

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 199473

Genesee Circuit Court

MARKEE BAILEY,

LC No. 93-049618-FH

Defendant-Appellant.

Before: Sawyer, P.J., and Hood and Hoekstra, JJ.

SAWYER, P.J. (dissenting).

I respectfully dissent.

In my opinion, the trial court did not err when it did not suppress the evidence seized by the police officers. I therefore would affirm.

In the course of an investigatory stop, a police officer may conduct a reasonable search for weapons where he has reason to believe that he is dealing with an armed and dangerous individual. *People v Taylor*, 214 Mich App 167, 169; 542 NW2d 322 (1995) (citing *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889, 909 [1968]). In determining the validity of such a search, the issue is whether a reasonably prudent person in the circumstances of the officer would be warranted in the belief that his safety or that of others was in danger. *Id.* In determining the lawfulness of a stop and frisk procedure, this Court must consider the general governmental interest of effective crime prevention and detection, and the more immediate interest of the police officer in protecting himself against armed violence. *Taylor, supra* at 170.

Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, or by putting questions to him if the person is willing to listen. *People v Daniels*, 160 Mich App 614, 617-618; 408 NW2d 398 (1987). Moreover, the police may ask a person to do something, such as produce identification, without necessarily converting the encounter into a *Terry* stop. *Id.* at 619, quoting, *Florida v Royer*, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983). Thus, for *Terry* purposes, a police approach for questioning on the street amounts to a consensual encounter, not a *Terry* stop, unless there exist intimidating circumstances leading the person to reasonably believe he

was not free to leave or the person rebuffs the police officer by refusing to answer and walking away. *Id.* It is in the latter situations that justification for a *Terry* stop must be present before the police may detain the person. *Id.*

Given the facts as stated by the parties prior to the court's ruling, I do not believe that it was improper for Officer Kendall to approach the van in a public place in order to see what was going on inside the van. Once Officer Kendall was standing at the driver's window, defendant continued to stuff something under his right leg. Officer Kendall therefore asked defendant for identification. Because there do not appear to be any facts indicating that defendant did not believe he was free to leave, the encounter did not rise to the level of an investigatory stop at this point. After Officer Kendall asked defendant for identification, defendant did not produce his identification and continued to stuff something under his leg. After defendant refused to produce his identification, Officer Kendall told defendant to put his hands up, but defendant continued to stuff something under his leg. Because there were several men in the van and defendant could have been attempting to hide a weapon, a reasonably prudent person in the circumstances of the officer would be warranted in the belief that his safety or that of others was in danger. Thus, Officer Kendall was justified in ordering defendant to exit the van. Once defendant stepped out of the van, he dropped a baggie containing marijuana. Because the evidence was obtained as a result of a valid investigatory stop, the court's ruling that the stop was legal was not erroneous.

Defendant argues that the facts of this case are analogous to those of *People v Shabaz*, 424 Mich 42; 378 NW2d 451 (1985). In that case, plain-clothed police officers in an unmarked car saw the defendant leaving a building, carrying a small brown paper bag, in an area where "one might expect to find narcotics, concealed weapons, and prostitutes." The defendant saw the police officers and he began stuffing the bag under his vest or in his pants. When the police car nearly came to a complete stop, the defendant "took off running." The officers chased the defendant into a building, but saw nothing in his hands. After they caught up with the defendant, the officers found a closed brown paper bag in the vestibule of the building. The bag contained a gun. The defendant was arrested for unlawfully carrying a concealed weapon. The Supreme Court affirmed the trial court's grant of defendant's motion to suppress, finding that the police did not have an articulable or particularized suspicion based on objective manifestations that the defendant was involved in criminal wrongdoing. *Id.* at 60, 67. The Court noted:

The officers did not approach [the defendant] merely for the purpose of questioning him, after first identifying themselves as police officers, nor was the defendant free to "go on his way." Indeed, when he attempted to "go on his way," he was pursued and seized by the officers. And when the officers spotted the defendant and began to chase him, they did not have probable cause to arrest him. [*Id.* at 58-59.]

To the contrary, in the present case, as indicated above, the police first approached defendant merely for the purpose of asking questions. They did not immediately stop defendant pursuant to an investigatory stop. They did so only after they gained suspicion from his continued attempt to hide something under his leg.

I would affirm.

/s/ David H. Sawyer