

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 29, 2016

v

NIKO DEANTE COLLON,

Defendant-Appellant.

No. 327282
Saginaw Circuit Court
LC No. 14-040690-FH

Before: STEPHENS, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of carrying a concealed weapon (CCW), MCL 750.227; felon in possession of a firearm, MCL 750.224f; felon in possession of ammunition, MCL 750.224f(6); possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b; and possession of a controlled substance (marijuana), MCL 333.7403(2)(d). Defendant was sentenced to five years' probation for the CCW and felon in possession convictions, two years in prison for the felony firearm conviction, and one day in jail for possession of marijuana. We affirm.

Law enforcement officers assigned to the Mid-Michigan Safe Streets Task Force testified that while they were on road patrol in Saginaw they saw two men, defendant and a friend, riding bicycles in the roadway at around 8:30 p.m. on October 8, 2014. Neither of the bicycles had lights on the front and back, as required by the Michigan Vehicle Code¹, so the officers followed the men into the parking lot of a market to make contact with them and inform them of the violation. When the officers arrived, defendant was inside the market, while his friend waited for him outside. The officers made contact with defendant's friend first, and when defendant emerged from the store the officers made contact with him and noticed that he smelled strongly of "fresh" or unburned marijuana.

One of the officers approached defendant and asked him for his identification. The officers noticed that defendant appeared to be attempting to conceal the right side of his body from them, which caused them sufficient concern to conduct a pat down search for officer safety.

¹ MCL 257.662(1).

During the search, the officers located a revolver on defendant's right hip. The officers then searched a backpack defendant was carrying to check for additional weapons and marijuana based on the odor they had detected, and located five small bags of marijuana. Defendant was arrested and advised of his *Miranda*² rights, at which point, defendant made certain statements to the officers.

Defendant moved to suppress the gun and marijuana found as a result of the search as well as his statements to the officers, asserting that the officers did not have probable cause to search him and that his statements were not voluntary because he was not advised of his rights before making them. The trial court denied his motions based on its finding that the scent of marijuana was sufficient to justify the officers' search, and that defendant had waived his *Miranda* rights before speaking with the officers. Trial proceeded and defendant was found guilty as charged.

On appeal, defendant argues that the trial court erred by finding that probable cause existed to search defendant. We agree with the trial court's conclusion that the search in this case was reasonable, but find that the search was reasonable based on the officers' reasonable concerns about their safety under *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

"The 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). "A search or seizure is considered unreasonable when it is conducted pursuant to an invalid warrant or without a warrant where the police officer's conduct does not fall within one of the specific exceptions to the warrant requirement." *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). However, a search may be conducted without a warrant where there is "both probable cause and a circumstance establishing an exception to the warrant requirement." *People v Mayes (After Remand)*, 202 Mich App 181, 184; 508 NW2d 161 (1993). The exceptions to the warrant requirement include: "(1) searches incident to a lawful arrest, (2) automobile searches, (3) plain view seizure, (4) consent, (5) stop and frisk, and (6) exigent circumstances." *In re Forfeiture of \$176,598*, 443 Mich 261, 266; 505 NW2d 201 (1993). However, a law enforcement officer may "in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Our Supreme Court has held that under *Terry*, "[a] police officer may perform a limited patdown search for weapons if the officer has a reasonable suspicion that the individual is armed, and thus poses a danger to the officer or to other persons." *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001), citing *Terry, supra*, 392 US at 27. We conclude that the search was reasonable based on the officers' reasonable suspicions that defendant was armed.

The officers testified at the suppression hearing that they believed defendant's movements indicated that he was trying to hide or conceal the right side of his body from them.

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Trooper Brian Savard testified that defendant's mannerisms in moving his hands a lot and turning away made him concerned that defendant may have a weapon. In *Custer*, our Supreme Court held that when performing a *Terry* search, an "officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Custer, supra*, at 328, citing *Terry, supra*, at 27. The Court held further that " '[r]easonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause.' " *Id.*, citing *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). "In order to demonstrate reasonable suspicion, an officer must have 'specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.' " *Id.*, citing *Terry, supra*, at 21.

We conclude that defendant's behavior in turning away from officers as though trying to conceal something on his person and moving his hands a lot was sufficient to give rise to a rational inference or reasonable suspicion that defendant was armed; therefore, the search was reasonable. See *id.*; compare *People v Laube*, 154 Mich App 400, 410; 397 NW2d 325 (1986) (Where, during the course of an encounter, the defendant "repeatedly placed his hands in his pockets while inching towards the rear of the patrol car [and] [t]his behavior persisted even after the deputies asked him to keep his hands out of his pockets[,] [w]e believe that this behavior was of a nature to create legitimate concern on behalf of the officers regarding their safety.").

Because we conclude that the search was warranted based on a reasonable suspicion that defendant was armed, we need not address whether the search may have also been warranted based on the odor of marijuana that the officers detected on his person.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher