

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KHARI L. SPENCE,

Defendant-Appellee.

UNPUBLISHED

June 30, 2000

No. 223026

Wayne Circuit Court

LC No. 97-007418

Before: McDonald, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Defendant was charged with carrying a concealed weapon, MCL 750.227; MSA 28.424. On February 13, 1998, the trial court granted defendant's motion to suppress evidence and dismissed the case. The prosecution appealed this ruling, and on April 30, 1999, this Court remanded the case to the lower court for further factfinding. On September 28, 1999, a hearing was held at which the trial court again granted defendant's motion to suppress and dismissed the case. The prosecution appeals as of right. We reverse and remand for further hearing before a different judge.

The prosecution argues that the trial court's findings regarding defendant's motion to suppress were clearly erroneous. We review a trial court's findings of fact for clear error and a trial court's ultimate decision on a motion to suppress de novo. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). Clear error exists where this Court is left with the definite and firm conviction that a mistake has been made. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (Griffin, J) (1993).

The trial court determined that the stop in this case was a pretext stop. An arrest or stop cannot be used as a pretext to search for evidence of a crime. *People v Haney*, 192 Mich App 207, 209; 480 NW2d 322 (1991). Whether a stop was a pretext depends on an objective analysis of the facts and circumstances of a stop and not upon an officer's subjective intent. *Id.* at 210. In order to make a lawful stop of a vehicle, a police officer must have a reasonable suspicion, based on an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing. *People v Peebles*, 216 Mich App 661, 664-665; 550 NW2d 589 (1996). The totality of the circumstances should be considered when assessing a police officer's suspicion of criminal activity. *Id.*

at 665. Furthermore, a traffic violation is sufficient to justify the stop of a vehicle if the circumstances create a reasonable suspicion that a traffic offense has been committed. *Id.* at 665-666; *Haney, supra* at 210.

The trial court found that the stop was a mere pretext because: defendant was followed for a number of blocks before being pulled over; Officer Szilagy saw nothing suspicious about defendant; and, Officer Panackia could not have seen a bulge in defendant's waistband. Regardless of whether the officers followed defendant for a number of blocks before stopping him, they had a reasonable suspicion that defendant had engaged in a traffic violation by failing to observe a stop sign in violation of MCL 257.611; MSA 9.2311, because the officers saw defendant disregard the stop sign. Because mere traffic violations are sufficient to justify an officer's stop of a vehicle, the stop of defendant's vehicle was lawful and cannot be considered a mere pretext. *Peebles, supra* at 666; *Haney, supra* at 210. The trial court did not find that defendant had stopped at the sign, but rather, found that the stop was a pretext because the officers trailed defendant after he failed to stop at the stop sign. In making this determination, the trial court implicitly found that defendant had committed the traffic violation in this case.

The next question, therefore, is whether the gun should have been suppressed because of events occurring after the lawful stop of defendant's vehicle. The trial court found that no bulge was created when defendant wore the gun at his waist. This finding was not clearly erroneous. Officer Szilagy testified that he did not notice anything unusual about defendant, and both Mitchell (defendant's passenger) and defendant testified that the gun did not create a bulge at defendant's waistband. The trial court chose to believe these three individuals as opposed to Officer Panackia. Also, because Officer Szilagy was standing outside the passenger door, he may have been in a better position than Officer Panackia to observe a bulge caused by the gun worn on defendant's right side. Furthermore, the in-court demonstration showed that no bulge was created when defendant wore the gun in the holster at his waistband. The trial court was in a better position to make this determination, and its finding was, therefore, not clearly erroneous.

The question remains, however, as to whether arguably improper police tactics were used to prompt defendant's disclosure of the gun. Although this Court's previous opinion directed the lower court to render findings on this issue, the trial court stated that such findings were unnecessary given its conclusion that the stop was a mere pretext. Because we conclude that defendant was lawfully stopped based on a traffic violation, this case must be remanded for the trial court to address the issue of whether defendant's disclosure of the gun was in response to improper police tactics.

Finally, in light of the trial court's failure to follow this Court's instructions on remand, we believe that it is necessary to remand this matter to a different judge in order to preserve the appearance of justice. See *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986).

Reversed and remanded to a different judge for further hearing consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ Hilda R. Gage

/s/ Michael J. Talbot