

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KARL BASHI,

Defendant-Appellee.

UNPUBLISHED

October 13, 2009

No. 286239

Wayne Circuit Court

LC No. 08-004251-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TOSHIRO TERENCE GERMANY,

Defendant-Appellee.

No. 286240

Wayne Circuit Court

LC No. 08-004251-FH

Before: M. J. Kelly, P.J. and K. F. Kelly and Shapiro, JJ.

K.F. KELLY, J. (*dissenting.*)

I respectfully dissent. I would reverse and remand for reinstatement of the charges.

I. Docket No. 286240

On appeal, plaintiff argues that the trial court erred in concluding that discovery of the gun defendant Germany possessed was the result of an illegal search and seizure. Plaintiff submits that Germany was not seized and that the search was based upon voluntary statements. I agree.

As the majority notes, “[t]he Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures.” *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). But, a police approach for questioning on the street does not amount to an illegal search and seizure “unless there exist intimidating circumstances leading the person to reasonably

believe he was not free to leave or the person rebuffs the police officer by refusing to answer and walking away.” *People v Daniels*, 160 Mich App 614, 619; 408 NW2d 398 (1987). And, a seizure for the purposes of the Fourth Amendment does not occur in the absence of an application of physical force to restrain movement or where the defendant submits to an officer’s display of authority. *People v Lewis*, 199 Mich App 556, 559; 502 NW2d 363 (1993). A display of authority includes such circumstances as where the police activate their lights and siren, display their weapons, or issue orders to a person as they approach. See *People v Mamon*, 435 Mich 1, 12; 457 NW2d 623 (1990). Thus, “[w]hen an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person’s liberty, and the person is not seized.” *People v Jenkins*, 472 Mich 26, 33; 691 NW2d 759 (2005).

The evidence adduced at the hearing showed that police arrived at the scene to conduct a business inspection.¹ Sergeant Ronald Gibson, accompanied by other officers, went to the club to determine whether the business license was at the location, and, if not, to issue “an ordinance violation for being open without a business license.” Gibson stated that the operation “was not a raid. It was a business license inspection.” Although Gibson normally conducted license inspections on his own, he brought along the other officers for safety reasons “because of the [shooting occurring several days previously] and the number of firearms that were taken out of the business and people that were found armed[.]”

Officer David Sanders testified that he assisted Gibson with the inspection. Sanders and his two partners arrived first. Sanders spotted Germany standing outside on the sidewalk. As Sanders approached to speak to him, Germany turned and stepped inside the vestibule of the club. Sanders asked Germany about “how the business was, how . . . it was going” and then “asked him if he was armed for my safety.” Germany replied, “Yes, but it’s not my gun.” Sanders patted him down and found a .38 caliber revolver in his right jacket pocket. Germany admitted that he did not have a concealed weapons permit and was placed under arrest. Subsequently, defendant Bashi told the police that he had given Germany the gun.

On this record, the trial court clearly erred in finding that the police stopped or seized defendant Germany. There was no evidence that the officers utilized a display of force or issued any orders to Germany. Nor was there any evidence that Germany attempted to end the conversation by walking away and was prevented from doing so or that he otherwise expressed an intent not to cooperate with the officers. Therefore, Germany was neither stopped nor seized and upon Germany’s voluntarily disclosure that that he had a gun on his person, the police had a reasonable suspicion that he was armed and could conduct a patdown search for a weapon. *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001). Because the discovery of the gun was lawful, the trial court erred in suppressing the weapon.

¹ The events took place at Minks, “a gentleman’s entertainment club.” Such establishments may not operate without possessing a properly issued license.

II. Docket No. 286239

I also dissent from the conclusion that the trial court did not err in granting the motion to quash the information as to defendant Bashi.

This Court has consistently stated that when reviewing a circuit court's ruling on a district court's preliminary examination bindover decision, the following standards apply:

A magistrate's ruling that alleged conduct falls within the scope of a criminal statute is a question of law reviewed [de novo] for error, and a decision to bind over a defendant is reviewed for abuse of discretion. In reviewing the district court's decision to bind over a defendant for trial, a circuit court must consider the entire record of the preliminary examination, and it may not substitute its judgment for that of the magistrate. Reversal is appropriate only if it appears on the record that the district court abused its discretion. . . . Similarly, this Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion. (*People v Beydoun*, 283 Mich App 314,322; ___ NW2 ___ (2009) citing *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997) (internal citations omitted).)

“An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.” *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

The carrying a concealed weapon (CCW) statute, MCL 750.227(2), punishes “not the possession of a weapon, but the carrying of a weapon, concealed.” *People v DeLeon*, 177 Mich App 306, 309; 441 NW2d 85 (1989). To establish CCW, the prosecutor must prove “that an accused carried a weapon and that it was concealed on or about his person.” *People v Shelton*, 93 Mich App 782, 785; 286 NW2d 922 (1979). One who aids and abets in the commission of an offense may be charged, convicted, and punished as a principal. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). The elements that must be proved to convict a defendant as an aider and abettor are that (1) the crime charged was committed by the defendant or some other person, (2) the defendant aided and abetted the commission of the crime, and (3) the defendant intended to aid the charged offense and knew that the principal intended to commit the charged offense or that the charged offense was a natural and probable consequence of the commission of the intended offense. *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006); *Turner, supra* at 568. “The term ‘aiding and abetting’ includes all forms of assistance. The term comprehends all words or deeds which may support, encourage, or incite the commission of the crime.” *People v Usher*, 121 Mich App 345, 350; 328 NW2d 628 (1982) (internal quotations and citations omitted). Further, “the amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime.” *People v Moore*, 470 Mich 56, 71; 679 NW2d 41 (2004). As we have previously stated:

An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors which may be considered include a close association between the defendant and the principal, the defendant's participation in the

planning or execution of the crime, and evidence of flight after the crime. *Turner, supra* at 568-569 (citations omitted).

Here, the evidence adduced at the preliminary examination created probable cause to believe that defendant Germany committed CCW, given that he had a gun in his jacket pocket and had no permit for a concealed weapon. The evidence also created probable cause to believe that defendant Bashi aided Germany in the commission of the offense, given that he supplied the weapon to Germany. Although there is no direct evidence that, at the time Bashi gave the gun to Germany, he intended that Germany should conceal it or knew that Germany planned to conceal it, such intent can be inferred from all the facts and circumstances. Defendant Bashi, as manager of the club, employed defendant Germany as a bouncer. If Germany were standing out front holding the gun in plain sight, that could either dissuade potential customers from entering the club or provoke a fight, neither of which would be conducive to business. Thus, it could be inferred that Bashi intended that Germany conceal the weapon, keeping it out of sight unless and until it was needed. Therefore, the district court did not abuse its discretion in binding over Bashi and the circuit court erred in quashing the information.

Accordingly, I dissent and would reverse and remand for reinstatement of the charges against defendants.

/s/ Kirsten Frank Kelly