

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY THOMAS FRANKLIN,

Defendant-Appellant.

UNPUBLISHED

December 5, 1997

No. 186146

Kent Circuit Court

LC No. 94-002316-FH

Before: Markey, P.J., and M.J. Kelly and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and was sentenced as a fourth felony offender, MCL 769.12; MSA 28.1084, to one-and-a-half to fifteen years' imprisonment. He appeals as of right. We affirm.

The trial court correctly denied defendant's motion to suppress the admission into evidence of the cocaine seized from his person. First, defendant argues that he was "stopped" and questioned by a police officer without justification. However, Officer Holly Botts testified at the suppression hearing, without contradiction on this point, that she initially approached defendant and asked him questions. An individual who is approached by a police officer in a public place and asked questions is not, absent some form of detention, subject to a seizure within the meaning of the Fourth Amendment. *People v Shabaz*, 424 Mich 42, 56-57; 378 NW2d 451 (1985); *People v Taylor*, 214 Mich App 167, 170; 542 NW2d 322 (1995), citing *Florida v Royer*, 460 US 491, 497; 103 S Ct 1319; 75 L Ed 2d 229 (1983); *People v Sasson*, 178 Mich App 257, 259-262; 443 NW2d 394 (1989). Accordingly, the initial encounter between the police and defendant did not constitute an unconstitutional search or seizure.

Defendant also argues that Officer Botts searched his person without consent. One may waive Fourth Amendment rights by consenting to a search of one's person. *People v Goforth*, 222 Mich App 306, 309; 564 NW2d 526 (1997). After the encounter commenced, Officer Botts asked for permission to search defendant's person. The officer testified that defendant gave her permission to

search him; defendant testified that he refused to give such consent. Defendant has not provided specific reasons for finding Officer Botts' testimony incredible. Further, the trial court, of course, had a better opportunity to observe and assess the witness' demeanor and credibility. Accordingly, the trial court's finding that defendant consented to the search was not clearly erroneous. *Ornelas v United States*, 517 US ____; 116 S Ct 1657; 134 L Ed 2d 911, 919-920 (1996); *Goforth, supra* at 310. Moreover, the officer's failure to explicitly inform defendant that he need not cooperate did not transform the officer's contact with defendant into a Fourth Amendment seizure. *Sasson, supra* at 262. Thus, defendant has not established that the trial court erred by declining to suppress as evidence the cocaine seized from defendant's person.

Also, the trial court did not abuse its discretion when it refused defendant's request for an instruction on the misdemeanor offense of unlawful use of cocaine. *People v Lucas*, 188 Mich App 554, 582; 470 NW2d 460 (1991). The trial court must instruct a jury on an appropriate lesser included misdemeanor offense if there exists an appropriate relationship between the charged offense and the requested misdemeanor, the requested misdemeanor instruction is supported by a rational view of the record, the defendant has proper notice or has made the request, and the instruction would not result in confusion or injustice. *People v Steele*, 429 Mich 13, 18-22; 412 NW2d 206 (1987); *People v Stephens*, 416 Mich 252, 255, 265; 330 NW2d 675 (1982). Because the misdemeanor offense of unlawful use of cocaine fails to bear an "appropriate relationship" to the felony charge of possession with intent to deliver, defendant was not entitled to have the jury instructed on this misdemeanor offense. *Lucas, supra*.

Affirmed.

/s/ Jane E. Markey

/s/ Michael J. Kelly

/s/ William C. Whitbeck