STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 24, 2013
v	No. 309829 Wayne Circuit Court
SOLOMON DASHAWN COBB, Defendant-Appellant.	LC No. 11-010814-FH

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

PER CURIAM.

Defendant appeals his bench trial convictions of carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm (felon in possession), MCL 750.224f, and possession of a firearm during the commission of a felony, second offense (felony-firearm), MCL 750.227b. The court sentenced defendant to three years' probation for the CCW and felon in possession convictions and five years in prison for the felony-firearm conviction. We affirm.

Defendant argues that he was unlawfully arrested and that the firearm, as a fruit of an unlawful arrest, should not have been admitted as evidence at trial. Defendant claims that the unlawful arrest and wrongfully admitted evidence violated his constitutional rights to due process and a fair trial. We disagree.

Defendant contends that Officer James Taylor had no specific reason to believe that defendant was engaged in an illegal activity, including when defendant ran from the police car. Because Officer Taylor lacked sufficient reason to chase and arrest defendant, defendant argues, the firearm that was seized was the result of an illegal search and seizure and should not have been admitted into evidence at trial. This Court reviews a trial court's factual findings regarding suppression of evidence for clear error, and the trial court's ultimate ruling de novo. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). This Court reviews constitutional issues de novo. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). Furthermore, this Court's review of a lower court's factual findings in a suppression hearing is for clear error, meaning the findings below will be affirmed absent a definite conviction that a mistake was made. *People v Lombardo*, 216 Mich App 500, 504; 549 NW2d 596 (1996). A trial court's rulings on a motion for new trial are reviewed for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

There are circumstances where a police officer may approach and temporarily detain a person for the purpose of investigating possible criminal behavior, though the officer lacks probable cause to support an arrest. *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). A brief detention does not violate the Fourth Amendment if the officer has a reasonable suspicion that criminal activity is afoot. *Terry*, 392 US at 30–31; *Jenkins*, 472 Mich at 32; *People v Custer*, 465 Mich 319, 327; 630 NW2d 870 (2001); *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001). Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case, based on an analysis of the totality of the facts and circumstances. *Jenkins*, 472 Mich at 32; *Oliver*, 464 Mich at 192. A determination regarding whether reasonable suspicion exists "'must be based on common sense judgments and inferences about human behavior.'" *Jenkins*, 472 Mich at 32, quoting *Oliver*, 464 Mich at 197 (internal citations omitted).

Furthermore, a "seizure" within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave. *People v Mamon*, 435 Mich 1, 11; 457 NW2d 623 (1990). When an officer approaches a person and seeks voluntary cooperation through non-coercive questioning, a person is not restrained and is not considered to be seized. *Florida v Royer*, 460 US 491, 497–498; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (plurality opinion).

Here, the officers testified that when defendant saw the marked scout car, he looked shocked to see the police car, stutter stepped, and began holding an object that was concealed in his pants. The totality of defendant's actions upon seeing the scout car gave the officers, through their police training and common-sense judgment, a reasonable suspicion that defendant could be engaged in some form of criminal behavior. With reasonable suspicion, Officer Taylor stepped out of the car and attempted to conduct an investigatory stop on defendant to see if he was partaking in any kind of criminal activity.

However, as soon as Officer Taylor opened his door, but before he got out of the car, defendant ran away. From these facts, it is clear that defendant was, at the inception of his flight, not yet seized by Officer Taylor, within the meaning of the Fourth Amendment.

The Fourth Amendment is not traditionally implicated until the acting officer actually hinders a defendant's attempt to leave the scene, thereby "seizing" him within the meaning of the Fourth Amendment. *Jenkins*, 472 Mich at 34. A seizure requires the application of physical force or the submission to the assertion of authority. *California v Hodari D*, 499 US 621, 626; 111 S Ct 1547; 113 L Ed 2d 690 (1991); *People v Frohriep*, 247 Mich App 692, 700; 637 NW2d 562 (2001); *People v Lewis*, 199 Mich App 556, 560; 502 NW2d 363 (1993). Here, the earliest defendant was seized was when the officer had him pinned on the ground. Defendant was not in a state of seizure at the point he fled from the police when Officer Taylor opened his door.

