STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 15, 2016
v	No. 328255 Washtenaw Circuit Court
WILLIAM JOSEPH CLOUTIER, Defendant-Appellant.	LC No. 14-000874-FH

Before: MURRAY, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for operating while intoxicated, third offense, MCL 257.652(1). Defendant was sentenced to 30 days imprisonment. MCL 257.625(9). We affirm.

I. FACTS AND PROCEEDINGS

A. BACKGROUND FACTS

This case arises out of a series of events that led to the arrest of defendant, William Cloutier, which occurred on July 19, 2014, in Ann Arbor. On that day, around 2:00 a.m., a security officer for the University of Michigan (U of M) Health System, Matthew Murray, was traveling westbound on Geddes, a divided one-way street, when he came across defendant driving the wrong way, heading directly towards him. Both vehicles came to a stop in the road and Murray approached defendant's car. Upon doing so, he became aware of a strong odor of intoxicants coming from defendant and noticed other physical symptoms of intoxication. Murray radioed dispatch to let the police know they should come to that location. Murray was not asked by the police to remain at the scene, but he remained on his own volition. While waiting for the police, Murray asked defendant to put the car in park and turn it off, and he advised defendant that he was not a police officer. Murray never demanded defendant to remain at the scene until the police arrived and he never informed defendant he was free to leave.

U of M police officer Sean Taylor arrived at the scene to conduct an investigation and Murray was no longer involved. Officer Taylor made contact with defendant and could smell a heavy odor of intoxicants from about six feet away. Defendant had also admitted, on separate occasions, to Murray and Officer Taylor that he had previously been drinking at a local night club. Knowing this information, noticing the heavy odor of intoxicants, and the observation of

other physical characteristics of intoxication, such as glassy, bloodshot eyes and slurred speech, Officer Taylor asked defendant to perform three Standardized Field Sobriety Tests (SFSTs). Defendant performed the horizontal gaze nystagmus (HGN) test, the walk-and-turn test, and the one-leg stand test. Officer Taylor noticed clues of intoxication from each of the tests and placed defendant under arrest for operating while intoxicated. At the station defendant agreed to take the DataMaster test and the results indicated a BAC of .17grams and 15 minutes later, .16 grams.

B. PROCEDURAL HISTORY

That same day, defendant was arrested and charged with one count of operating while intoxicated-third offense, MCL 257.625(9). A preliminary examination was held and the district court held that the prosecution had shown probable cause to believe the crime charged occurred and that it was committed by defendant, and defendant was bound over for trial in the circuit court.

Defendant filed a motion to suppress/motion to dismiss/request for hearing and argued that the evidence would show that a U of M security officer unlawfully stopped defendant's vehicle on a public roadway and unlawfully detained defendant in violation of his statutory and constitutional rights. Specifically, defendant argued that the security officer was a state actor for purposes of defendant's constitutional protections, *Dennis v Sparks*, 449 US 24, 27-28; 101 S Ct 183; 66 L Ed 2d 185 (1980), but did not have the lawful authority to conduct a traffic stop of defendant or to detain him for any amount of time for an alleged traffic offense. Defendant also argued that the evidence would reveal that he was unlawfully arrested by U of M police when the totality of the circumstances did not provide the officer with probable cause to believe that defendant had operated a motor vehicle while intoxicated, and thus his arrest violated defendant's statutory and constitutional rights. Defendant therefore argued that pursuant to the US Const, Am IV, and *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963), all evidence obtained by the U of M security and U of M police should be suppressed as a result of multiple constitutional violations, and the charge should be dismissed as no lawfully obtained evidence was secured against defendant.

A hearing on the motion was held and the trial court denied defendant's motion to suppress/motion to dismiss. The trial court determined that the facts were undisputed, and found that the Hospital security officer was not a state actor when he encountered defendant driving the wrong way. The trial court further found that the security officer was not exercising any powers of a police officer and he had made that clear to defendant at the time. The trial court then ruled that under the totality of the circumstances, the police officer had a reasonable, articulable suspicion that justified an investigative stop of defendant.

