STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED February 28, 2008
v	No. 277441 Wayne Circuit Court
KENNIE SMITH, Defendant-Appellee.	LC No. 07-003131-01

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's decision granting defendant's motions to suppress evidence and to dismiss. We reverse and remand.

Detroit Police Officers Sweeney and Carlisi were on routine patrol in a partially marked police vehicle. They observed defendant standing on the sidewalk, along with a number of other people. Defendant was doing nothing suspicious other than "creating a possible impediment to pedestrian traffic," although by admission there were no actual pedestrians to be impeded. Defendant saw the police car, bolted from the crowd, and ran across the street before the officers made contact with him.

Officer Sweeney testified that as the officers approached, defendant "proceeded to grab his waistband area and ran northbound across the street into the side of 14281 Flanders. At which time he removed a chrome, silver in color, small caliber handgun and tossed it over the fence." One officer detained defendant, while the other recovered the weapon.

Importantly, this sequence of events differed from that in a police report, wherein the officers indicated that they began pursuing defendant before they observed him dispose of the gun. As a basis for decision, the trial court relied on the latter statement.

Defendant was charged with carrying a concealed weapon, MCL 750.227. Defendant moved to suppress the evidence on the ground that he had been unlawfully seized. The trial court granted the motion, relying on *People v Shabaz*, 424 Mich 42; 378 NW2d 451 (1985), and, because there was no additional evidence, dismissed the case.

We review a trial court's conclusions of law related to a decision to suppress evidence de novo, *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999), and review a trial court's

factual findings related to a decision to suppress evidence for clear error. *People v Chambers*, 195 Mich App 118, 121; 489 NW2d 168 (1992). A decision is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake was made. *People v Rasmussen*, 191 Mich App 721, 724; 478 NW2d 752 (1992).

We agree with the prosecution that *Shabaz* is no longer a completely accurate statement of the relevant law. In relevant part, *Shabaz* held that a police chase is inherently a "seizure" under the Fourth Amendment to the United States Constitution, and therefore it minimally requires the kind of objective, articulable suspicion of imminent or ongoing criminal activity that would justify a *Terry*[1] stop. *Shabaz*, *supra* at 58-65. Also in relevant part, our Supreme Court explained that whether the police had a sufficient basis to seize a defendant depended on the totality of the circumstances, but it is insufficient for a person merely to exercise his or her right not to talk to a police officer – even "at top speed." *Id*., 63. Under *Shabaz*, defendant was therefore unlawfully seized, and the handgun properly suppressed as the fruit of an unlawful invasion of defendant's rights. *Id*., 65-67.

However, our Supreme Court has more recently clarified the proper standard for what contitutes a seizure. In *People v Mamon*, 435 Mich 1; 457 NW2d 623 (1990), a multiply-divided Court nevertheless agreed on a number of issues. The three-Justice "lead opinion" held only that a police foot chase is not *automatically* a "seizure" within the meaning of the Fourth Amendment. Critically, however, the lead opinion did not state that a foot chase is *never* a seizure, either. Rather, the lead opinion held that for the police to follow a person who has fled from them is not a "seizure," even if it is intimidating, until there has been some "show of authority which would indicate to a reasonable person that he was not free to leave." *Id*., 11-13. In fact, the lead opinion explicitly recognized that its result was intended to "permit[] the police to follow and observe persons in public places" while leaving "open the possibility that some police chases might constitute a seizure under the Fourth Amendment." *Id*., 14.

The concurring opinion warned that active police chases on foot should be distinguished from passive and casual police trailing of someone in a cruiser. *Id*., 16-19. The concurrence observed that the defendant in that case "started to run *before* there had been any indication that he was being pursued," and he was not "seized" until it became clear to the defendant that the police were specifically "chasing *him* rather than responding to something else the officers had seen." *Id*., 20-21 (emphases in original). Both dissenting opinions opined that a police officer merely emerging from a police cruiser and commencing a chase is enough to communicate to a defendant that he is not free to leave, and that communication constitutes a Fourth Amendment "seizure." *Id*., 26-31.

Therefore, although there was no opinion in *Mamon* signed by a majority of the Justices, there was nevertheless a majority in agreement that: (1) a defendant is not *automatically* "seized" under the Fourth Amendment merely because the police follow him or her after he or she flees from the police or declines to talk to them; but (2) a defendant *is* "seized" when the police communicate – through words or actions – that pursuant to their authority as law

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

enforcement officers, the defendant is not free to "go on his way." See also *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005), reiterating that a "'seizure' within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave." The law in Michigan regarding whether a person fleeing from a police pursuit has been "seized" is therefore more nuanced than the standard enunciated in *Shabaz*. In this case, that distinction is critical.

We find no clear error in the trial court's decision to rely on the police report's version of events, indicating that although defendant began running away from the police before the police gave chase, defendant only chose to dispose of the gun *after* the police began pursuing him. However, whether defendant was "seized" when he disposed of the gun turns on whether some show of police authority communicated to him that he was not free to leave; the bare fact that the police chose to follow defendant's flight is no longer the determining factor. Accordingly, the trial court did not make the requisite factual finding on the record. Moreover, although the police report itself was apparently provided to the trial court, no copy thereof has been provided to us on appeal. We would therefore lack a sufficient record to review that determination in any event. We reverse the trial court's grant of defendant's motion to suppress premised on the bare fact that the police began chasing defendant before he disposed of the gun. We remand to provide the trial court with the opportunity to determine instead whether, at the time he disposed of the gun, defendant would reasonably have believed that, pursuant to a show of authority by the police, "he was not free to leave." *Jenkins*, *supra* at 32.

Reversed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Alton T. Davis