STATE OF MICHIGAN

COURT OF APPEALS

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

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

O'CONNELL, J. (*dissenting*).

I respectfully dissent. For a Fourth Amendment violation to occur, defendant must be either physically or constructively seized.[1] No seizure occurred here, because defendant felt free to break off his contact with the police and ask them to leave his home—in fact he initially did so. The majority concludes that a three to four minute conversation with defendant concerning a bulge of money in defendant's pocket[2] amounted to a seizure of defendant's person. I disagree. I would reverse the lower court's decision.

Because defendant allowed the police into his home and initially offered to participate in their investigation, defendant was not seized. *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). Nor did the officers conduct a search of the premises during their initial visit, so the Fourth Amendment's prohibition against unreasonable searches and seizures simply does

[1] I agree with the majority that police officers may not use the "knock and talk" procedure to bulldog a confession out of someone who merely complies with a request to speak with officers in his home. However, I disagree with the majority that the facts of this case reflect such an improper effort by police.

[2] The bulge in defendant's pocket was $6,500 in cash. Much of the officers' discussion with defendant concerned defendant's spurious explanation for carrying $6,500 in cash in his pocket. In my opinion, any reasonable police officer would grow suspicious and pursue this avenue of questioning when following up on a tip that the defendant was dealing narcotics.

not apply to the primary issue in this case. *Id*. Moreover, the majority overlooks the essential touchstone for whether the police or prosecutor may use information or consent a suspect provides in a knock and talk scenario—voluntariness. A suspect who voluntarily offers information in response to police questioning is not, by definition, knuckling under to coercive police tactics. It stands to reason that police may properly use any information garnered from a consensual dialogue such as the one the police chief initiated in this case.[3] *Id*.

The record lacks any evidence that police officers refused to leave defendant's home or otherwise threatened to remain there until defendant provided a confession. In fact, the police immediately left the home at defendant's request when he offered to take them to his car dealership. The police chief merely asked one more question after defendant asked the officers to leave and began ushering them to the door, and I can find no legal authority for the proposition that an officer must cease all questioning while leaving a lawfully entered home.[4] I agree that a scenario in which an officer persistently questions a suspect while obstinately refusing to leave the suspect's home could qualify as trespassing, an unreasonable seizure of the home, and a coercive tactic worthy of the suppression sanction. MCL 750.552; US Const, Am IV; *Wong Sun v United States*, 371 US 471, 485-486; 83 S Ct 407; 9 L Ed 2d 441 (1963). However, none of these classifications applies to this case.

Rather than stand mute or reassert his desire for the officers' departure, defendant voluntarily, albeit dishonestly, answered the one last question the police chief posed. After defendant began the charade of going to his dealership, he did not express any desire to simply return to his house and end his participation with the investigation. In fact, unlike the typical "knock and talk" scenario, the officers left the home without obtaining defendant's consent to search the house or any valuable information that might lead to a warrant. Swingle & Zoellner, *"Knock and talk" consent searches: If called by a panther, don't anther*, 55 J Mo B 25, 26 (1999). Instead, they only gained defendant's consent to further participate in the investigation, which eventually garnered them a voluntary confession. In short, defendant failed to bear his burden of presenting any evidence that the police coerced his confession, or anything else, from him. Rather, defendant's invitation to enter the home, his response to the chief's question, his agreement to accompany the officers to his dealership, and, most importantly, his confession to

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[3] I note that defendant never asked the police officers to stop asking him questions; he only asked them to leave.

[4] The majority's conclusion to the contrary amounts to placing a gag order on officers as soon as a homeowner asks them to leave. The relationship between an effort to eject the officers and their interjection of more questions is tenuous at best. Again, if the officers had refused to leave until they received information or had exerted any other form of coercion, those additional facts would certainly affect my finding that defendant acted voluntarily. However, the timing and other circumstances surrounding this incident exonerate the officers of wrongdoing, so the district court erred when it imposed the heavy sanction of suppression. *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004).

the crime charged,[5] were all unforced and voluntary actions.[6] Because the majority finds otherwise by reading nonexistent facts into this scant record, I must dissent.

/s/ Peter D. O'Connell

[5] While not essential to my disposition of the case because I would find defendant's responses to the chief voluntary, I must also note that the confession in this case is not "fruit of the poisonous tree." The circumstances between defendant's confession and the chief 's questioning in the house were separated by an extended period. Any pressure defendant felt to cooperate because he could not remove the officers from his home ended when he lured them away from the house. Under these circumstances, the link between the original confrontation and the confession was too attenuated to require suppression. *Wong Sun*, *supra* at 487-488.

[6] I also agree with the majority that defendant probably felt pressure to comply with the officers' requests, but I believe that pressure stemmed from the knowledge that he had hidden several pounds of marijuana a short distance from where the officers stood. While this anxiety over being caught in his wrongdoing undoubtedly clouded defendant's judgment and compelled him to account for his funds and lead the officers away from the house, the source of this compulsion was a pricked conscience, not the state. Therefore, I am convinced that the majority imputes defendant's impulses to the wrong source, and errs in the process.