STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED February 9, 2010
v	No. 287922 Wayne Circuit Court
CHRISTOPHER PATRICK BROWN, Defendant-Appellee.	LC No. 08-008207-FH

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

PER CURIAM.

After an evidentiary hearing, defendant's motion to suppress a gun was granted and all charges against him were dismissed without prejudice. The prosecution appeals as of right. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The prosecution argues that the trial court's suppression of the gun must be reversed because the ruling was based on clearly erroneous findings of fact. We agree.

We review a trial court's factual findings on a motion to suppress evidence for clear error, and review the trial court's conclusions of law and ultimate decision de novo. *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009).

The trial court found that Detroit police officer Lavar Green's testimony was "illogical" and "not credible" based on inconsistencies that did not exist. The court stated:

> At the Preliminary Examination, Officer Green testified that he saw the defendant sitting at a table in the parking lot with a green Wayne County jumpsuit on . . . This testimony is different. In court here, Officer Green did not mention that the defendant was sitting at a table or wearing a green Wayne County jumpsuit. At the Preliminary Exam, he testified he was walking after the defendant and then said "Police." . . . The second time he testified, he said he announced "Police" and then the defendant put his hand on his waistband and walked away. And he never mentions that the defendant is sitting at a table.

The court also found it "illogical" that defendant would run away from Officer Green, who was "backup," when there were already officers on the scene.

Officer Green testified at both the preliminary examination and the evidentiary hearing that he said "police" after defendant started to walk away. There was no inconsistency. Moreover, Officer Green did not testify at the preliminary examination that defendant was sitting at a table in the parking lot of the bar wearing a green Wayne County jumpsuit. In context, it is clear that defendant was wearing this clothing at the preliminary examination, and that Officer Green was simply identifying him at that time. Thus, Officer Green's failure to state at the evidentiary hearing that defendant was sitting at a table in the parking lot wearing a green jumpsuit was not indicative of a lack of credibility. Finally, it was not "illogical" that defendant would retreat when backup police approached the crowd when he did not retreat while other officers were at the scene. It is not illogical that someone might fail to react when police were focused, generally, on the crime scene, but react instead when police approached the crowd where he was standing. Given these factors, we conclude that the trial court's finding regarding Officer Green's credibility was clearly erroneous.

Nonetheless, a determination must still be made on defendant's motion to suppress. Analysis of the legality of a stop and frisk hinges on how the scene reasonably appeared to the officers under the totality of the circumstances and based on common sense inferences about human behavior. *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). Under *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the police had to reasonably conclude that 1) a crime was afoot, and 2) the person with whom police were dealing was armed and dangerous. *People v Jackson*, 188 Mich App 117, 119; 468 NW2d 523 (1990). These conclusions must not be based on a subjective suspicion or hunch but rather on specific reasonable inferences drawn from the facts in light of the officers' experience. *Id*. While flight alone may be insufficient to provide a reasonable articulable suspicion for an investigatory stop, '"nervous, evasive behavior is a pertinent factor in determining reasonable suspicion."' *People v Oliver*, 464 Mich 184, 197; 627 NW2d 297 (2001), quoting *Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d 570 (2000).

Here, police were on the scene investigating the report of a shooting and, therefore, could reasonably conclude that a crime was afoot. The only open question is whether the police reasonably concluded that defendant was armed and dangerous. Officer Green testified that he believed defendant was armed when defendant grabbed the right side of his waistband area as he walked away from the crowd and then ran toward the bar. Defendant testified that he was grabbed without warning as he walked across the parking lot and denied grabbing at his right waistband area or trying to evade police. Since there is conflicting testimony about whether defendant made furtive gestures, suggestive of someone carrying a weapon, and whether he purposely walked or ran from police or was simply going about his business, this case must be remanded so that the trial court can develop the necessary facts to determine whether the police acted on a reasonable, articulable suspicion when they stopped defendant.

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

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello