

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BLAIR DAMON JOHNSON,

Defendant-Appellee.

UNPUBLISHED

May 28, 2002

No. 236086

Washtenaw Circuit Court

LC No. 00-000734-FH

Before: Cavanagh, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the decision of the circuit court suppressing evidence and dismissing the case against defendant. We reverse and remand.

Defendant was charged with carrying a concealed weapon, MCL 750.227, and with a firearm safety inspection violation, MCL 750.228. On the evening at issue, the police detained defendant pursuant to the investigation of an armed robbery. While it was determined that defendant was not the suspect in the armed robbery, during the course of the detention and before any arrest, the police discovered a handgun case, described as being “a very common, very familiar gun case,” which contained an unregistered handgun in defendant’s automobile.

The only issue on appeal involves the legality of the discovery by the police of a handgun in defendant’s automobile. This Court reviews a circuit court’s factual findings at a suppression hearing for clear error and the court’s ultimate decision on a motion to suppress de novo. See *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001); *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001).

The United States and the Michigan Constitutions prohibit unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The determination as to “whether a person has a protected privacy right under the Fourth Amendment or art 1, § 11 is whether the defendant had an expectation of privacy in the object of the search and seizure and whether the expectation is one that society recognizes as reasonable.” *People v Powell*, 235 Mich App 557, 560; 599 NW2d 499 (1999). These constitutional protections against unreasonable searches and seizures apply only to government conduct that can be reasonably characterized as a “search” or a “seizure.” *People v McKendrick*, 188 Mich App 128, 142; 468 NW2d 903 (1991), quoting *United States v Attson*, 900 F2d 1427, 1429, 1430-1431 (CA 9, 1990). Therefore, the initial inquiry of a Fourth Amendment analysis is whether there was actually a search.

On the basis of the foregoing, the trial court erred by failing to address plaintiff's contention that the handgun case was in plain view on the front seat of the automobile and, therefore, that the discovery was not the result of a search as contemplated by the constitutional provisions, or that it fit into an exception to the constitutional warrant requirements. Defendant had no reasonable expectation of privacy in the plainly visible interior of his automobile. In an analogous analysis, we determined that an officer's inspection of vehicle identification numbers in an automobile was not an unconstitutional search due to the lack of a reasonable expectation of privacy:

"A car is not a home. An automobile runs and stops on the public roads, where viewers may crawl under it or press their faces against its windows. Its exterior and much of its interior are within the 'plain view' of the casual or purposeful onlooker, and thus are not protected by the Fourth Amendment from searching eyes." [*People v Valoppi*, 61 Mich App 470, 479; 233 NW2d 41 (1975), quoting *United States v Polk*, 433 F2d 644, 647 (CA 5, 1970).]

However, in this case, conflicting evidence exists on the record as to the location of the evidence at issue when it was discovered. The police officer testified that the handgun case was in plain view on the front seat of the automobile when it was discovered, so that anyone could have viewed the handgun case by simply looking through the window of the automobile. The officer also denied having opened the door of the automobile at any time before observing the handgun case. Conversely, defendant contended that the handgun case was not in plain view and insisted that it was located underneath the front seat.

Because the trial court is in the better position to make factual determinations based on the credibility of witnesses, this case is remanded to the trial court for a determination with regard to this issue. If the trial court finds that at the time of the officers' discovery of the evidence it was in plain view as the officers looked through the window of the automobile, no search occurred for the purposes of Fourth Amendment or article 1, § 11 analyses; therefore, the evidence at issue was not subject to the exclusionary rule and the trial court erred by granting the motion to suppress. In the alternative, if the trial court decides that the handgun case was not in plain view, and that a search as defined by the United States and Michigan Constitutions did occur, the trial court was correct in applying a Fourth Amendment analysis to the evidence at issue.

If it is determined that a search occurred, clearly at issue is a warrantless search. "Generally, a search conducted without a warrant is unreasonable unless there exists both probable cause and a circumstance establishing an exception to the warrant requirement." *People v Snider*, 239 Mich App 393, 407; 608 NW2d 502 (2000), quoting *People v Mayes (After Remand)*, 202 Mich App 181, 184; 508 NW2d 161 (1993). In such an instance, the burden is on the prosecution to show that a search was justified by a recognized exception. *Id.* Specifically, the automobile exception to the warrant requirement permits the search of an automobile when there is probable cause to believe that evidence of a crime will be found. See *People v Levine*, 461 Mich 172, 179; 600 NW2d 622 (1999); *People v Williams*, 383 Mich 549, 555; 177 NW2d 151 (1970).

In this case, the trial court found a lack of the requisite probable cause. For example, the trial court concluded that the description of the suspects given to the officers during their

departmental briefings did not match defendant's description. Moreover, the trial court emphasized that defendant "did not take off running or attempting to vacate the location at the time. . . . unlike what had happened the week before. . . ." After review of the record, we cannot conclude that these findings of fact were clearly erroneous; therefore, we are not left with a definite and firm conviction that a mistake was made. See *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996).

An automobile may also be searched, without a warrant, pursuant to the so-called "auto frisk." *Michigan v Long*, 463 US 1032, 1049-1050; 103 S Ct 3469; 77 L Ed 2d 1201 (1983). In *Long*, the United States Supreme Court applied the *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), rationale to uphold this limited exception, observing the critical importance of public safety. In *Long*, the Court concluded:

[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. [*Long, supra* at 1049.]

Again, we cannot assert with a definite and firm conviction that the trial court erred in its conclusion that defendant, who had no weapon on his body, was dangerous or that he was in the position to gain immediate control of weapons located in an automobile well beyond the limits of his reach. Even if the police did have the requisite reasonable suspicion to detain and frisk defendant, they would not necessarily have probable cause to search the automobile.

In sum, while the circuit court was justified in determining that there was a lack of probable cause to search the vehicle, the court failed to consider whether the evidence at issue was obtained pursuant to a search. Accordingly, we remand this case to the trial court to consider this issue.

Reversed and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Peter D. O'Connell