STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 30, 2012
v	No. 304162 Wayne Circuit Court
ERVIN KENNETH VINCENT, JR., Defendant-Appellant.	LC No. 10-005001-FH

Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM.

Defendant appeals his bench trial conviction of possession of 50 grams or more but less than 450 grams of a controlled substance, MCL 333.7403(2)(a)(3). The trial court sentenced defendant to 3 to 20 years in prison. For the reasons set forth below, we affirm.

I. FACTS

At approximately 9:00 p.m. on April 29, 2010, two state troopers pulled defendant over for tailgating another vehicle. A LEIN check revealed that defendant had an outstanding arrest warrant. The officers placed defendant under arrest and conducted a pat-down search. One of the officers felt a hard object between defendant's buttocks. The officer lowered defendant's pants so that the second officer could pull the back waistband of defendant's boxer shorts to examine the area. The officer saw that, between his buttocks, defendant was clenching a white material wrapped in plastic. The officers confiscated the item and testing later revealed it was 54.4 grams of crack cocaine.

II. DISCUSSION

Defendant concedes that the traffic stop was lawful, but claims the search violated his Fourth Amendment rights and that the cocaine should have been suppressed.

"On appeal, the trial court's findings of fact on a motion to suppress evidence are reviewed for clear error, but the trial court's ultimate decision on the motion is reviewed de novo." *People v Malone*, 287 Mich App 648, 662-663; 792 NW2d 7 (2010). A finding of fact is clearly erroneous if this Court "is left with a definite and firm conviction that a mistake has been made." *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003). This Court will not interfere with the fact-finder's role of determining the weight of the evidence or the

credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Hill*, 257 Mich App 126, 140–141; 667 NW2d 78 (2003).

The United States and Michigan Constitutions guarantee the right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). "The lawfulness of a search or seizure depends on its reasonableness." *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). "As a general rule, searches conducted without a warrant are per se unreasonable under the Fourth Amendment unless the police conduct falls under one of the established exceptions to the warrant requirement." *Id.* "Among the recognized exceptions to the warrant requirement are searches incident to a lawful arrest, stop and frisk, consent, and plain view. . . . Each of these exceptions, while not requiring a warrant, still requires reasonableness and probable cause." *People v Brzezinski*, 243 Mich App 431, 433-434; 622 NW2d 528 (2000) (internal citation omitted). "Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that evidence sought will be found in a stated place. Whether probable cause exists depends on the information known to the officers at the time of the search." *Id.* at 433. "Probable cause is traditionally determined on the basis of the totality of the circumstances." *Kazmierczak*, 461 Mich at 423. "Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity." *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). When conducting a pat-down search, the officer may seize any item that, by its feel, creates probable cause to believe that the item is contraband. *People v Champion*, 452 Mich 92, 111-114; 549 NW2d 849 (1996).

Here, the trier of fact could reasonably conclude that the trooper had probable cause to believe defendant possessed contraband when he felt a hard object between defendant's buttocks when patting down the outside of defendant's clothing. The officer and his partner then took steps to remove the object. *Champion*, 452 Mich at 111-114. The officers' actions were justified under the "plain feel" exception to the warrant requirement. *Champion*, 452 Mich at 100-101.

Defendant claims the search was unreasonable because the officers strip-searched him or conducted an intrusive and unconstitutional body cavity search on the roadside while they restrained him. MCL 764.25a(1) states that "'strip search' means a search which requires a person to remove his or her clothing to expose underclothing, breasts, buttocks, or genitalia."

Here, the officers denied that they removed defendant's outer pants or the boxer shorts underneath his pants. The first officer testified that he merely lowered defendant's outer pants slightly, exposing the waistline on defendant's boxer shorts, and pulled the boxer shorts away from defendant's body. At no point did the officers require defendant to expose his buttocks to the public during their search. Their actions did not constitute a strip search as defined by statute.

The evidence further demonstrates that the officers did not conduct a body cavity search. A body cavity search is "a physical intrusion into a body cavity for the purposes of discovering any object concealed in a body cavity." MCL 764.25b(1)(b). "'Body cavity' means the interior

of the human body not visible by normal observation, being the stomach or rectal cavity of a person and the vagina of a female person." MCL 764.25b(1)(a).

The testimony established that the search consisted of an officer pulling defendant's boxer shorts away from his body and shining a flashlight in the area where the officer felt the hard object. While the first officer held the flashlight, the second officer took a key and tilted the object forward, then grasped it with his two fingers to remove it. The second officer described the object as completely visible when defendant's undergarment was pulled back and testified that the object was not in defendant's rectal cavity. The first officer denied ever manipulating defendant's buttocks or entering defendant's rectal cavity to find the object. The second officer also denied inserting a key in defendant's buttocks or anus. On the basis of this evidence, the officers did not physically intrude into defendant's rectal cavity while carrying out their search and, therefore, did not conduct a body cavity search.

Defendant argues that the search invaded his reasonable expectation of privacy because it was conducted on a busy, public street rather than in a police station or correctional facility. Defendant contends he was exposed not only to the officers conducting the search, but to any driver of a motor vehicle passing by.

To show a legitimate expectation of privacy in a Fourth Amendment claim, a defendant must demonstrate that, under the totality of the circumstances, there existed a legitimate personal expectation of privacy in the area or object searched. Also, the individual's expectation must be one that society accepts as reasonable. *People v Custer (On Remand)*, 248 Mich App 552, 560; 640 NW 2d 576 (2001).

Here, the officers conducted their pat-down search in a reasonable manner. The officers took steps to ensure that defendant was safe during the search and that his privacy was protected. During the search, defendant was positioned in front of his vehicle to screen him from traffic coming in the same direction. Also, two officers positioned their bodies physically between defendant and the roadway to provide him as much privacy as possible. Defendant was also screened by a median separation on the freeway, where oncoming traffic was not visible. Moreover, the pat-down search took place at night. The testimony of the police officers establish that defendant was not exposed to passing motor vehicles and that his privacy was not violated.[1]

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[1] Our holding that the search was clearly reasonable is dispositive. However, we observe that, if defendant made any showing that the officers acted unreasonably in the manner in which they removed the cocaine from defendant's underwear, it is not at all clear under our case law that the exclusionary rule would apply. The officers discovered the drugs during an otherwise lawful search and, if not at the scene of the stop, undoubtedly would have discovered and removed the baggie at some point. Thus, there is no causal nexus between the officers' conduct here and the discovery of the drugs to justify suppression. It is well-settled that "[w]hether the exclusionary sanction is appropriately imposed in a particular case . . . is an 'issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Mark J. Cavanagh

police conduct.' " *United States v Leon*, 468 US 897, 906; 104 S Ct 3405; 82 L Ed 2d 677 (1984), quoting *Illinois v Gates*, 462 US 213, 223; 103 S Ct 2317; 76 L Ed 2d 527 (1983). Further, suppression of evidence is a "last resort, not our first impulse," *Hudson v Michigan*, 547 US 586, 591; 126 S Ct 2159; 165 L Ed 2d 56 (2006), particularly where "the interest protected by the constitutional guarantee . . . would not be served by suppression of the evidence obtained." *Id*. at 593. Had defendant made some showing of embarrassing or offensive conduct by the officers, which he did not, a civil action under 42 USC § 1983 would have been arguably been the appropriate deterrent, not suppression of the drugs in his criminal trial.