STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 17, 2012
v MARCUS JACKSON, Defendant-Appellee.	No. 303127 Wayne Circuit Court LC No. 10-012928-FH

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Defendant was charged with felon in possession of a firearm, MCL 750.227f, possession of a loaded firearm in a vehicle, MCL 750.227c, and possession of a firearm during the commission of a felony, MCL 750.227b. He was arrested after the police found a loaded rifle in the car he was operating. The rifle was found lying on the back seat of the car, partially covered by a blanket. Defendant moved to exclude use of the rifle as evidence on the grounds that it was the fruit of an unlawful search and seizure.

The officer and the defendant each testified at the suppression hearing and their testimony described two different versions of events. The trial court did not make factual findings regarding what actually occurred, holding instead that even under the scenario described by the officer's testimony, the search and seizure was unlawful. We conclude that the trial court erred in concluding that suppression was necessary even if the officer's testimony was accurate. We therefore reverse the order granting defendant's motion. We remand, however, for the trial court to make a factual determination regarding the controlling events and thereafter render a decision as to the constitutionality of the challenged search and seizure.

Officer Michael Smith testified that while on routine patrol, he and his partner, Officer Benton, observed defendant's vehicle parked in an alley next to a vacant house. The officers pulled up behind the car to investigate. When the officers got out of their patrol car, defendant immediately got out of his vehicle. Officer Smith testified that he shone his flashlight through the window of defendant's car, at which point he observed the rifle on the backseat and only then entered the vehicle to search its interior and confiscate the weapon.

Defendant testified that he voluntarily agreed to allow an officer to search him near the trunk of his car and that while that search was occurring, he saw the other officer enter the car and after entry, turn on his flashlight and search the interior of the vehicle. Defendant testified

that he had an uninterrupted view of the officer and that the officer did not turn on the flashlight on until after his entry into the vehicle.

Both the officer and the defendant testified that it was dark and that there was no outside lighting. The officer testified that defendant left the front driver's side door open, but could not recall whether or not the dome or other interior light was on. Defendant testified that he did not leave his door open and that no interior lights were on. The officer testified that defendant was not arrested until after the discovery of the rifle and the prosecutor conceded that the search of the vehicle was not incident to a lawful arrest.[1]

The trial court ruled that even assuming the officer's version of events to be accurate, the search was unlawful. The court concluded that regardless of whether the officer had seen the rifle from outside the vehicle, it still did not provide probable cause to search the vehicle or seize the rifle. The trial court reasoned that the officer's observation of the gun did not provide probable cause that a crime had been committed and that if the officer "had suspicion that the rifle should not have been in the car," the officer should have sought a search warrant.

This conclusion was erroneous as a matter of law. Under the plain view doctrine, evidence in plain view in a vehicle may be seized without a warrant so long as the police "are lawfully in a position from which they view the item, and . . . the item's incriminating character is immediately apparent." *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996).

Officer Smith did not violate the Fourth Amendment in arriving at a place from which the gun could be plainly viewed from outside the car, which was parked in an alley next to a vacant house. See *Texas v Brown*, 460 US 730, 739-740; 103 S Ct 1535; 75 L Ed 2d 502 (1983) ("[t]here is no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers").

Further, the rifle was an item of immediately apparent incriminating character. This criterion requires that upon viewing the object and without further search or manipulation, an officer has probable cause to believe that the item is seizable. *People v Champion,* 452 Mich 92, 102-103; 549 NW2d 849 (1996). "If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—*i.e.,* if its incriminating character [is not] immediately apparent,—the plain-view doctrine cannot justify its seizure." *Minnesota v Dickerson*, 508 US 366, 375; 113 S Ct 2130, 2137; 124 L Ed 2d 334 (1993) (citations and internal quotation marks omitted). "Probable cause does not require certainty. Rather, it requires only a probability or substantial chance of criminal activity." *Champion,* 452 Mich at 112 n 11. The presence of a rifle, partially covered with a blanket, on the backseat of a car, meets this standard. At a minimum, the officers had probable cause to believe that defendant committed the offense of possessing or transporting a loaded firearm other

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[1] Thus, this case is not controlled by *Arizona v Gant,* 556 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009).

than a pistol in a motor vehicle, MCL 750.227c, or possessing or transporting an unloaded firearm other than a pistol in violation of MCL 750.227d.[2]

Where probable cause exists to believe that a vehicle contains contraband, the vehicle may be searched without a warrant pursuant to the automobile exception to the warrant requirement. See generally, *People v Carter*, 250 Mich App 510; 655 NW2d 236, 240 (2002). *Boone,* 385 F3d at 928; see also *United States v Galaviz,* 645 F3d 347, 357 (CA 6, 2011). Thus, the trial court's conclusion that the police required a warrant before entering the car even after lawfully observing the presence of the rifle was in error. "[W]here the police have probable cause to search an automobile, they may do so without a search warrant even if they would have had time and opportunity to obtain a search warrant." *People v Garvin*, 235 Mich App 90, 102; 597 NW2d 194, 200 (1999).

The trial court erred in concluding that the search and seizure was unlawful even if the officer's version of events was accepted as true. As the trial court did not make findings of fact regarding what actually occurred nor render a legal ruling based upon such factual findings, we cannot conduct any further review. Accordingly, we remand this matter to the trial court for it to make factual findings, and to determine, based on those findings, whether the seized rifle should be admitted or suppressed. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro

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[2] MCL 750.227d(1) provides:

> Except as otherwise permitted by law, a person shall not transport or possess in or upon a motor vehicle or any self-propelled vehicle designed for land travel a firearm, other than a pistol, unless the firearm is unloaded and is 1 or more of the following:
>
> (a) Taken down.
>
> (b) Enclosed in a case.
>
> (c) Carried in the trunk of the vehicle.
>
> (d) Inaccessible from the interior of the vehicle.