

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARKUS LAWHORN,

Defendant-Appellee.

UNPUBLISHED

October 6, 2009

No. 286721

Wayne Circuit Court

LC No. 08-006300-FH

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant was charged with carrying a concealed weapon, MCL 750.227, firearm possession by a felon, MCL 750.224f, and possession of a firearm in the commission of a felony, MCL 750.227b(1). The lower court granted defendant's motion to suppress the gun and dismissed the charges. The prosecutor appeals as of right and for the reasons set forth in this opinion we reverse the suppression of the gun and remand the matter to the trial court for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On April 5, 2008, Detroit police officers were conducting surveillance on the Cozy House and were going to execute a search warrant. Undercover officers had gone into the Cozy House and observed drugs and alcohol being sold. The Cozy House did not have a liquor license and was a "blind pig," i.e., an after hours club that illegally sold alcohol after 2:00 a.m.

A little before 2:00 a.m., prior to the execution of the search warrant, the officers observed defendant outside of the Cozy House. He was wearing dark clothing and a security badge, and was directing parking for Cozy House patrons. Although the Cozy House had a parking lot, defendant was directing patrons to park along a side street. The officers observed this for 45 minutes.

According to the arresting officer, when the search warrant was executed he approached defendant and arrested him for engaging in an illegal occupation. After defendant was placed under arrest he was searched and the officer discovered a gun. The trial court granted defendant's motion to suppress the gun based on its determination that the officers did not have reasonable suspicion to believe that defendant was armed.

We review a challenge to an order excluding evidence with great deference to the lower court's factual findings, which are reviewed for clear error. *People v Custer*, 465 Mich 319, 325-26; 630 NW2d 870 (2001). However, we review questions of law de novo. *People v Hawkins*, 468 Mich 488, 496; 669 NW2d 602 (2003).

Plaintiff brought this appeal arguing that the trial court erroneously determined the search of defendant was unlawful. Plaintiff asserts that because the search was conducted incident to a lawful arrest, hence, the officers did not need to suspect defendant was armed. However, the trial court relied on *People v Eberhardt*, unpublished opinion per curiam of the Court of Appeals, issued January 16, 2007 (Docket No. 242903), and its discussion of a *Terry*¹ frisk in determining that the search of defendant was unlawful. A *Terry* frisk is limited to instances where "the officer has reasonable suspicion that the individual stopped for questioning is armed and thus poses a danger to the officer." *Champion, supra* at 99. However, a *Terry* frisk is a different type of intrusion than a search incident to arrest; although it must be justified by reasonable suspicion that a suspect is armed, a search incident to arrest needs no justification, so long as the underlying arrest is lawful. Since *Terry*, detention of suspects has been essentially divided into two categories, stops and arrests. A *Terry* stop is a temporary detention of the suspect in order for the officer to ascertain whether their suspicions of criminal activity were justified. An arrest occurs when the officer's intent is to exercise custody over the individual to answer charges of criminal activity. Because this case involves an arrest and not a mere stop, the trial court clearly erred when it based its decision to suppress the evidence on our prior decision in *Eberhardt, supra*.

The arresting officer testified at the preliminary examination that while waiting to execute a search warrant on the premises suspected to be used as a "blind pig," he watched for 45 minutes to an hour as defendant directed people entering the building where to park. Specifically, the arresting officer testified that he observed cars pull up and when defendant "...didn't want them to park in front of the location or in the parking lot directly at the location; he directed them to park down the side street." As the time came to execute the search warrant, the arresting officer approached defendant and observed that he was wearing a "...badge on a chain that said, 'Security.'" The arresting officer then stated "When the Raid Crew hit the front door; me and my partner took down the engagers from the outside, which was Mr. Lawhorn, parking the cars. We arrested him as engaging in an illegal occupation." After defendant was under arrest, the officer testified that he did a "pat down" and recovered a loaded .22 caliber firearm in defendant's waistband.

We begin our analysis of plaintiff's claim of error by examining whether the search incident to an arrest involved a lawful arrest. For an arrest to be lawful, the arresting officer must have had probable cause at the time of the arrest to believe the suspect was acting illegally. *United States v Watson*, 423 US 411, 418; 96 S Ct 820; 46 L Ed 2d 598 (1976). Probable cause exists when the "facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense . . . is being committed." *Champion, supra* at 115.

¹ *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

“Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity.” *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). We must “determine whether facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected person had committed” a crime. *People v Coward*, 111 Mich App 55, 60; 315 NW2d 144 (1981). Thus, for defendant’s arrest to have been lawful, plaintiff must prove that the arrest of defendant was based on the officer’s observations that there was probable cause that defendant was engaged in an illegal occupation or business in contravention of MCL 750.167(d). Because a violation of MCL 750.167(d) is a misdemeanor, plaintiff must also prove that prior to the arrest, a police officer observed the crime being committed in his presence, MCL 764.15.

Defendant does not dispute the observations made by the arresting officer. Rather he asserts that it is not a crime to be parking cars. Defendant also argues that because he was never seen entering the Cozy House, there was no direct evidence that he worked for the Cozy House or knew that illegal activity was going on within. However, in establishing probable cause, officers may look to circumstantial evidence and the inferences to be derived therefrom. *People v Northey*, 231 Mich App 568, 575; 591 NW2d 277 (1998).

We find defendant’s arguments devoid of merit. The testimony of the arresting officer revealed that based on undercover officers’ prior entry into the address to be searched there were illegal sales of alcohol and narcotics. Accordingly, there was probable cause to execute a search warrant that an illegal business was being operated.² Additionally, the arresting officer observed defendant acting as a security guard for that illegal business by use of a badge and by also directing patrons of the illegal business where to park their vehicles. Thus, based on the testimony of the arresting officer, probable cause existed at the time of defendant’s arrest to believe that defendant was engaged in an illegal business or occupation. MCL 750.167(d). Further, the testimony clearly reveals that the arresting officer observed all of the underlying actions which gave rise to the arrest, MCL 764.15. Consequently, the arrest of defendant constituted a lawful arrest.

Having found the arrest to be lawful, we find that the search incident to that arrest which revealed a .22 caliber firearm was also lawful. A search incident to a lawful arrest is per se reasonable, and is permitted by the Fourth Amendment³ even without a warrant. *People v Eaton*, 241 Mich App 459, 464-62; 617 NW2d 363 (2000). It may be conducted so long as the arrest is lawful; no further justification is required. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). Because defendant’s arrest was lawful, the search incident was also permissible.

² Though the arresting officer learned of the illegal activity going on inside from another officer, rather than observing it himself, our Supreme Court “has recognized the collective-knowledge approach to assessing probable cause, [which] allows numerous police officers to possess different information that in its totality constitutes probable cause.” *People v Davis*, 468 Mich 897, 900-901; 660 NW2d 67 (2003).

³ US Const, Am IV.

Accordingly, the .22 caliber firearm should not have been suppressed and the charges against defendant should not have been dismissed.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Stephen L. Borrello