

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 11, 2012

v

KENNIE CLAY APPLEWHITE,

Defendant-Appellant.

No. 308808
Kent Circuit Court
LC No. 11-005780-FH

Before: TALBOT, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals by right his conviction after a bench trial of possession with intent to deliver less than 50 grams of a controlled substance, MCL 333.7401. We affirm.

On June 8, 2011, starting at about 2:00 p.m., police officers of the city of Grand Rapids conducted surveillance in an area of the city near Cherry Street and Division Street. Detective Todd Butler almost immediately noticed defendant standing at the corner of Sheldon and Cherry and not moving with the normal flow of foot traffic. While observing defendant for approximately 30 minutes, Detective Butler saw six individuals contact defendant, and each contact lasted a minute or less. Initially, each time defendant had contact with one of the individuals, they briefly stepped out of Detective Butler's sight. Detective Butler changed his position so he would not lose sight of defendant to witness the fifth and sixth contacts. Detective Butler observed defendant "put his arm down . . . into his underwear" after contact. Detective Butler and Detective Maureen O'Brien testified that immediately after contacting defendant, the fifth individual repeatedly tried to light an object held to his mouth, consistent with use of crack cocaine. Detective O'Brien believed she had observed a hand-to-hand drug transaction.

Officers approached defendant and asked him if he had anything illegal. Defendant stated, "[i]t's all right there" and looked down, towards his waistband. An officer handcuffed defendant and searched the area defendant had indicated. He found a tobacco pouch in defendant's pocket containing sandwich bags and a substance, which later tested positive for cocaine. A subsequent search found a pouch inside defendant's pants but outside his underwear containing defendant's identification and \$253.

Defendant moved to suppress the evidence before trial. The trial court denied the motion after the close of plaintiff's proofs. We review a trial court's findings of fact at a suppression

hearing for clear error and the trial court's ultimate decision on a motion to suppress de novo. *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009).

Reasonableness is the touchstone of a constitutional search or seizure. *Id.* In general, a search or seizure conducted without prior judicial approval is unreasonable unless the police have both probable cause and the circumstances establish an exception to the warrant requirement. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000). One exception to the warrant requirement is a search incident to the lawful arrest of a person for weapons or evidence to prevent its concealment or destruction. *Arizona v Gant*, 556 US 332, 338-339; 129 S Ct 1710; 173 L Ed 2d 485 (2009); *People v Solomon*, 220 Mich App 527, 530; 560 NW2d 651 (1996). A lawful arrest without a warrant requires that the police 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).

In this case, the officers observed defendant remain in the same general location and make brief contact with six individuals within about 30 minutes. Immediately after contact with defendant, the fifth individual appeared to be lighting crack cocaine. Defendant was reaching into his underwear. When asked if he had anything illegal, defendant stated "[i]t's all right there" and looked down, towards his waistband. The observations of defendant's behavior, and his response regarding his possession of illegal substances, provided the police with probable cause to arrest defendant for possession of controlled substances with intent to deliver and the search incident to arrest was valid. *Solomon*, 220 Mich App at 530.

We further note that even if the officers did not have probable cause to arrest defendant when they first approached him, there were grounds for a valid investigatory stop at that time. Officers "may make a valid investigatory stop if they possess 'reasonable suspicion' that crime is afoot." *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996) (citation omitted). A reasonable suspicion is "more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *Id.* In this case, the officers' observations of defendant's behavior established particularized reasons to suspect defendant was involved with illegal drug transactions, which justified an investigatory stop. In the course of the valid investigatory encounter with defendant, the police established probable cause to arrest defendant when he made his incriminating statement regarding his possession of contraband. Thereafter, his arrest without a warrant was based on probable cause and the search incident to arrest was valid. *Id.* at 115; *Solomon*, 220 Mich App at 530. Consequently, the trial court properly denied the motion to suppress.

We affirm.

/s/ Michael J. Talbot
/s/ Jane E. Markey
/s/ Michael J. Riordan