STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 26, 2010
v	No. 286528 Shiawassee Circuit Court
DAVID BRIAN SRNEC, Defendant-Appellant.	LC No. 07-006431-FH

Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

Defendant was found guilty by a jury of two counts of resisting and obstructing a police officer causing injury, MCL 750.81d(2), and was sentenced to six months of jail time and two years of probation. He appeals as of right. We affirm.

On the evening of November 12, 2007, Officer Esther Ameila Ray of the Owosso Police Department and State Police Trooper Timothy Murphy both responded to a "suspicious persons" call indicating that two males were trying to get into the Crossroads Party Store and that the males appeared intoxicated as they drove away. The caller identified defendant's car and provided its license plate number. Upon her arrival at defendant's residence to investigate, Officer Ray knocked on defendant's door and requested to speak to the two occupants of the identified suspect vehicle, at which point defendant and another man stepped out onto the front porch to speak to her. Officer Ray noted that both individuals appeared highly intoxicated, but indicated to them that she was not going to arrest them for Operating While Intoxicated (OWI), and only intended to identify them and ask them questions regarding the party store.

Officer Ray decided to detain the other man while she checked for any outstanding warrants for his arrest. As she and Trooper Murphy escorted him to the patrol car, defendant asked if he could go into the home. Officer Ray asserted that she told defendant "no," and ordered him to stand next to her on the sidewalk until she could check for any warrants for his arrest also, at which point defendant suddenly ran toward the door of his home. Defendant claims that Officer Ray did not say "no," but responded that she would like him to stay on the porch, at which point defendant stated that he needed a drink and went into his home.

Officer Ray testified that a struggle ensued between her and defendant as he opened the door and tried to get into his home. Trooper Murphy assisted Officer Ray, but defendant remained "combative," "struggling and fighting" with both officers. The officers repeatedly

ordered defendant to stop resisting, but "he continued to thrash and struggle and buck his arms out." At one point, defendant was on top of Officer Ray pushing her against the porch railing, and Officer Ray believed she was going to go over the railing. Officer Ray was eventually able to reach her taser and "tased" defendant, at which point he complied with the officers' commands and put his hands behind his back. Both officers eventually went to the emergency room where they were treated for cuts and abrasions.

Defendant gave a different account of the events that transpired. Defendant claimed he was going back outside the home willingly but the officers continued to pull on him, almost causing all three of them to go over the railing of the porch. The officers were "jabbing" defendant in the back of the leg, dragged him off the porch by his arms, and put defendant face-down in the dirt. Officer Ray told defendant to put his hands behind his back or she would "taser" him, at which point defendant felt the "taser," and was subsequently handcuffed and placed in the patrol car.

Defendant was arrested and was subsequently charged and convicted of two counts of resisting and obstructing a police officer causing injury pursuant to MCL 750.81d(2).

On appeal, defendant first argues the trial court erred in denying his motion for a new trial and to dismiss because the officers' seizure of him violated his Fourth Amendment constitutional right to be free from unlawful seizure. Defendant claims that Officer Ray had no intention of arresting him for OWI, and there were no other facts present supporting an articulable and reasonable suspicion that crime was afoot. We disagree.

This Court has held that a search and seizure without a warrant is reasonable if consent to the search is freely and voluntarily given, and when there is no evidence of coercion based on a totality of the circumstances. *People v Bolduc*, 263 Mich App 430, 440; 688 NW2d 316 (2004). Conduct itself can be sufficient to constitute consent. *People v Brown*, 127 Mich App 436, 441; 339 NW2d 38 (1983). "[V]oluntary cooperation by a citizen in response to non-coercive questioning [raises no constitutional issues.]" *People v Frohriep*, 247 Mich App 692, 699-700; 637 NW2d 562 (2001). Brief detention of a person "is considered a reasonable seizure if the officer has a 'reasonably articulable suspicion' that the person is engaged in criminal activity." *People v LoCicero*, 453 Mich 496, 501; 556 NW2d 498 (1996). A reasonable suspicion is "an objective manifestation that the person stopped was or was about to be engaged in criminal activity as judged by those versed in the field of law enforcement when viewed under the totality of circumstances. The detaining officer must have had a particularized and objective basis for the suspicion of criminal activity." *People v Champion*, 452 Mich 92, 98-99; 549 NW2d 849 (1996).

