

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

COREY HOLMES,

Defendant-Appellee.

UNPUBLISHED

May 22, 2012

No. 304115

Wayne Circuit Court

LC No. 10-013031-FH

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

The prosecution appeals as of right orders granting defendant's motion to suppress evidence and dismissing the charge of carrying a concealed weapon, MCL 750.227. We reverse and remand for further proceedings.

While on patrol in a high crime area, Detroit police officers Anthony Jones and Gregory Jones saw defendant standing with several other males on the sidewalk in front of a house located on Algonac Street. After defendant looked in their direction, he immediately grabbed his waistband, began walking backwards toward the house, then turned and ran inside the house. The officers stopped in front of that house and Officer Anthony Jones, the passenger, exited the vehicle. While standing on the front lawn, the officer was able to see inside the house through a large picture window and he saw defendant pull a gun from his waistband and toss it to the floor. The officer then knocked on the front door, and defendant came to the door but said that he did not know how to open the door. Eventually, defendant exited the house through the front window, and he was detained. Officer Anthony Jones then knocked on the door again, and a person came to the door and opened it. He gave the officers permission to enter the house, but said that he did not live at the house and did not know who lived at the house. The officers entered the house and Officer Gregory Jones found a handgun on the floor, near the window where Officer Anthony Jones saw defendant toss the gun. Defendant was charged with carrying a concealed weapon.

Defendant filed a motion to suppress the recovered gun, alleging that the warrantless search was illegal. An evidentiary hearing followed. The trial court concluded that the officers did not have probable cause to "chase" defendant; that defendant was standing outside with a group of people and touched his waistband did not give rise to probable cause. Thus, defendant's subsequent arrest violated the Fourth Amendment. The court further held that the

search of the house conducted without a warrant was also illegal. Peering into a window and allegedly seeing defendant toss a gun did not establish probable cause sufficient to permit a search of the house without a warrant. Accordingly, defendant's motion was granted and the charge of carrying a concealed weapon was dismissed. This appeal followed.

The prosecution first argues that defendant's Fourth Amendment rights were not violated because "an officer's act of stopping his vehicle and following a defendant toward a house without stopping him does not constitute a seizure." We agree.

This Court reviews de novo a trial court's ultimate decision with regard to a motion to suppress evidence; however, we review the trial court's findings of fact in deciding the motion for clear error. *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983); *People v Darwich*, 226 Mich App 635, 636; 575 NW2d 44 (1997). Where admissibility of evidence depends on a question of law, this Court's review is de novo. *People v Callon*, 256 Mich App 312, 321; 662 NW2d 501 (2003). A finding of fact is clearly erroneous if, after review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

The Fourth Amendment of the United States Constitution and the Michigan Constitution prohibit unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. A person is "seized" for Fourth Amendment purposes "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan v Chesternut*, 486 US 567, 573; 108 S Ct 1975; 100 L Ed 2d 565 (1988), quoting *United States v Mendenhall*, 446 US 544, 554; 100 S Ct 1870; 64 L Ed 2d 497 (1980). The test is flexible and "is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Chesternut*, 486 US at 573. The setting in which the conduct occurs is also a consideration. *Id.* at 574. And the standard is objective in that it "look[s] to the reasonable man's interpretation of the conduct in question." *Id.*

In this case, similar to the facts presented in *Chesternut*,¹ when defendant observed the approach of the police car on routine patrol, he immediately grabbed his waistband, began walking backwards toward the house, then turned and ran inside the house. By the time the police vehicle reached and stopped at the house, defendant was already inside the house. In an investigatory pursuit, Officer Anthony Jones exited the vehicle, and stood on the front lawn. This pursuit of defendant, contrary to the trial court's holding, did not constitute a seizure and the officers were not required to have probable cause to further investigate defendant's suspicious

¹ In *Chesternut*, the defendant observed the approach of a police car on routine patrol and began to run. The police followed the defendant and, after observing him discard packets containing controlled substances, he was arrested. The charges were dismissed, however, on the ground that the defendant had been unlawfully seized during the police pursuit preceding the disposal of the drugs. *Chesternut*, 486 US at 569-570. The United States Supreme Court reversed the dismissal, holding that the officers' pursuit of the defendant did not constitute a "seizure" within the contemplation of Fourth Amendment protections. *Id.* at 574-576.

behavior. Clearly, defendant was not detained; he was able to run into the house without interruption. And the officers did nothing that would lead defendant to reasonably believe that he was not free to disregard the officers' presence and go about his business in the house. See *Chesternut*, 486 US at 575-576. Thus, because there was no investigatory stop, the officers were "not required to have 'a particularized and objective basis for suspecting [defendant] of criminal activity' in order to pursue him." See *id.* at 576, quoting *United States v Cortez*, 449 US 411, 417-418; 101 S Ct 690; 66 L Ed 2d 621 (1981). As explained by the Supreme Court in *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), effective crime prevention and detection is a legitimate governmental interest that "underlies the recognition that a police 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." *Id.* at 22. Here, defendant was not approached during this investigation and he was not stopped from entering the house; thus, the officer's actions did not constitute either a seizure or an investigatory stop. See *People v Champion*, 452 Mich 92, 98-99; 549 NW2d 849 (1996).