II. ANALYSIS

A. UNLAWFUL TRAFFIC STOP FOURTH AMENDMENT VIOLATION

Defendant first argues that his Fourth Amendment constitutional rights were violated because the trial court failed to suppress evidence that was unlawfully obtained. More specifically, defendant contends that Murray performed an unlawful search and seizure of defendant and these unlawful acts subsequently lead to defendant's arrest and conviction.

"This Court's review of a lower court's factual findings in a suppression hearing is limited to clear error and those findings will be affirmed unless we are left with a definite and firm conviction that a mistake was made." *People v Lewis*, 251 Mich App 58, 67; 649 NW2d 792 (2002). "However, the lower court's ultimate ruling with regard to the motion to suppress is reviewed de novo, because the application of constitutional standards regarding searches and seizures to undisputed facts is entitled less deference." *Id.* at 67-68 (citations omitted).

Assuming the Fourth Amendment was implicated when Murray encountered defendant on the road, there was no violation of defendant's Fourth Amendment rights. An illegal *Terry*[1] stop of the defendant never occurred. In regards to this determination, the Supreme Court has stated,

> We adhere to the view that a person is 'seized' only when, by means of physical force or show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' [*United States v Mendenhall*, 446 US 544, 554; 100 S Ct 1870; 64 L Ed 3d 497 (1980), quoting *United States v Martinez Fuerte*, 428 US 543, 554; 96 S Ct 3074; 49 L Ed 2d 1116 (1976).]

As long as the person, who is being asked questions, remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy under the constitution. *Mendenhall*, 446 US at 554. In other words, a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v Ohio*, 392 US 1, 19; 88 S Ct 1868; 20 L Ed 2d 383 (1968). "*Mendenhall* establishes that the test for existence of a "show of authority" is an objective one: not whether the citizen perceived that he was ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *California v Hodari D*, 499 US 621, 628; 111 S Ct 1547; 113 L Ed 2d 690 (1991).

We conclude no "seizure" of defendant occurred when he was approached by Murray. The events took place on a public road, Murray was not wearing a police uniform, and was not displaying a weapon. Murray did not summon defendant, but instead approached him and informed him that he was not a police officer. Murray requested, but did not demand, that defendant turn off the car and never demanded that defendant remain where he was. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest. Defendant was not seized when Murray approached him, posed to him a few questions, and asked him to turn off the car. Defendant remained free to disregard Murray and walk away. The facts as found by the trial court do not show that Murray's actions constituted a "show of authority" nor did he use physical force to restrain defendant. As a state actor, Murray did not exceed his authority and defendant was not unlawfully searched or seized. Accordingly, in light

[1] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 383 (1968).

of each of the factors noted above, we hold that defendant's Fourth Amendment rights were not violated.

Our conclusion that no seizure occurred is not affected by the fact that defendant was not expressly told by Murray that he was free to leave, for the voluntariness of his actions does not depend upon him having been so informed. *Schneckloth v Bustamonte*, 412 US 218, 248; 93 S Ct 2041; 36 L Ed 2d 854 (1973). Whether defendant's consent to remain at the scene was in fact voluntary or the product of duress or coercion, express or implied, is to be determined by the totality of the circumstances and is a matter which the government has the burden of proving. *Id*. As reflected above, plaintiff's evidence showed that defendant was not told he had to remain at the scene, but was simply asked if he would turn off his car. There were neither threats nor any show of force or authority by Murray, and defendant had been questioned only briefly before the sworn police officer arrived.

B. UNLAWFUL ARREST FOURTH AMENDMENT VIOLATION

Defendant next contends that his Fourth Amendment rights were violated when the trial court failed to suppress evidence obtained during an unlawful arrest of defendant. Namely, defendant argues that Officer Taylor did not have probable cause to arrest defendant for operating while intoxicated, and as a result, all evidence obtained pursuant to this unlawful arrest should have been suppressed by the trial court.

Generally, this Court reviews de novo a trial court's ultimate determination on a motion to suppress, but its factual findings are reviewed for clear error. *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Dendel*, 481 Mich 114,130; 748 NW2d 859 (2008), mod 481 Mich 1201 (2008). Great deference is given to a magistrate's determination of probable cause. *People v Keller*, 479 Mich 467, 474; 739 NW2d 505 (2007). "However, the lower court's ultimate ruling with regard to the motion to suppress is reviewed de novo, because the application of constitutional standards regarding searches and seizures to undisputed facts is entitled less deference." *Lewis*, 251 Mich App at 67-68 (citation omitted).

We conclude that the trial court did not err in denying defendant's motion to suppress/motion to dismiss because Officer Taylor had probable cause to arrest defendant and defendant's Fourth Amendment rights were not violated.

Although defendant attacks the accuracy and results of each individual field sobriety test given to him, to find probable cause it is not necessary for the results of each and every test to be conclusive and positive. Rather, in evaluating the validity of a stop or an arrest, we must consider "the totality of the circumstances—the whole picture." *United States v Sokolow*, 490 US 1, 8; 109 S Ct 1581; 104 L Ed 2d 1 (1989). "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common—sense conclusions about human behaviors; jurors as fact-finders are permitted to do the same—and so are law enforcement officers." *United States v Cortez*, 449 US 411, 418; 101 S Ct 690; 66 L Ed 2d 621 (1981). Going further, this Court has stated that probable cause exists when the facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed, and which is based upon information known

to the officers at the time of the search. *Mullen*, 282 Mich App at 27-28. On this topic, the United States Supreme Court has stated,

> In this regard we have cautioned that courts should not indulge in "unrealistic second-guessing" and we have noted that "creative judge[s], engaged in *post hoc* evaluations of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, in itself, render the search unreasonable." Authorities must be allowed "to graduate their response to the demands of any particular situation." [*United States v Montoya de Hernandez*, 473 US 531, 542-543; 105 S Ct 3304; 87 L Ed 2d 381 (1985) (citations omitted).]

Common sense and ordinary human experience must govern over rigid criteria. *Id*. at 543.

Applying the facts of the case to the probable cause requirements, we conclude that Officer Taylor had probable cause to arrest defendant. When Officer Taylor arrived on the scene, around 2:30 a.m., defendant's car was facing the wrong direction on a one-way street. Officer Taylor noticed that defendant's eyes were glassy and his speech was slurred, which are both indications of intoxication. Defendant had also admitted to having had drinks at a local night club. Once Officer Taylor noticed a strong odor of intoxicants coming from defendant, he asked defendant to perform a series of field sobriety tests. It has been held that the strong smell of intoxicants on a motorist's breath can give a police officer reasonable suspicion that the motorist has consumed intoxicating liquor, which may have affected the motorist's ability to operate a motor vehicle. *People v Rizzo*, 243 Mich App 151, 158; 622 NW2d 319 (2000). The strong odor of intoxicants gave Officer Taylor reason to believe that defendant had consumed intoxicating liquor, and defendant's driving the wrong way on a one-way street reasonably confirmed that consuming intoxicating liquor affected his ability to operate a motor vehicle.

Whether probable cause exists depends on the information known to the officers at the time of the search, not what careful review of video footage may show. *People v Mullen*, 282 Mich App at 27-28. In other words, it is only necessary to determine if a reasonable person in Officer Taylor's situation would have reason to believe that defendant was committing the crime of operating while intoxicated.

Considering the totality of the circumstances, namely, that defendant was driving the wrong way, had physical indications of intoxication (glassy eyes and slurred speech), had a strong odor of intoxicants, made an admission to drinking that night, and showed signs of intoxication during the field sobriety tests, we hold that there was probable cause to arrest defendant.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Jane M. Beckering