Defendant initially cooperated with the officers, exiting his home and submitting to Officer Ray's questioning. He was free to ignore the officers' presence when they arrived at his home and knocked on his door, and he was free to refuse to answer Officer Ray's questions knowing that he was not subject to criminal charges. There was no indication that defendant did not consent to the questioning; he never requested that the officers leave his residence. Finally, there is no evidence that the officers physically or verbally coerced defendant to exit his residence or to answer their questions. Officer Ray had an articulable and reasonable suspicion that criminal activity was afoot when she detained the other man. Defendant disobeyed her order to stay on the sidewalk and instead suddenly attempted to get back into his home. Her suspicion

was reasonable because Officer Ray was aware that there were two locations for Crossroads Party Store, and that one of the two store locations had been broken into, or had attempted "breaking and enterings," twice in the prior week. She feared that defendant may be entering his home to get a gun or other weapon, or to get assistance from someone else in the home to attack the officers. Thus, she believed that her safety and the safety of the others on the scene was in danger. Considering the totality of the circumstances, defendant's detention and seizure were lawful and reasonable, and not in violation of the Fourth Amendment.

However, even if defendant's seizure was unlawful, this Court's decision in *People v Ventura*, 262 Mich App 370; 686 NW2d 748 (2004), eliminated the lawfulness requirement of an arrest or detention from the application of MCL 750.81d. An individual wishing to challenge the legality of a police officer's conduct can seek redress through actions brought under 42 USC § 1983, and state actions for false imprisonment. Therefore, the officers did not violate defendant's Fourth Amendment right to be free from unlawful seizures.

Next defendant argues that the trial court erred in denying his motion for a new trial and to dismiss because MCL 750.81d unconstitutionally violated his Fourteenth Amendment right to be free from illegal seizure without due process of law. We disagree.

A violation of substantive due process occurs when the government deprives a person of liberty or property by an arbitrary exercise of power. *Conlin v Scio Twp*, 262 Mich App 379, 389; 686 NW2d 16 (2004). "[W]hether challenged legislation violates principles of substantive due process depends on the nature of the right affected." *Brinkley v Brinkley*, 277 Mich App 23, 30; 742 NW2d 629 (2007). "If a party challenges a fundamental right or the challenge involves a suspect classification, strict scrutiny applies and a compelling state interest is required to uphold it." *Id*.

There is no fundamental constitutional right to resist an unlawful arrest or seizure. Because a fundamental right does not exist and the challenge also does not involve a suspect classification, MCL 750.81d does not deprive defendant of his substantive due process rights. Even if there was a fundamental constitutional right to resist an unlawful arrest or seizure, MCL 750.81d is not unconstitutional because the State has a compelling interest in preserving public order and protecting both police officers and the general public from the dangers inherent in an arrest context. In *Ventura*, this Court noted that MCL 750.81d serves as a "mechanism to reduce the likelihood and the magnitude of the potential dangers inherent in an arrest situation, thereby dually protecting both the general public and its police officers." *Ventura*, *supra* at 378. In *People v MacLeod*, 254 Mich App 222, 229-230; 656 NW2d 844 (2002), this Court noted that the "[p]ublic order is better served if a person, subject to an arrest pursuant to an existing law, challenges the constitutionality of that law in the courts, rather than through resisting arrest." Therefore, the State's interest in preserving public order and protecting both police officers and the general public from the dangers inherent in an arrest context is a compelling reason to uphold MCL 750.81d.

Defendant next argues that the trial court erred in denying his motion for a new trial and to dismiss because the Second Amendment safeguarding the right to bear arms affords every citizen a right of self-defense against unlawful arrest or seizure. Defendant claims that MCL 750.81d unconstitutionally deprives every citizen of this right because it allows officers to seize

the citizen, regardless of the lawfulness of the seizure, and then penalizes the citizen for resisting through the use of self-defense. We disagree.

Under the plain language of the Second Amendment of the United States Constitution and Const 1963 art 1 § 6, the right to keep and bear arms involves the right to use firearms in self-defense. See *District of Columbia v Heller*, ___ US ___; 128 S Ct 2783, 2818; 171 L Ed 2d 637 (2008). Defendant claims he has a constitutional right to use firearms to resist an unlawful arrest or seizure. Defendant's argument fails because the Second Amendment does not give any citizen a constitutional right to use deadly force to resist an unlawful arrest or seizure. The right to bear arms does not safeguard an individual's right to self-defense short of deadly force. In *People v Dillard*, 115 Mich App 640, 645; 321 NW2d 757 (1982), this Court noted that "the [common law] right to resist an unlawful arrest can never include the right to use deadly force where the only danger perceived is loss of liberty."

The right to use self-defense to resist unlawful arrest has only been afforded protection at the common law and is not a constitutional right. *Elk v United States*, 177 US 529, 535; 20 S Ct 729; 44 L Ed 874 (1900); *Vak La v Hayducka*, 269 F Supp 2d 566, 577 (DC NJ, 2003). The Legislature has the authority to abrogate the common law, and if a statutory provision and the common law conflict, the common law must yield. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 389-390; 738 NW2d 664 (2007). Again, this Court's decision in *Ventura* eliminated the lawfulness requirement of an arrest or seizure from the application of MCL 750.81d, and found that the Legislature intended to abandon the common law right to resist unlawful arrest or seizure. *Ventura*, *supra* at 376.

Finally, defendant argues that the trial court erred in denying his motion for a new trial and to dismiss because MCL 750.81d violated his rights to equal protection under the Fourteenth Amendment. We disagree.

The equal protection clauses of the United States and Michigan Constitutions require that persons in similar circumstances be treated alike. *El Souri v Dep't of Social Services*, 429 Mich 203, 207; 414 NW2d 679 (1987). If the statute affects a fundamental interest or creates an inherently suspect classification, a strict scrutiny test is appropriate. *People v Pitts*, 222 Mich App 260, 273; 564 NW2d 93 (1997). Under a strict scrutiny analysis, a statute will be upheld if the state can demonstrate that the classification was tailored to serve a compelling governmental interest. *Morales v Michigan Parole Bd*, 260 Mich App 29, 50; 676 NW2d 221 (2003). If the statute does not create an inherently suspect classification or a fundamental interest is not involved, the courts will use a rational basis test to determine if the statute violates equal protection principles. *Pitts*, *supra* at 273. Under this test, a statute is constitutional if it furthers a legitimate governmental interest and if the challenged statute is rationally related to achieving that interest. *Boulton v Fenton Twp*, 272 Mich App 456, 467; 726 NW2d 733 (2006). Legislation challenged on equal protection grounds is presumed constitutional and, therefore, the burden falls on the defendant to rebut this presumption. *Id*.

According to defendant, MCL 750.81d deprives him of his right to use self-defense as a victim while other individuals victimized by non-law enforcement actors retain their right to use self-defense legally. Defendant argues that he fits within a suspect classification protected under the equal protection clause by claiming he is unfairly treated in comparison with those victimized by non-law enforcement actors who retain their right of self-defense. Defendant claims the strict

scrutiny analysis applies and the State has failed to demonstrate a compelling interest to uphold MCL 750.81d.

Suspect classifications generally do not extend beyond race and color, alienage, religion, and national origin. *Massachusetts Bd of Retirement v Murgia*, 427 US 307, 313-314; 96 S Ct 2562; 49 L Ed 2d 520 (1976). Moreover, defendant was not deprived of his fundamental right to resist unlawful arrest or seizure because the right to resist an unlawful arrest or seizure has never been recognized as a constitutionally protected right; it has only been recognized at common law, which the majority of states, including Michigan, have abrogated with legislation. *Elk*, *supra* at 535.

Because there is no fundamental constitutional right to resist unlawful arrest or seizure, and because defendant does not fit within a suspect classification protected under the equal protection clause, the strict scrutiny test does not apply. Even if there was such a fundamental right to resist, the State's interest in preserving public order and protecting both police officers and the general public from the dangers inherent in an arrest context is not only a legitimate State interest rationally related to MCL 750.81d, but also a compelling reason to uphold MCL 750.81d. Thus, the State's interest passes both the rational basis test and the strict scrutiny test to uphold the statute.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro