# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant,<br><br>v<br><br>JERRY JOSEPH BOLDUC,<br><br>Defendant-Appellee. | FOR PUBLICATION<br>August 24, 2004<br>9:20 a.m.<br><br>No. 244970<br>Genesee Circuit Court<br>LC No. 01-071102-AR<br><br>Official Reported Version |

Before: Hoekstra, P.J., and O'Connell and Donofrio, JJ.

HOEKSTRA, P.J.

This case is before us by order of our Supreme Court, which, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *People v Bolduc*, 467 Mich 900 (2002). In this case, we are required to further define what is permissible conduct by the police when conducting a knock and talk procedure.[1] In *People v Frohriep*, 247 Mich App 692; 637 NW2d 562 (2001), we determined that the knock and talk procedure itself is not unconstitutional, but we also concluded that the knock and talk procedure is subject to judicial review to determine whether the particular circumstances comply with general constitutional protections. *Id.* at 697-698. The case presently before us raises the issue whether it is unreasonable, and therefore unconstitutional, for the police to prolong a knock and talk encounter at a home after the resident who is the focus of the investigation, defendant herein, has refused to grant permission to search and has directed the police to leave. The district court found that under the circumstances of this case the conduct of the police in extending the encounter with defendant was inherently coercive, and thus the district court suppressed evidence of defendant's incriminating statements and the marijuana that defendant turned over to the police. The circuit court affirmed. We conclude that the district court's findings were not clearly erroneous and that the coerciveness of the encounter constituted an unreasonable seizure

[1] In general, "the knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items." *People v Frohriep*, 247 Mich App 692, 697; 637 NW2d 562 (2001).

of defendant's person. Further, the district court properly suppressed defendant's incriminating statements and the marijuana found in defendant's residence and dismissed the case. Accordingly, we affirm the circuit court's order affirming the district court's order of dismissal.

## I. Facts[2] and Procedural History

At the preliminary examination, the prosecution presented only one witness,[3] a police officer, Captain Michael Compeau, who testified as follows. Approximately two weeks before he and another police officer initiated the knock and talk encounter with defendant, Compeau received a tip that defendant was storing marijuana at his residence. On several occasions during the intervening weeks, he conducted surveillance of defendant, but never observed anything that supported the tip. On the date of the incident, April 16, 2001, Compeau, along with four other police officers, went to defendant's residence at approximately 7:00 p.m. to conduct the knock and talk procedure.

At defendant's residence, Compeau and one other officer approached the front door and defendant admitted them into his residence. Just inside the front door, a three to four minute encounter took place between defendant and the officers, with Compeau apparently doing all of the talking for the two officers. Compeau informed defendant, who was initially upset by the presence of the officers, but soon calmed down and became "gentleman[ly]," that they were police officers and that they had received a tip that marijuana was stored at his residence. Although defendant did not deny having marijuana, he "said no" to Compeau's request for permission to search the home. When questioned regarding whether defendant asked them to leave, Compeau responded, "He certainly did, yes." Compeau further related that "[defendant] put his hands up, and I said don't—don't touch me, [sic] and that's the time we started talking about the money."

Compeau initiated the conversation concerning money after defendant denied the officers consent to search and instructed them to leave both orally and by gesture directed at Compeau's person. The topic of money arose when Compeau asked defendant about the large bulge in defendant's rear pocket. While Compeau could not articulate when he first observed the bulge, he stated that he may have noticed it when he was conducting a pat-down search of defendant's person around the waist area for weapons "to protect myself" and because "[i]t's good police procedure and safety." However, Compeau also stated that nothing from the tip, his surveillance, or defendant's conduct at his residence gave Compeau reason to suspect that defendant would be armed with a weapon.

When Compeau asked defendant what was causing the large bulge in his rear pocket, defendant responded that he had sold a car that day for $6,500 and he offered to take Compeau to his car lot to verify the sale. Defendant rode to the car lot with Compeau and, once there,

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[2] Because no trial has occurred in this matter, our recitation of facts is taken from the preliminary examination transcript.

[3] The prosecution also read into the record pertinent portions of the laboratory report on the evidence obtained from defendant.

defendant was unable to verify that he sold a car that day. Eventually, defendant admitted having marijuana and took the officers back to his residence, where he opened his freezer, retrieved nine bags of marijuana that weighed 3.7 pounds, and gave them to the police. Defendant voluntarily went to the police station with Compeau while other officers remained at defendant's house to conduct a more thorough search. While at the station, and without being advised of his *Miranda*[4] rights, defendant gave a tape-recorded statement[5] and later signed a consent to search form.[6]

Defendant was charged with possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). At the preliminary examination, the district court dismissed the charge, finding that defendant's self-incriminating statements and the marijuana were obtained after police officers improperly failed to leave defendant's house. Specifically, the district court found that defendant denied permission to search and directed the officers both orally and by gesture to leave. Thereafter, by continuing to question defendant about the large bulge in his rear pocket, Compeau's conduct was inherently coercive because he was using an "indirect offer of force" and indicating that he was not leaving until "I get the information I want." Thus, the district court entered an order of dismissal of the charge against defendant.

The prosecution appealed the district court's order of dismissal to the circuit court, which affirmed the district court's order. The prosecution then filed with this Court a delayed application for leave to appeal the circuit court's order. This Court denied the prosecution's application "for lack of merit in the grounds presented." *People v Bolduc*, unpublished order of the Court of Appeals, entered June 17, 2002 (Docket No. 241103). The prosecution then sought leave to appeal in the Supreme Court. As previously stated, in lieu of granting leave to appeal, our Supreme Court issued an order remanding the case to this Court for consideration as on leave granted. 467 Mich 900.

## II. Standard of Review

In *Frohriep, supra* at 702, we stated the standard of review when considering a trial court's ruling on a motion to suppress evidence:

> We review a trial court's findings of fact for clear error, giving deference to the trial court's resolution of factual issues. *People v Farrow*, 461 Mich 202, 208-209; 600 NW2d 634 (1999), quoting *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). We overstep our review function if we substitute our judgment for that of the trial court and make independent

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[5] Defendant was fingerprinted at the police station before giving the tape-recorded statement.

[6] Compeau testified that during this entire incident, defendant was not under arrest.

findings. *Farrow, supra* at 209. However, we review de novo the trial court's ultimate decision on a motion to suppress. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000).

III. Law

While this Court held in *Frohriep, supra* at 697-698, that the knock and talk procedure is not unconstitutional per se, we noted that it is not without constitutional implications. Specifically, this Court stated that "a person's Fourth Amendment right to be free of unreasonable searches and seizures may be implicated where a person, under particular circumstances, does not feel free to leave or where consent to search is coerced." *Id*. at 698.

Both US Const, Am IV[7] and Const 1963, art 1, § 11[8] guarantee the right against unreasonable searches and seizures.[9] See also *Illinois v McArthur*, 531 US 326, 330; 121 S Ct 946; 148 L Ed 2d 838 (2001); *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). In *Frohriep, supra* at 699-700, we explained:

> The Fourth Amendment protects people from unreasonable searches and seizures. *People v Faucett*, 442 Mich 153, 157-158; 499 NW2d 764 (1993). Stated another way, "[t]he lawfulness of a search or seizure depends on its reasonableness." [*People v*] *Snider*, [239 Mich App 393,] 406 [ 608 NW2d 502 (2000)]. Our Supreme Court has explained that "[t]he reasonableness of a Fourth Amendment seizure balances the governmental interest that justifies the intrusion against an individual's right to be free of arbitrary police interference." *Faucett, supra* at 158.

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[7] The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[8] Section 11 of article 1 of the Michigan Constitution provides:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

[9] Michigan's constitutional prohibition against unreasonable searches and seizures is to be construed to provide the same protection as that secured by the Fourth Amendment of the United States Constitution, absent compelling reason to impose a different interpretation. *People v Green*, 260 Mich App 392, 396; 677 NW2d 363 (2004).

> In order for any police procedure to have constitutional search and seizure implications, a search or seizure must have taken place. US Const, Am IV; Const 1963, art 1, § 11; *United States v Mendenhall*, 446 US 544, 554; 100 S Ct 1870; 64 L Ed 2d 497 (1980) (opinion of Stewart, J.); see also *Florida v Royer*, 460 US 491, 498; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (plurality opinion). As the Sixth Circuit Court of Appeals explained, "[t]he safeguards of the Constitution, with respect to police/citizen contact, will vest only after the citizen has been seized." *United States v Richardson*, 949 F2d 851, 855 (CA 6, 1991). The Sixth Circuit Court of Appeals agreed that "'voluntary cooperation of a citizen in response to non-coercive questioning [raises no constitutional issues.]'" *Id*., quoting *United States v Morgan*, 936 F2d 1561, 1566 (CA 10, 1991).
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> In *Terry v Ohio*, 392 US 1, 19, n 16; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court stated:
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> > Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.
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> Accord *Florida v Bostick*, 501 US 429, 434; 111 S Ct 2382; 115 L Ed 2d 389 (1991); *Mendenhall, supra* at 551-557.

Generally stated, the test for what constitutes a seizure is whether, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *INS v Delgado*, 466 US 210, 215; 104 S Ct 1758; 80 L Ed 2d 247 (1984), quoting *Mendenhall, supra* at 554 (Stewart, J.); *Michigan v Chesternut*, 486 US 567, 573; 108 S Ct 1975; 100 L Ed 2d 565 (1988); *People v Sasson*, 178 Mich App 257, 260-262; 443 NW2d 394 (1989). However, in situations where a person would have no desire to leave, such as where the person is seated on a bus, this test is not an accurate measure of the coercive effect of an encounter with police.[10] Rather, "[i]n such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick, supra* at 436. The *Bostick* Court stated, "[w]e have said before that the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Id.* at 437, quoting *Chesternut, supra* at 569; see also *Kaupp v Texas*, 538 US 626; 123 S Ct 1843; 155 L Ed 2d 814 (2003); *People v Bloxson*, 205 Mich App 236, 242-244; 517 NW2d 563 (1994). The *Bostick* Court summarized:

> We adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances

[10] In *Bostick, supra* at 435, the United States Supreme Court stated that the state court erred "in focusing on whether Bostick was 'free to leave' rather than on the principle that those words were intended to capture."

> surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus. [*Bostick, supra* at 439-440.]

Here, the knock and talk encounter took place at defendant's home, and a person's home garners special consideration in the law. "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo v United States*, 533 US 27, 31; 121 S Ct 2038; 150 L Ed 2d 94 (2001), quoting *Silverman v United States*, 365 US 505, 511; 81 S Ct 679; 5 L Ed 2d 734 (1961). "'[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Payton v New York*, 445 US 573, 585-586; 100 S Ct 1371; 63 L Ed 2d 639 (1980), quoting *United States v United States District Court*, 407 US 297, 313; 92 S Ct 2125; 32 L Ed 2d 752 (1972). "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton, supra* at 586; *People v Johnson*, 431 Mich 683, 691-692 n 5; 431 NW2d 825 (1988).

While searches and seizures without warrants are generally unreasonable per se under the Fourth Amendment and Const 1963, art 1, § 11, there are several exceptions, including consent. *People v Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999); *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). Consent to search must be freely and voluntarily given and is based on an evaluation of the totality of the circumstances. *Borchard-Ruhland, supra* at 294. Consent is not voluntary if it is the result of coercion or duress. *Id.*

## IV. Analysis

On appeal, the prosecution claims that "the [c]ircuit [c]ourt erred in affirming the [d]istrict [c]ourt's order of dismissal." In essence, the prosecution's position is that the district court clearly erred in finding that Compeau's questioning of defendant concerning the bulge in his pocket after defendant directed the officers to leave was inherently coercive, and therefore constituted an illegal seizure of defendant's person. We disagree.

Compeau's testimony at the preliminary examination established that two officers confronted defendant at his residence, identified themselves as police officers, and while inside defendant's home informed defendant that they had reason to believe that he was storing marijuana. Defendant responded by denying permission to search and by requesting, both orally and by gesture, that they leave the premises. Compeau ordered defendant to not touch him when defendant gestured toward him, apparently in an effort to get the officers to leave his home. Rather than leave, however, the officers turned their attention to a large bulge in defendant's rear pocket and asked defendant to explain it. The evidence also reveals that Compeau patted down defendant for weapons even though Compeau had no reason to suspect that defendant was armed with a weapon. Given this evidence, we cannot say that the district court clearly erred in finding that the circumstances, as they existed when the police failed to leave and instead persisted by asking defendant to explain a bulging pocket, were inherently coercive. By failing to leave

defendant's home when requested to do so, the police officers suggested that they were in control of the situation and would not accept defendant's exercise of the right to preclude them from further activity at the home.

Further, a "seizure" occurs when a police officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Frohriep, supra* at 700, quoting *Terry, supra* at 20 n 16; see also *People v Lewis*, 251 Mich App 58, 68-69; 649 NW2d 792 (2002) (person is "'seized' under the Fourth Amendment when a police officer has restrained the person's individual freedom"). At the pivotal moment in the present case, i.e., the point when the police could either leave as requested or defy that request, the police chose the latter course. Compeau admonished defendant not to touch him and then pursued a new line of inquiry with defendant. What message does that send? The district court concluded, and we think rightly so, that this was an "indirect offer of force" indicating that they were not going away until "I get the information I want." A person who is the subject of that tactic in his own home has no recourse. As is well-settled in the context of the law of self-defense, there is no place to retreat to when one is in his own home. See, e.g., *People v Riddle*, 467 Mich 116, 120-121, 134-135; 649 NW2d 30 (2002).[11] Unlike a street encounter, a person such as defendant does not have the option of testing whether he is actually confined by the police by simply walking away. Where was defendant to go to avoid the intrusion of the police upon his own property? At that point, defendant had done everything that was reasonably possible for him to convey the message that the police were no longer welcome in his home. And despite his efforts, the message in return

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[11] In *Riddle, supra* at 134-135, our Supreme Court explained:

> It is universally accepted that retreat is not a factor in determining whether a defensive killing was necessary when it occurred in the accused's dwelling:
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> "Regardless of any general theory to retreat as far as practicable before one can justify turning upon his assailant and taking life in self-defense, the law imposes no duty to retreat upon one who, free from fault in bringing on a difficulty, is attacked at or in his or her own dwelling or home. Upon the theory that a man's house is his castle, and that he has a right to protect it and those within it from intrusion or attack, the rule is practically universal that when a person is attacked in his own dwelling he may stand at bay and turn on and kill his assailant if this is apparently necessary to save his own life or to protect himself from great bodily harm. [40 Am Jur 2d, § 167, p 636.]" [Emphasis omitted.]
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> The rule has been defended as arising from "'an instinctive feeling that a home is sacred, and that it is improper to require a man to submit to pursuit from room to room in his own house.'" *People v Godsey*, 54 Mich App 316, 319; 220 NW2d 801 (1974) (citations omitted). Moreover, in a very real sense a person's dwelling is his primary place of refuge. Where a person is in his "castle," there is simply *no safer place* to retreat. [Emphasis in original.]

was that we are here until we decide to go, which is not until you have answered all our questions. A person in his own home ought not be placed in that situation by police action without being considered seized. In our judgment, the circumstances here leave no doubt that a reasonable person in defendant's position would have believed that he was not free to go about his home, and moreover, because of the police presence and action in his home, that person essentially lacked the ability to remove them from his home. Considering all the circumstances surrounding the knock and talk encounter, especially the fact that the police were in defendant's home and did not leave despite defendant's request and gesture, the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. Clearly, defendant was not at liberty to ignore the police presence and go about his business. *Bostick, supra*. Consequently, under these circumstances we conclude that the police officers' persistence despite defendant's efforts to terminate the encounter resulted in defendant being seized in violation of his constitutional rights.

However, our analysis does not end here. The remaining question is whether the inherently coercive context in which defendant was seized entitles defendant to the relief of having his incriminating statements and the marijuana suppressed. Defendant's entitlement to relief is compromised by the fact, as the prosecution correctly points out, that defendant exhibited no reluctance to answer Compeau's question concerning the bulge in his pocket, quickly offered to verify his answer by taking Compeau to his car lot, was not formally placed under arrest and made his incriminating statements to the police at the car lot, and voluntarily returned with the police and turned over to the police the marijuana in his freezer. Thus, the events that actually incriminated defendant took place at a point in time that was much later than the events that transpired at his home during the initial knock and talk encounter and, in part, at a different location. Moreover, all the incriminating events occurred during a period when there was no indication of a formal arrest or any subsequent coercive conduct by the police. Nevertheless, we conclude that defendant is entitled to the suppression of his incriminating statements and the marijuana. Defendant's conduct of apparent cooperation by answering the question and offering to accompany Compeau to his car lot was the product of the seizure of his person that resulted from the failure of the police to depart from his residence, and ultimately led to the retrieval of the marijuana and defendant making self-incriminating statements. Because this evidence ensued from the police officers' improper conduct in failing to leave when requested, they were properly suppressed as the fruit of the illegal seizure when the police officers failed to leave the house as requested by defendant. *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963) (suppression of unlawfully obtained evidence required when unlawful seizure not sufficiently attenuated or purged); *People v Cartwright*, 454 Mich 550, 557-558; 563 NW2d 208 (1997) (remedy for violation of the Fourth Amendment right against unreasonable searches and seizures is suppression of the unlawfully obtained evidence).

## V. Conclusion

In sum, while the police are free to employ the knock and talk procedure, *Frohriep, supra*, they have no right to remain in a home without consent, absent some other particularized legal justification. A person is seized for purposes of the Fourth Amendment when the police fail to promptly leave the person's house following the person's request that they do so, absent a

legal basis for the police to remain without the person's consent. Accordingly, we affirm the circuit court's order affirming the district court's dismissal of this case.

Affirmed.

Donofrio, J., concurred.

/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio