STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARK SCOTT VIANO,

Defendant-Appellee.

UNPUBLISHED
May 3, 2002

No. 231291
Oakland Circuit Court
LC No. 00-173412-FH

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

GRIFFIN, J. (*dissenting*).

I respectfully dissent. I agree with the majority that defendant was validly stopped for the purpose of issuing a ticket for the civil infraction of impeding traffic. Further, I agree that the lower court clearly erred by suppressing the evidence on the basis that defendant was in custody and therefore entitled to the *Miranda*[1] warnings. On the sole issue that is raised in this appeal, I join the majority's holding that "it is clear that the roadside questioning of a motorist detained pursuant to a routine traffic stop does not require *Miranda* warnings because the motorist is not in custody for purposes of *Miranda*."

Despite the incorrect reasoning of the lower court, my colleagues nonetheless affirm the suppression of the evidence of cocaine on the grounds that "the police officer did not have reasonable and articulable suspicion to conduct a patdown search of defendant or to question defendant regarding whether he had any drugs on him." However, these issues are not properly before us because defendant did not raise or argue these questions in the lower court or on appeal. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Further, because defendant never challenged the legality of his *Terry*[2] patdown search, the evidentiary record regarding this unpreserved issue is not fully developed. Nonetheless, after considering these never argued and unpreserved issues in light of the undeveloped record, I respectfully disagree with the majority's Fourth[3] and Fifth Amendment analysis.

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

[2] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

[3] Michigan's constitutional guarantee against unreasonable searches and seizures (art 1, § 11) is
(continued…)

Following a lawful stop, a police officer may patdown the suspect for weapons in the interest of protecting the safety of the officer if there is a reason to believe that the suspect may be armed. *Adams v Williams*, 407 US 143, 156; 92 S Ct 1921; 32 L Ed 2d 612 (1972); *Terry, supra*; *People v Champion*, 452 Mich 92, 99; 549 NW2d 849 (1996). The purpose of the limited search is not to discover evidence of a crime, but to allow the officer to pursue his investigation in safety. *Adams*, *supra*.

In the present case, like *Adams*, the "stop and frisk" of defendant occurred in a "high-crime area." Because of the "high concentration of drug activity and other criminal activity" in the area where defendant was stopped, Hazel Park Police Officer Joseph Lowry testified that he was concerned that defendant may have been armed and, therefore, in the interest of protecting his personal safety conducted a *Terry* patdown search.[4] In his brief on appeal, defendant does not contest the validity of the *Terry* patdown and concedes "the officer did a patdown for his safety." In my view, the limited *Terry* patdown performed by Officer Lowry was reasonable and not a violation of the Fourth Amendment as applied to the states by the Fourteenth Amendment. Further, it was during the lawful patdown search of defendant that Officer Lowry felt a rock or pebble-like object in defendant's pocket. Thereafter, defendant consented to Officer Lowry retrieving the object from his pocket. Under these circumstances, which include a valid patdown search and a consensual seizure, suppression is not warranted under the Fourth Amendment.

(…continued)

not applicable because the motion to suppress regards a narcotic drug seized outside the curtilage of a dwelling house. *People v Custer*, 465 Mich 319, 326, n 2; 630 NW2d 870 (2001) (opinion by Markman, J.).

[4] Officer Lowry testified, in pertinent part, as follows:

> *Q.* Would you relate to the Court what happened in the course of your stopping Mr. Viano on this case for the offense of impeding traffic?
>
> *A.* I made contact with Mr. Viano, escorted him over out of traffic to a safe, level portion of the roadway and then conducted a *Terry* patdown search for weapons.
>
> *Q.* And if you could explain to the Court the reason why you were conducting a *Terry* patdown search on Mr. Viano at this time?
>
> *A.* Well, officer's safety primarily, but –
>
> *Q.* And why was your safety a concern to you at that moment given your contact with Mr. Viano?
>
> *A.* Well, the area he was in.
>
> *Q.* And by the area where your safety, where you believed your safety was in jeopardy, what about that area again?
>
> *A.* Well, high concentration of drug activity and other criminal activity.

Also, the Fifth Amendment does not mandate suppression because defendant was not in custody and *Miranda* warnings were not required. Accordingly, the officer was entitled to ask any questions that defendant voluntarily chose to answer. *Florida v Bostick*, 501 US 429; 111 S Ct 2382; 115 L Ed 2d 389 (1991); *People v Edwards*, 158 Mich App 561; 405 NW2d 200 (1987).

As the United States Supreme Court explained in *Bostick*, *supra* at 434-435:

> Since *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure. In *Florida v Royer*, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (plurality opinion), for example, we explained that "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, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Id.* at 497; 103 S Ct at 1324; see *id.* at 523, n 3; 103 S Ct at 1338, n 3 (Rehnquist, J., dissenting).
>
> . . . We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, . . . ask to examine the individual's identification, . . . and request consent to search his or her luggage . . . as long as the police do not convey a message that compliance with their requests is required. [Citations omitted.]

In my view, defendant's voluntary answer to the officer's question and consent to the retrieval of the cocaine do not warrant the suppression of the evidence. In this regard, the present case is substantially similar to *People v Acoff*, 220 Mich App 396-400; 559 NW2d 103 (1996), where our Court held:

> On appeal, defendant concedes that he consented to the search, but argues that his consent was involuntary because it was given while he was in police custody and, therefore, was the product of coercion. We disagree. The evidence indicates that after defendant got out of his car at the officers' request, he was patted down for weapons and asked if there were any drugs or weapons in the car. Defendant then consented to a search of his car and was placed in the back of the patrol car. On the basis of the foregoing, it is clear that at the time he consented to the search, defendant was merely the subject of a *Terry*-type stop and frisk. The United States Supreme Court has noted that *Terry* stops are not inherently coercive in nature. *Berkemer v McCarty*, 468 US 420, 437-439; 104 S Ct 3138; 82 L Ed 2d 317 (1984). Therefore, we are not persuaded that defendant's consent here was involuntary.

I would reverse and remand for further proceedings consistent with this opinion.

/s/ Richard Allen Griffin