Whether seizure of an object has occurred also depends on whether the defendant had a justifiable expectation of privacy in the object. *People v Zahn*, 234 Mich App 438, 448; 594 NW2d 120 (1999). If the defendant has abandoned an object, he no longer has an expectation of privacy in the object. Any police confiscation of the object after its abandonment is not a seizure in the constitutional sense. *People v Taylor*, 253 Mich App 399, 406; 655 NW2d 291 (2002); *People v Boykin*, 119 Mich App 763, 766; 327 NW2d 351 (1982). However, coercive police

conduct that prompts abandonment nullifies the abandonment. *People v Rice*, 192 Mich App 512, 516; 482 NW2d 192 (1992). Because defendant's actions gave rise to reasonable suspicion and he was not seized until he was apprehended, the firearm that Officer Taylor found and that was subsequently admitted as evidence, was not the fruit of an illegal search and seizure, because defendant abandoned the gun before being seized.

Defendant abandoned his reasonable expectation of privacy in the firearm when he discarded it. An expectation of privacy is legitimate if the person has an actual, subjective expectation of privacy and that actual expectation is one that society recognizes as reasonable. *Bond v United States*, 529 US 334, 338; 120 S Ct 1462; 146 L Ed 2d 365 (2000); *People v Perlos*, 436 Mich 305, 317; 462 NW2d 310 (1990); *People v Smith*, 420 Mich 1, 27; 360 NW2d 841 (1984); *People v Antwine*, 293 Mich App 192, 195; 809 NW2d 439 (2011).

Officer Taylor testified that he saw defendant throw the firearm in the direction that he was fleeing. The chase occurred outside and the gun landed by a wooden fence. By dropping the firearm outside, defendant discarded any reasonable expectation of privacy in the object. Also, as stated before, the initial "stop" by the officers was legitimate. Therefore, the seizure of the firearm was not illegal and its admission at trial was proper.

Defendant also says that his Fourth Amendment right was violated when the officers chased him through his curtilage, which was enclosed off from the public by a fence. However, although defendant considered Ellow Louise Cobb's (Ellow) house to be his residence, the record shows that defendant owned and lived at a different address. Therefore, defendant cannot establish a Fourth Amendment violation regarding the officers chasing him through Ellow's curtilage because defendant did not reside at Ellow's house.[1]

Further, defendant contends that he did not receive effective assistance of counsel because defense counsel failed to object regarding the lawfulness of defendant's arrest and the admission of the firearm into evidence, failed to seek adjournment of the trial until Officer Johnny Fox was available to testify, failed to request a hearing by the gun committee, and pressured defendant to waive his right to a jury trial. We disagree.

An ineffective assistance of counsel claim presents a mixed question of fact and also constitutional law. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). A trial court's findings of fact are reviewed for clear error and issues of constitutional law are reviewed de novo by this Court. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional

[1] The Fourth Amendment reads, in part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" US Const, Am IV. Defendant claims that he lived at the residence, but he owned a residence at a different address and there is no evidence stating how long he planned to remain at Ellow's house after he arrived there the night before.

norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that actually occurred was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

First, as established above, defendant was not unlawfully arrested and the firearm was properly admitted into evidence. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Because it would have been futile to object to the lawfulness of defendant's arrest and the admission of the firearm into evidence, defendant's counsel was not ineffective for failing to object regarding these two claims.

Second, given the testimony of Officer Taylor and Officer Ernest Cleaves, it would appear that Officer Fox's testimony would have corroborated the testimony of his colleagues. It appears that it was in defendant's best interest that Officer Fox did not appear at trial. Because there is no evidence showing that Officer Fox's testimony would have been significantly different from that of the other two officers, defendant cannot show that, but for Officer Fox's failure to testify, there was a reasonable probability that the result of trial would have been different and that Officer Fox's absence caused a fundamentally unfair or unreliable result.

Third, defendant has not produced any transcripts or other evidence that would support his claim that defense counsel pressured him into waiving a jury trial. Furthermore, even if defendant produced evidence indicating that he was talked out of a jury trial, he does not offer any evidence showing that the trial's outcome would have been different if he had chosen a jury trial over a bench trial.

Fourth, defendant testified at trial that he was not in possession of a gun on the day of the incident. If defendant was unwilling to admit that he had a gun, then the prosecution's gun committee would have been unable to consider the case. Defendant has failed to demonstrate a reasonable probability that, but for the failure to request a gun committee hearing, the result would have been different.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Kathleen Jansen