minutes. He testified that he described the perpetrator to police as 20 to 22 years old, 5’5” to 5’7” tall, weighing 150 pounds and of thin build, with medium brown skin and braids in his hair, and wearing a red shirt and grey jogging pants. Jones’ testimony shows that his in-court identification of defendant was based on his independent recollection of the robbery itself, and it was not influenced by the lineup

⁵ The prosecution also suggests that “the police could easily have arranged for [the victim] to view a photo array and identify defendant as his assailant,” but this, too, is unsupported by any record evidence that the police were already in possession of a photograph of defendant.

identification or by the illegal police search. It appears that the trial court nevertheless suppressed the in-court identification because Jones did not testify at the suppression hearing and the court could not recall Jones' testimony whether he had an independent basis for the identification. The trial court erred in doing so.

In summary, I find that the police officers' initial stop of the vehicle in which defendant was a passenger was legal, but the subsequent search exceeded the scope of what was permitted under the "search incident to an arrest" exception to the warrant requirement. The trial court properly suppressed Jones' lineup identification of defendant as the fruit of an illegal search that was not shown by the prosecution to have been inevitable in the absence of the illegal search. However, the trial court improperly suppressed Jones' independent in-court identification of defendant as his robber.

I concur in affirming the trial court's suppression of the lineup identification, in reversing the trial court's suppression of the in-court identification, and in remanding for further proceedings.

/s/ Alton T. Davis