Then, while standing on the front lawn, Officer Anthony Jones was able to look through a large picture window located in the front of the house and see defendant pull a gun from his waistband—consistent with the officer's prior observations—and toss it to the floor. Carrying a concealed weapon is a felony. See MCL 750.227(3). Like the defendant in *Chesternut*, 486 US at 574-576, at the time defendant removed the gun from his waistband in front of the picture window, he was not "seized" for purposes of Fourth Amendment protections. And, contrary to the trial court's apparent conclusion, the officer's observations of defendant's actions while standing on the front lawn did not constitute a "search" for purposes of the Fourth Amendment. "Merely entering the private property of another is not an offense unless one has been forbidden to do so or refuses to depart after having been told to do so by a proper person." *People v Shankle*, 227 Mich App 690, 694; 577 NW2d 471 (1998), citing MCL 750.552. That is, Officer Anthony Jones' acts of standing on the front lawn and looking through a window, as anyone else in the public could do, did not interfere with defendant's legitimate expectation of privacy. See *People v Lombardo*, 216 Mich App 500, 504; 549 NW2d 596 (1996).

After making this observation, Officer Anthony Jones knocked on the front door and defendant came to the door, but indicated that he did not know how to open the door—the same door he had entered minutes earlier. The police officers did not enter the house. Eventually, defendant exited the house through the picture window and, when outside, defendant was "seized."² A warrant is generally not required to make a felony arrest. *People v Johnson*, 431 Mich 683, 690-691; 431 NW2d 825 (1988). To lawfully seize a defendant without a warrant, the police officer must "possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it." *People v Reese*, 281 Mich App 290, 294-295; 761 NW2d 405 (2008). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are

² "[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry*, 392 US at 16.

sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *Champion*, 452 Mich at 115.

Here, Officer Anthony Jones had probable cause to believe that defendant committed the felony offense of carrying a concealed weapon; thus, defendant’s seizure did not violate his Fourth Amendment rights. During the investigation of defendant’s suspicious behavior, Officer Anthony Jones’ suspicion that defendant was carrying a concealed weapon in his waistband was confirmed when he observed defendant, through a picture window, remove a gun from his waistband and toss it to the floor. The facts and circumstances within Officer Anthony Jones’ knowledge, based on his own observations, were sufficient to warrant a person of reasonable caution to believe that the felony offense of carrying a concealed weapon had been committed by defendant. Thus, when defendant voluntarily exited the house, he was lawfully seized. To the extent that the trial court held otherwise, the holding is reversed.

Next, the prosecution argues that the trial court erroneously held that the house was illegally searched because defendant had no reasonable expectation of privacy in that house; thus, he did not have standing to challenge the search. We agree.

The prosecution raises the issue of defendant’s standing to challenge the legality of the search for the first time on appeal. We will review a standing issue raised for the first time on appeal if it is necessary for the proper determination of the case, including whether evidence should be suppressed. See *People v Smith*, 420 Mich 1, 11 n 3; 360 NW2d 841 (1984). “Whether a party has standing is a question of law that is reviewed de novo.” *People v Gadomski*, 274 Mich App 174, 178; 731 NW2d 466 (2007).

A defendant may not attack the propriety of a search and seizure unless the search infringed on a constitutionally protected interest. *Smith*, 420 Mich at 28. An infringement occurred if the defendant had a reasonable expectation of privacy in the object of the search and seizure considering the totality of the circumstances. *Id.*; see, also, *People v Perlos*, 436 Mich 305, 317-318; 462 NW2d 310 (1990). The defendant has the burden of establishing standing and, if he does not have standing to challenge the search, no violation of the Fourth Amendment occurred. *People v Powell*, 235 Mich App 557, 561; 599 NW2d 499 (1999) (citation omitted).

Here, the record evidence is sufficient for us to conclude that defendant did not have a reasonable expectation of privacy with regard to the searched house. It is clear from the record that defendant did not own the house that was searched. In fact, defendant testified that he did not know if people came and went freely from the house. Defendant testified that he had “just pulled up probably five minutes ago.” Prior to that, he just “was standing outside.” Defendant also indicated to the police officers that he did not know how to exit through the front door. Although an overnight guest at a residence may have a legitimate expectation of privacy protected by the Fourth Amendment, a mere visitor present with the consent of the householder has no such legitimate expectation of privacy. See *Minnesota v Carter*, 525 US 83, 89-90; 119 S Ct 469; 142 L Ed 2d 373 (1998); *People v Parker*, 230 Mich App 337, 340-341; 584 NW2d 336 (1998). Here, as the trial court noted in its findings of fact, both of defendant’s own witnesses testified that defendant was merely a visitor at the house. Accordingly, defendant did not establish an infringement on a constitutionally protected interest because, considering the totality of the circumstances, he did not have a reasonable expectation of privacy with regard to the

searched house. See *Smith*, 420 Mich at 28. Thus, the trial court's decisions to suppress the gun recovered from that search and dismiss the charge of carrying a concealed weapon were erroneous.

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

/s/ Deborah A. Servitto

/s/ Mark J. Cavanagh

/s/ Karen M. Fort Hood