STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CHARLES MURPHY,

Defendant-Appellee.

UNPUBLISHED
September 16, 2008

No. 278777
Wayne Circuit Court
LC No. 07-005099-01

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

In this prosecutor's appeal, plaintiff appeals as of right from the circuit court's order suppressing evidence and dismissing the case. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

On the evening of December 28, 2006, police officers noticed a car parked illegally in front of a liquor store. The police drove into the lot, then noticed defendant approach the illegally parked car, and then walk away from it apparently upon noticing the police presence. The officers approached defendant, who volunteered that the car in question was his. When asked for identification, defendant indicated that he had some in the car.

One of the officers patted down defendant for weapons, but found nothing. Defendant opened the passenger door of his car to retrieve his identification, upon which one of the officers detected a strong scent of marijuana. According to that officer, defendant, when asked if he smoked marijuana, admitted to having "a couple bags." The officer placed defendant under arrest, then searched defendant's car and found five pounds of marijuana.

Defendant was charged with possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*). However, defendant moved to suppress the evidence discovered in the search. The court granted the motion, explaining as follows:

> [W]e have the defendant walking away. He's prevented from walking away. Then we have the defendant patted down for offensive weapons. At this point, this is definitely an intimidating circumstance. The defendant is compelled to cooperate with the patdown. And from that point on, the defendant has to be under the belief that he's not free to leave. The officers can say all day long he's

> free to leave. But I think in the real world if the defendant tried to walk away at that point, it wasn't going to happen. They were going to prevent it.
>
> But be that as it may, he was then escorted to his car to find identification. The marijuana flows from that. And it was definitely a Terry stop at that point. They found no offensive weapons. There was no reason to go any further. Motion to suppress is granted.

This appeal followed.

In reviewing a trial court's decision following a suppression hearing, we review the trial court's factual findings for clear error, but review the legal conclusions de novo. See *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999).

Evidence obtained in the course of an unreasonable search or seizure in violation of a suspect's rights under the Fourth Amendment of the United States Constitution is subject to suppression at trial. *People v Cartwright*, 454 Mich 550, 557-558; 563 NW2d 208 (1997). See also *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961) (incorporating the Fourth Amendment against the states under the Fourteenth Amendment).

"A 'seizure' within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave." *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). A police officer's brief and noncoercive questioning, or mere request for identification, does not constitute a seizure of the person asked. *Id.* at 33.

The Fourth Amendment permits police to stop, briefly detain, and conduct a limited search of the outer clothing of, a person in response to a reasonable suspicion that criminal activity may be at hand. *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Here, plaintiff concedes that the police lacked any such reasonable suspicion of criminal activity when they initially detained defendant, and patted him down. However, plaintiff argues that what followed the pat down was merely a noncoercive request for identification and defendant's voluntary cooperation with that request, independently led to the discovery of the marijuana. We disagree.

The United States Supreme Court has advised that

> not . . . all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." [*Wong Sun v United States*, 371 US 471, 487-488; 83 S Ct 407; 9 L Ed 2d 441 (1963), quoting Maguire, Evidence of Guilt, 221 (1959).]

Had the interaction of the police with defendant begun with the request for identification, no seizure would have taken place, and defendant's inadvertent release of marijuana odor upon

opening his car door would have established probable for the police to arrest him and search for the marijuana. However, those events took place immediately after the police improperly detained and searched defendant's person. As defendant experienced those events, he was seized when patted down, and could not have been expected to feel entirely at his liberty when the police sought further information from him. The request for identification, and the resulting discovery of marijuana odor, were not sufficiently distinguishable from the improper detention and search that immediately preceded them to avoid their taint. *Wong Sun*, *supra*.

For these reasons, we conclude the trial court did not clearly err in concluding that the improper *Terry* stop extended to defendant's opening of his car door, the release of marijuana odor, then the search of the vehicle, and so properly suppressed the evidence thus seized as the fruit of that poisonous tree.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly