STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 27, 2008
v	No. 270638 Wayne Circuit Court
MARK LAVELL LEONARD, Defendant-Appellee.	LC No. 05-009123-01

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In this Fourth Amendment case, the prosecutor appeals as of right the trial court's order dismissing a charge of armed robbery. MCL 750.529. We affirm the trial court's suppression of defendant's pretrial lineup identification. However we reverse the trial court's suppression of the in-court identification and the trial court's dismissal of the armed robbery charge, and remand for further proceedings consistent with the opinions set forth in this case.

From the outset we note that this case has caused each of us to reach different legal conclusions on a variety of the issues presented. Therefore, we write separately to express our separate legal reasoning and conclusions.

In this case, my colleagues, Judge Schuette and Judge Davis, agree that the initial stop of the vehicle was constitutional and therefore permissible. On this issue, I respectfully dissent for the reasons set forth in this opinion. Judge Davis and I concur that the trial court was correct in suppressing defendant's pretrial identification, albeit premised on differing legal conclusions. I would hold that suppression should be based on an unconstitutional stop of the vehicle, whereas Judge Davis would suppress the evidence based on an unconstitutional search of the automobile. Judge Schuette dissents on these two issues and would reverse the trial court's decision to suppress the pretrial lineup identification for the reasons set forth in his partial concurrence and dissent. We are all in agreement that the trial court erred in suppression of the in-court identification, and therefore we reverse that portion of the trial court's decision as well as dismissal of the armed robbery charge and remand the matter to the trial court on that issue.

I. FACTS AND PROCEDURAL HISTORY

On the night of August 25, 2005, at about 9:45 p.m., a young man and a young woman flagged down Lieutenant Billy Jackson with the Detroit Police Department and told him that they

had been robbed. According to Lieutenant Jackson, the man and woman indicated that the robbery had occurred about 10 to 15 minutes before his arrival and gave him a very limited description of the perpetrators: two young black males who were wearing mostly black clothing. Lieutenant Jackson did not receive any information regarding the perpetrators' height or weight. The man and woman told Lieutenant Jackson that the perpetrators fled on foot to a gated apartment complex that was approximately 75 to 100 yards west of the park where the robbery occurred. Officers Jason Tonti, a ten-year veteran with the Detroit Police Department, and Kimberly Love, responded to Lieutenant Jackson's call for assistance. According to Officer Tonti, Lieutenant Jackson described the perpetrators as "three black males" and described the perpetrators' clothing as either dark clothing or "[b]lack shirt, pants, hat." Officer Tonti did not receive a height or weight description for the suspects. Based on information that the perpetrators had fled on foot to a nearby the apartment complex, Officer Tonti drove his unmarked scout car to the entrance of the apartment complex and "parked [the] scout car there facing southbound with [the] driver's side to the entrance and exit" of the apartment complex. It was dark outside, and Officer Tonti had his overhead lights, headlights and spotlight on. He stated that there were "a few other" scout cars there as well. According to Officer Tonti, a person could enter or exit the apartment complex on foot at various locations, but the only place to drive a car in or out of the complex was by the location where he parked his scout car. Officer Tonti stated that he "sat there . . . watching to see if there was anybody that fit the description pulling out of the complex."

About 10 to 15 minutes after Officer Tonti arrived at the apartment complex, an older model Ford Explorer with three black male occupants exited the complex. According to Officer Tonti, the front seat passenger was wearing a dark colored shirt and a hat and the rear seat passenger was also wearing a dark colored shirt. Officer Tonti stated that usually when people come to an area where there are a lot of police officers, they gawk, but the individuals in the Explorer "didn't do anything. They looked straight ahead." Officer Tonti stated that he "just wanted to check it out, get some names, you know[,]" so he pulled the vehicle over and asked the driver for his driver's license, proof of insurance, and registration. When the driver indicated that he did not have a driver's license, Officer Tonti "pulled him out of the car" and then searched the three men. During an investigatory search of the vehicle, Officer Tonti recovered from under one of the back seats two credit cards bearing the name "Julian Jones." At trial, Officer Tonti asserted that defendant was the front seat passenger, but at the motion hearing, he asserted that defendant was the rear seat passenger and that he recovered the credit cards from underneath the seat upon which defendant was sitting. Officer Tonti's partner recognized Jones' name as the name of an individual who had been the victim of an armed robbery in early August 2005. At that time, Officer Tonti "placed the suspects in custody . . . just on the information that was given to me by my partner."

Thereafter, the police conducted a live lineup in which Jones identified defendant as the individual who had robbed him earlier in the month. Defendant was charged and tried by a jury in connection with the robbery of Jones. At trial, Jones identified defendant in court as the perpetrator. The jury hung, and defendant was not convicted. Thereafter, defendant moved to suppress evidence of Jones's identification of defendant in the lineup as well as Jones's in-court identification of defendant.[1] Defendant argued that the pretrial lineup identification evidence

[1] The motion to suppress did not seek to suppress evidence of the two credit cards that were

must be suppressed because it was the fruit of a Fourth Amendment violation and it was unduly suggestive. Defendant also argued that there was no independent basis for Jones's in-court identification of defendant and that the in-court identification evidence must be suppressed as well.

At the suppression hearing, the prosecutor argued that Officer Tonti had a reasonable suspicion to stop the vehicle in which defendant was a passenger based on the descriptions of the perpetrators and because defendant was in the same area where the suspects fled on foot within 30 minutes of the robbery. Defendant argued that Officer Tonti did not have a particularized suspicion of criminal activity because the only description of the perpetrators was that they were two black men wearing dark or black clothing who fled on foot, and the police stopped three black men in a vehicle. Defendant further contended that because it was nighttime and the men were in a vehicle, Officer Tonti could only see their clothing from the shoulders up. The trial court ruled that the investigatory stop of the vehicle in which defendant was a passenger was illegal because it was based on the fact that the occupants of the vehicle were black. Therefore, the trial court suppressed Jones's pretrial lineup identification of defendant:

> There is nothing that presents [defendant and the other occupants of the vehicle] as being about to commit a crime. No reasonable, articulable suspicion . . . that they have committed a crime, are in the process, or did commit a crime. Nothing that would justify their detention. Because they're just black males, and he's stopping all black males, but that's not particularized.

The prosecutor argued at the suppression hearing that Jones's in-court identification of defendant should be admissible because Jones may have had an independent ability to recognize defendant. The trial court noted that Jones was not present at the suppression hearing to testify regarding the existence of an independent basis for identifying defendant and that it could not recall Jones's trial testimony regarding the issue. In fact, at trial, Jones identified defendant in court as the perpetrator and testified regarding an independent basis for his in-court identification of defendant as a result of his opportunity to view defendant's face when defendant robbed him. Unaware of this trial testimony, the trial court suppressed the in-court identification, opining that the remedy for a Fourth Amendment violation must be suppression of the in-court identification.

The prosecutor appeals as of right the trial court's suppression of Jones's pretrial lineup identification of defendant and Jones's in-court identification of defendant.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion to suppress. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). We review for clear error a trial court's factual findings at a suppression hearing. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). Application of the exclusionary rule to a Fourth Amendment violation is a question of law that we review de novo. *Id*.

III. ANALYSIS

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discovered during the search of the vehicle.

A. Standing

As a threshold issue, we must determine whether defendant, as a passenger[2] in the vehicle that was stopped by the police, has standing to challenge the stop of the vehicle and the subsequent search of the vehicle. The trial court stated on the record at the suppression hearing that defendant, as a passenger of the vehicle, did not have standing to challenge the stop of the vehicle, but nevertheless suppressed Jones's lineup identification of defendant and in-court identification of defendant based on the illegal stop of the vehicle in which defendant was a passenger. Whether a party has standing is a question of law that this Court reviews de novo. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001).

The United States Supreme Court recently held that when a police officer makes a traffic stop of a vehicle, any passenger in the vehicle stopped, like the driver, is seized within the meaning of the Fourth Amendment and therefore has standing to challenge the constitutional validity of the stop. *Brendlin v California*, ___ US ___ ; 127 S Ct 2400; 168 L Ed 2d 132 (2007); see also *United States v Garcia*, 496 F3d 495, 503 (CA 6, 2007). Therefore, defendant has standing to challenge the stop of the vehicle in which he was a passenger.

Whether defendant has standing to challenge the search of the vehicle is a separate issue. Both this Court and the Michigan Supreme Court have held that where a stop of a vehicle is legal, a passenger lacks standing to challenge a subsequent search of the vehicle. *People v LaBelle*, 478 Mich 891, 892; 732 NW2d 114 (2007); *People v Armendarez*, 188 Mich App 61, 71; 468 NW2d 893 (1991). For reasons that will be explained more fully in this opinion, I conclude that the stop of the vehicle in which defendant was a passenger was not a valid investigatory stop. Thus, the issue is whether defendant has standing to challenge an illegal search of a vehicle in which he was a passenger.

To date, our Courts have yet to address the issue whether a passenger in a vehicle has standing to challenge the search of a vehicle that was stopped in violation of the Fourth Amendment. However, after examining cases in the federal courts of appeals addressing the issue of passenger standing, to challenge a search of a vehicle following an illegal stop, Judge Davis and I hold that defendant does have standing to challenge the search of the vehicle. It is true that as a passenger in the vehicle and not the owner of the vehicle, defendant arguably lacked a legitimate expectation of privacy in the car.[3] *Garcia*, *supra* at 503 n 3. Generally, a defendant only has standing if she "has a 'legitimate expectation of privacy' in the places searched or the items seized." *Id.*, quoting *United States v King*, 55 F3d 1193, 1195 (CA 6, 1995); see also *United States v Davis*, 430 F3d 345, 360 (CA 6, 2005). "[T]he prevailing view in the [federal] courts of appeals is that an illegal traffic stop entails a suppression remedy for all occupants of the car." *United States v Mosley*, 454 F3d 249, 266 (CA 3, 2006). Thus, "most [federal] courts [of appeal] treat evidence found during an illegal traffic stop as the fruits of that

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[2] The vehicle in which defendant was a passenger was owned by the father of the driver of the vehicle.

[3] This Court recently discussed the fact that even drivers of automobiles have a diminished expectation of privacy when it comes to a police search of an automobile because of the need for pervasive governmental regulation of automobiles. See *People v Mungo*, __ Mich App __ ; __ NW2d __ (Docket No. 269250; January 17, 2008).

stop, and see no conceptual difficulties in suppressing such evidence when introduced against passengers." *Id.* at 257. See, e.g., *United States v Ellis*, 497 F3d 606, 612 (CA 6, 2007); *United States v Ameling*, 328 F3d 443, 446-447 n 3 (CA 8, 2003); *United States v Twilley*, 222 F3d 1092, 1095 (CA 9, 2000). Judge Davis and I agree that "passengers in an illegally stopped vehicle have 'standing' to object to the stop, and may seek to suppress the evidentiary fruits of that illegal seizure under the fruit of the poisonous tree doctrine[.]" *Mosely*, *supra* at 253 (footnote omitted). Therefore, Judge Davis and I hold that defendant may seek to suppress evidence uncovered during the search of the vehicle following the illegal stop.[4]

B. Legality of the Investigatory Stop

The prosecutor argues that Officer Tonti had a reasonable suspicion that criminal activity was afoot when he stopped the vehicle in which defendant was a passenger and that the investigatory stop of the vehicle therefore did not violate the Fourth Amendment. Defendant contends that the investigatory stop of the vehicle in which he was a passenger was unlawful because Officer Tonti did not have a particularized suspicion of criminal activity.

The stop of the vehicle in which defendant was a passenger implicates defendant's right to be free from unreasonable searches and seizures; this right is guaranteed by both the United States Constitution and the Michigan Constitution. US Const, Am IV; Const 1963, art 1, § 11; *People v James Green*, 260 Mich App 392, 396; 677 NW2d 363 (2004), overruled sub nom on other grounds *People v Anstey*, 476 Mich 436 (2006). Absent a compelling reason to impose a different interpretation, Michigan's constitutional prohibition against unreasonable searches and seizures must be construed as providing the same protection as that guaranteed by the Fourth Amendment. *Green*, *supra* at 396. The Fourth Amendment search and seizure restrictions protect citizens against unlawful brief investigative detentions. See *id.* However, in *Terry v Ohio*, 392 US 1, 21, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court held that the Fourth Amendment permits police to make a brief investigative stop and detention of a person if the officer has a reasonable, articulable suspicion that criminal activity is afoot. The police may also make a *Terry* investigatory stop and brief detention of a person who is in a motor vehicle if the officer has a reasonable, articulable suspicion that the person is engaged in criminal activity. *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001); *People v Whalen*, 390 Mich 672, 682-683; 213 NW2d 116 (1973).

In determining reasonableness, the court must consider whether the facts known to the officer at the time of the stop would warrant an officer of reasonable caution to suspect criminal

[4] I observe that in the context of the Fourth Amendment, the United States Supreme Court has emphasized that a defendant's ability to claim the protection of the Fourth Amendment is more appropriately analyzed under substantive Fourth Amendment law, "rather than on any theoretically separate, but invariably intertwined concept of standing." *Rakas v Illinois*, 439 US 128, 139; 99 S Ct 421; 58 L Ed 2d 387 (1978). In *Rakas*, the United States Supreme Court opined that a defendant's ability to claim the protection of the Fourth Amendment hinges on whether the defendant "has a legitimate expectation of privacy in the invaded place." *Rakas*, *supra* 439 US at 143. Whether the issue is characterized as one of standing or whether defendant has a reasonable expectation of privacy in a vehicle that was not his own, Judge Davis and I conclude that defendant can challenge the admission of evidence obtained as a result of the illegal stop and subsequent search of the vehicle in which he was a passenger.

activity. *Terry*, *supra* 392 US at 21-22. Good faith on the part of the officer is not enough to justify an investigatory stop. *Id.* at 22. Similarly, an "'inchoate and unparticularized suspicion or 'hunch'" is also not sufficient. *People v LoCicero (After Remand)*, 453 Mich 496, 502; 556 NW2d 498 (1996), quoting *Terry*, *supra* 392 US at 27. "The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances." *LoCicero*, *supra* at 501-502. "[I]n determining whether the totality of the circumstances provide reasonable suspicion to support an investigatory stop, those circumstances must be viewed 'as understood and interpreted by law enforcement officers, not legal scholars . . . .'" *Oliver*, *supra* at 192, quoting *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). An officer's conclusion must be drawn from reasonable inferences based on the facts in light of his training an experience. *Terry*, *supra* 392 US at 27. Fewer foundational facts are necessary to support a finding of reasonableness when moving vehicles are involved, than if a house or a home were involved. *Whalen*, *supra* at 682. Furthermore, a stop of a motor vehicle for investigatory purposes may be based upon fewer facts than those necessary to support a finding of reasonableness where both a stop and a search is conducted by the police. *Id.*

Race alone does not provide a sufficient basis for the police to make an investigatory stop. *United States v Brignoni-Ponce*, 422 US 873, 885-887; 95 S Ct 2574; 45 L Ed 2d 607 (1975). See also *Oliver*, *supra* at 194-195 (footnotes omitted) ("[T]he fact that the car had at least three occupants and at least two black males indicated that its occupants were consistent with the description of the suspected perpetrators. Of course, that in itself would not provide the particularized suspicion necessary for a valid investigatory stop.") However, race can be a relevant factor in making the decision to make an investigatory stop. *Brignoni-Ponce*, *supra* 422 US at 885. As our Supreme Court explained in *Oliver*:

> We note that there are certainly many ways in which it would be inappropriate for the police to use race as a factor in performing their duties. However, no reasonable person would contend that the police should disregard race where it has been reported by eyewitnesses that a crime has been committed by a person of a particular race or skin color. Simply put, it would have made no sense in the case at hand for the police to have pursued non-black individuals as having been the individuals who actually robbed the bank. As the United States Court of Appeals for the Sixth Circuit observed in *United States v Waldron*, 206 F3d 597, 604 (CA 6, 2000), "[c]ommon sense dictates that, when determining whom to approach as a suspect of criminal wrongdoing, a police officer may legitimately consider race as a factor if descriptions of the perpetrator known to the officer include race." [*Oliver*, *supra* at 195 n 5.]

In the present case, the totality of the facts and circumstances did not establish a reasonable suspicion of criminal activity to justify the investigatory stop of the vehicle in which defendant was a passenger. Race was a factor in Officer Tonti's decision to stop the vehicle in which defendant was a passenger. Because the victims of the August 25, 2005, armed robbery described the perpetrators as black, it would have been proper for Officer Tonti and his partner to consider the race of the occupants of a vehicle as *one* factor in determining whether to conduct an investigatory stop of the vehicle. However, additional particularized facts were necessary to justify the stop, and they simply do not exist in this case. Lieutenant Jackson described the suspects as two men who fled on foot, but Officer Tonti stopped three men in a vehicle.

Moreover, the description of the men, two black males wearing dark clothing, included no information about the height or weight of the perpetrators, and was not particularized and could have applied to a number of individuals who were either present or living near the area where defendant and the other occupants of the vehicle were located. The apartment complex was located about 75 to 100 yards from where the victims of the August 25, 2005, robbery were located when the offense occurred. Lieutenant Jackson testified that the victims flagged him down about 10 to 15 minutes after they had been robbed, and Officer Tonti asserted that he stopped the vehicle in which defendant was a passenger about 10 to 15 minutes after he parked his scout car outside the apartment complex. Thus, approximately 20 to 30 minutes had elapsed from the time the armed robbery occurred until Officer Tonti stopped the vehicle in which defendant was a passenger. In my view, given the proximity of the apartment complex to the location of the robbery, the passage of this amount of time was significant, rendering it *less* likely that the individuals in the vehicle were the perpetrators of the armed robbery that Officer Tonti and his partner were investigating because if the suspects fled on foot to a getaway car in the apartment complex, they would have effectuated their getaway well before the passing of 20 or 30 minutes.

Although he did not so state at the suppression hearing, Officer Tonti indicated at trial that the occupants of the vehicle looked straight ahead and that none of them would look at the police. According to Officer Tonti, people will generally gawk when they see a number of police vehicles. In *Oliver*, our Supreme Court stated that "the overall behavior of all occupants of a car in seeming to avoid looking in the direction of a marked police car can[] be considered as one factor in support of a finding of reasonable suspicion." *Id.* at 198. If, in addition to the description of the perpetrators as being black and wearing dark clothing, there were additional factors rendering the stop of the vehicle reasonable, I would agree that avoidance of eye contact would be one factor that the police could consider in determining whether to stop a vehicle. However, such additional factors do not exist in this case. Essentially, Officer Tonti stopped the vehicle in which defendant was a passenger because the occupants, black males in dark clothing, matched the broad and general description of the suspected perpetrators (although the number of individuals in the vehicle did not match the number of perpetrators described by the victims) and avoided eye contact with the police. These facts, considered alone or in the aggregate, do not provide an articulable suspicion of criminal activity sufficient to justify the stop of the vehicle. The description of the individuals was not sufficiently particularized, and the police were not constitutionally permitted to stop *every* vehicle in the area with black male occupants just because they matched the broad general description of the perpetrators. As our Supreme Court observed in *Oliver*, the fact that occupants of a car are black males, which is consistent with the general description of the suspected perpetrators of a crime does not, by itself, provide the particularized suspicion necessary for a valid investigatory stop. *Id.* at 195.

Moreover, I find Officer Tonti's explanation, or rather lack of explanation, for why he stopped the vehicle to be significant and constitutionally intolerable. An officer who stops an individual or automobile based on inferences the officer made based on his or her experience and training "is obliged to articulate how the behavior that he [or she] observed suggested, in light of his experience and training, an inference of criminal activity."[5] *LoCicero*, *supra* at 505-506.

[5] Although a police officer must articulate how behavior suggests an inference of criminal activity, I am mindful that this Court, in determining whether the stop of the vehicle in this case

Except for the fact that they avoided eye contact with the police and matched the general description of the perpetrators, Officer Tonti did not articulate behavior that gave an indication of criminal activity. Significantly, Officer Tonti never indicated that he stopped the vehicle because he thought the occupants were engaged in criminal activity; to the contrary, he stated that he "just wanted to check it out, get some names . . . ." Absent some evidence of criminal activity, the police do not have the authority under the Fourth Amendment to simply stop vehicles just to check them out. An investigatory stop is unconstitutional unless the police have an articulable suspicion that criminal activity is afoot. *Terry*, *supra*. Moreover, Officer Tonti's response to the following questions asked by the trial court at the suppression hearing suggests that Officer Tonti would have stopped *every* vehicle in the area that contained black occupants:

> THE COURT: Mr. [Prosecutor], I know this is important to you, but Mr. Tonti will tell you if there was one person in that car, he was going to stop the car. If it was two, had it been four, he was going to stop it.
>
> [THE PROSECUTOR]: Okay.
>
> THE COURT [addressing Officer Tonti]: Isn't that right, sir?
>
> [OFFICER TONTI]: Probably, sir, yeah.
>
> THE COURT: It doesn't matter what the pants were, you were going to stop the car to ask some questions.

Given the fact that the limited description of the perpetrators was that there were two black men wearing dark clothing, Officer Tonti's admission that he probably would have stopped every car regardless of the number of occupants in the car is tantamount to an admission that he would have stopped every vehicle with black occupants that was leaving the apartment complex. An investigatory stop might be considered unreasonable for myriad reasons. But an unreasonable stop of a vehicle based on the race of the occupants of a vehicle occupies the highest rung on the ladder of unreasonable stops. An investigatory stop which is based on the race of the occupants of a vehicle is too egregious to be constitutionally tolerated. Clearly, based on the description of the perpetrators, Officer Tonti would have been justified in stopping *only* black males in the area of the crime. But, without more than a general description of black males wearing dark clothing, Officer Tonti was not justified in stopping *every* car containing black males in the vicinity. "A valid investigatory stop must be justified in its inception . . . ." *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). In this case, the investigatory stop was not justified in its inception. Based on the totality of the facts surrounding Officer Tonti's stop of the vehicle in this case, I find that the stop was unreasonable. I agree with the trial court's

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was reasonable, must consider all of the factors available to Officer Tonti and his partner in determining whether the stop was justified. *People v Oliver*, 464 Mich 184, 200; 627 NW2d 297 (2001) ("[O]bjective facts known to the police officers who effected the traffic stop should be considered in determining whether the stop was justified by reasonable suspicion regardless of whether the officers subjectively relied on those facts."). To that end, I have considered every factor that I can glean from the record, including factors not articulated by Officer Tonti, in rendering my decision regarding the validity of the stop in this case.

conclusion that the police stopped the vehicle in which defendant was a passenger because the occupants of the vehicle were black:

> You know why [defendant's vehicle] got searched? Not because that officer saw anything. Because it's at night, and he's a black male. That's why he got searched. He didn't—this man did not do anything that this officer testified to that could show that there was an articulable, reasonable suspicion that he was armed.

The prosecutor contends that the facts in *Oliver* are similar to the facts in the instant case. In *Oliver*, the Supreme Court upheld an investigatory stop of a vehicle based on numerous factors:

> We conclude that, under the totality of the circumstances, Deputy Elder's investigatory stop of the car at issue was supported by reasonable suspicion that occupants of that car may have been involved in the robbery of the Republic Bank. The reasons for that conclusion include: (1) the deputy encountered the car near the crime scene, given that the apartment complex was within a quarter mile of the bank; (2) the time was short, with at most fifteen minutes elapsing from the time of the report of the robbery to the traffic stop; (3) the car was occupied by individuals who comported with the limited description that the officer had at his disposal; (4) Deputy Elder had tentatively eliminated the direction north of the bank as an escape route on the basis of the information he received from the carpet store employees; (5) on the basis of his familiarity with the area and experience with crimes of this nature, Deputy Elder formed the reasonable and well-articulated hypothesis that the robbers had fled to the secluded Westbay Apartments; (6) the deputy also reasonably hypothesized on the basis of his experience that the robbers would use a getaway car to try to escape from the area; (7) Deputy Elder also reasonably inferred on the basis of his experience that a driver would probably be at the getaway car waiting for the actual robbers; (8) the behavior of each of the car's four occupants in seeming to avoid looking in the direction of the deputy's marked police car was atypical; (9) the car was *leaving* the apartment complex, which is consistent with it being a getaway car whose occupants were attempting to leave the area; (10) the car followed a circuitous route that avoided driving by the site of the bank robbery. [*Oliver*, *supra* at 200-201 (emphasis in original).]

The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances. *LoCicero*, *supra* at 501-502. I disagree with the prosecutor's contention that the facts supplying reasonable suspicion in *Oliver* are sufficiently similar to the facts of the instant case to warrant the conclusion that the officer in this case was also justified in making the stop of the vehicle in which defendant was a passenger. There were more facts to support the stop in *Oliver* than there are in this case. In *Oliver*, the deputy making the stop testified that based on his experience as a police officer, he concluded that the perpetrators of the bank robbery would most likely have the assistance of a getaway driver. There was no such testimony in the instant case, and even if Officer Tonti did believe that the perpetrators of the robbery may have had the assistance of a getaway car and that the getaway

car was waiting in the apartment complex, given the fact that the apartment complex was only about 75 to 100 yards away from the scene of the robbery and the length of time (20 to 30 minutes) that elapsed between the time of the robbery until Officer Tonti pulled over the vehicle, it would not have been reasonable to believe that the getaway car would still be located anywhere near the apartment complex. Thus, the proximity of the apartment complex to the scene of the crime and the passing of time actually mitigates against a finding of reasonableness in this case. Furthermore, the officer in *Oliver* followed the suspects for some time after observing evasive behavior. *Id.* at 189. In contrast, in the present case Officer Tonti did not observe the vehicle occupants for suspicious activity before pulling them over; rather, he stopped them immediately upon encountering them.

It is true that some of the factors in *Oliver* also exist in this case. Specifically, the three men in the vehicle in which defendant was a passenger were black and were wearing dark clothing, which was consistent with the very general and broad description of the perpetrators, and they avoided looking at the police. However, there were additional factors in *Oliver* which do not exist in this case, and we hold that the totality of the circumstances in this case do not provide articulable suspicion of criminal activity. Essentially, in this case, Officer Tonti stopped the vehicle in which defendant was a passenger because the black males in the car matched the limited description of the perpetrators of the armed robbery and because the men avoided eye contact with the police. This is insufficient to establish an articulable suspicion of criminal activity. In *Oliver*, our Supreme Court specifically held that there was not articulable suspicion necessary for a valid investigatory stop when the car that the police stopped contained occupants who were black males, which was consistent with the description of the perpetrators. *Id.* at 194-195. In this case, Officer Tonti had nothing more than an unparticularized suspicion or hunch that the occupants of the vehicle that he stopped may have been involved in the robbery he was investigating. Besides the fact that the occupants of the vehicle were black and matched the general description of the perpetrators, the only additional factor to support a finding of articulable suspicion was that the occupants avoided eye contact with the police. Under the totality of the circumstances, these factors are not enough to establish articulable suspicion of criminal activity. As the Supreme Court stated in *Oliver*, "there is certainly nothing suspicious about four men occupying a car that is leaving an apartment complex." *Id.* at 194.

In sum, I would hold that the trial court did not err by finding that the prosecution failed to carry its burden in showing that the investigatory stop was supported by a reasonable articulable suspicion of criminal activity. Consequently, no evidence acquired during the stop, such as defendant's identity, may be used against defendant unless an exception to the exclusionary rule applies.

C. Lineup and In-court Identification

1. Lineup Identification

The prosecutor next argues that even if the investigatory stop of the vehicle in which defendant was riding was invalid, the trial court erred in applying the exclusionary rule to preclude evidence that the victim identified defendant in a pretrial lineup.

The exclusionary rule is a judicially created remedy that was designed to protect Fourth Amendment rights. *People v Goldston*, 470 Mich 523, 529, 532; 682 NW2d 479 (2004). When evidence has been seized in violation of the constitutional prohibition against unreasonable searches and seizures, it generally must be excluded from trial. *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). The rule excludes from admissibility both the "primary evidence obtained as a direct result of an illegal search or seizure" and "evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" *Segura v United States*, 468 US 796, 804; 104 S Ct 3380; 82 L Ed 2d 599 (1984), quoting *Nardone v United States*, 308 US 338, 341; 60 S Ct 266; 84 L Ed 307 (1939). "The fruit of the poisonous tree doctrine seeks to discourage unlawful police practices by depriving the people of advantages flowing from the illegality." *People v Jones*, 66 Mich App 223, 230; 238 NW2d 813 (1975). However, all evidence is not "'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Id.*, quoting *Wong Sun v United States*, 371 US 471, 487; 83 S Ct 407; 9 L Ed 2d 441 (1963). The exclusionary rule must not be applied rigidly and unthinkingly; it has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. *People v Stevens (After Remand)*, 460 Mich 626, 636; 597 NW2d 53 (1999). There are exceptions to the exclusionary rule: the independent source exception, the attenuation exception, the inevitable discovery exception, and the good faith exception. *Stevens*, *supra* at 636; *Goldston*, *supra* at 538. Two of these exceptions, the inevitable discovery exception and the attenuation exception, warrant discussion in the context of the lineup identification evidence.

We first analyze whether the lineup identification is admissible under the inevitable discovery exception. Under the inevitable discovery exception, evidence acquired through police misconduct may still be admissible if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been revealed in the absence of the police misconduct. *Stevens*, *supra* at 637. The inevitable discovery exception "justif[ies] the admission of otherwise tainted evidence which ultimately would have been obtained in a constitutionally accepted manner." *People v Kroll*, 179 Mich App 423, 429; 446 NW2d 317 (1989). The purpose of the inevitable discovery doctrine is to block setting aside convictions that would have been obtained without police misconduct. *Id.* at 429. "The test is whether the prosecution can establish be a preponderance of the evidence that the information ultimately or inevitably would be discovered by lawful means." *Id.*

According to the prosecutor, the police learned defendant's identity during the initial phase of the lawful investigatory stop before any alleged police misconduct, and, even if the police had released defendant after lawfully stopping the vehicle, they would have ultimately learned his identity after they discovered the stolen credit cards, and Jones would have still identified him in a pretrial lineup. The prosecutor's argument incorrectly presumes that the initial stop of the vehicle was lawful and essentially argues not that the unlawfully obtained evidence was nevertheless admissible because it would have inevitably been discovered, but that the police did not discover defendant's identity as a result of a Fourth Amendment violation. For the reasons stated above, I reject the prosecutor's argument that the initial stop of the vehicle was unlawful. Furthermore, the inevitable discovery exception does not warrant admission of Jones's identification of defendant in a pretrial lineup because the prosecutor failed to show by a preponderance of the evidence that defendant's identity inevitably would have been discovered by lawful means. *Stevens*, *supra* at 637. The prosecutor offered no testimony regarding how the

police would have discovered defendant's identity independent of the illegal investigatory stop and the subsequent search of the vehicle. Without the illegal stop of the vehicle, the police would not have discovered the stolen credit cards that linked defendant to the robbery of Jones. Thus, the police discovered defendant's identity as a direct result of the violation of defendant's Fourth Amendment rights, and it cannot be said that defendant's identification would have been obtained without the police misconduct. I therefore reject the contention that the primary taint on any evidence procured during the illegal stop was dissipated through the inevitable discovery exception. The trial court did not err in not applying the inevitable discovery exception to the exclusionary rule to preclude evidence that Jones identified defendant in a lineup.

We next analyze whether the lineup identification evidence was admissible under the attenuation exception to the exclusionary rule. Under this exception, evidence obtained in violation of the Fourth Amendment may be admissible if the connection between the illegal activity of the police and the evidence procured "has "'become so attenuated as to dissipate the taint[.]'"" *People v Frazier*, 478 Mich 231, 253; 733 NW2d 713 (2007), quoting *Wong Sun*, *supra* 371 US at 487, quoting *Nardone*, *supra* 308 US at 341. There is not a bright-line test to determine whether evidence illegally obtained is sufficiently attenuated as to dissipate the taint. *Brown v Illinois*, 422 US 590, 603; 95 S Ct 2254; 45 L Ed 2d 416 (1975) (whether such evidence is attenuated "must be answered on the facts of each case"). "The question which must be asked is whether the evidence has been procured by an exploitation of the illegality of the police or instead by means sufficiently distinguishable to be purged of the primary taint." *Jones*, *supra* at 230. "Attenuation can occur when the causal connection is remote or when 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" *Frazier*, *supra* at 253, quoting *Hudson v Michigan*, 547 US 586, ___ ; 126 S Ct 2159, 2164; 165 L Ed 2d 56 (2006). This Court, recognizing that there are various approaches to decide whether the connection between the evidence obtained and the primary illegality has become so attenuated as to dissipate the taint, has previously made this determination by analyzing "'whether it was reasonably foreseeable by the police when they acted that by engaging in the illegal behavior they might obtain evidence *of the kind they obtained*.'" *Jones*, *supra* at 231 (emphasis added in *Jones*), quoting *People v Roderick Walker*, 27 Mich App 609, 617; 183 NW2d 871 (1970).

In this case, the evidence the police obtained as a result of the illegal stop of the vehicle in which defendant was a passenger included two credit cards, which led to the police discovering defendant's identity as a suspect in the armed robbery of Jones and the subsequent lineup identification evidence. Officer Tonti stopped the vehicle in which defendant was riding while he was investigating an armed robbery that had just occurred. It is foreseeable that police stopping a vehicle in hopes of ascertaining the identity of the perpetrator of an armed robbery would in fact discover that one or more individuals in the vehicle may have been the perpetrator of an armed robbery. Although defendant does not argue that the credit cards should be excluded, we find that it is also foreseeable that police searching a vehicle for evidence of an armed robbery would find stolen credit cards. The fact that the evidence discovered concerned a separate armed robbery, and not the armed robbery that the police were investigating at the time they stopped the vehicle in which defendant was a passenger, does not negate a finding of foreseeability. Although Officer Tonti probably expected to discover evidence pertaining to the armed robbery case that he was investigating, the question under *Jones* is whether "'it was reasonably foreseeable by the police when they acted that by engaging in the illegal behavior

they might obtain evidence *of the kind they obtained*.'" *Jones*, *supra* at 231, quoting *Walker*, *supra* at 617. Police investigating an armed robbery could reasonably expect to obtain evidence regarding the identity of the perpetrator and uncover items taken from the victim during the robbery. That is precisely what Officer Tonti and his partner discovered in this case. Under these facts, we cannot conclude that the lineup identification evidence was sufficiently attenuated from the illegal stop of the vehicle to purge the taint of the primary illegality. I find that Officer Tonti could have foreseen this causal sequence of events, and therefore, evidence of defendant's identity was not purged of its primary taint.[6] Consequently, the trial court did not err in not applying the attenuation exception to the exclusionary rule.

Furthermore, the fact that Officer Tonti essentially admitted that he would have stopped every vehicle with black occupants regardless of the number of occupants also mitigates against applying the attenuation exception in this case. An important consideration in determining whether the prior illegality and challenged evidence has become so attenuated as to dissipate the taint is an assessment of "the purpose and flagrancy of the official conduct." See *Brown*, *supra* 422 US at 604. If the police conduct has a quality of purposefulness, this mitigates against a finding of attenuation. See *id.* at 605. As I have previously stated, my primary concern with the stop in this case is that, absent other articulable factors to justify the stop of the vehicle in which defendant was a passenger, the stop of the vehicle in which defendant was a passenger was primarily based on the fact that the occupants of the vehicle were black males. I previously articulated my belief that of all the varieties of unreasonable stops, I can think of none that is as egregious and unacceptable as an illegal stop based on the race of the occupants of the vehicle. A stop of a vehicle based on the occupants' race is a flagrant unconformity to constitutional norms. In my view, the level of the Fourth Amendment violation in this case was so wanton and purposeful that it warrants exclusion of all evidence that was obtained as a result of the illegal stop.

Furthermore, requiring the exclusion of the lineup identification testimony would further the purpose of the exclusionary rule to deter future violations of the Fourth Amendment. *Goldston*, *supra* at 538 ("The goal of the exclusionary rule . . . is to deter police misconduct."). *United States v Janis*, 428 US 433, 457 n 34; 96 S Ct 3021; 49 L Ed 2d 1046 (1976). It is axiomatic that it is desirable to deter police officers from conducting investigatory stops of vehicles based on the race of the vehicle's occupants. Investigatory stops of vehicles based on the race of the occupants would be encouraged if the police knew that evidence, both direct and

[6] In *People v Jones*, 66 Mich App 223; 238 NW2d 813 (1975), an illegal police search of the defendant's vehicle produced two firearms. A ballistics check on one of the firearms showed that it could have been the murder weapon in a murder that had taken place some months earlier. This prompted the police to arrange a lineup. At the lineup, a witness identified the defendant as the perpetrator of the murder that had occurred some months earlier. This Court declined to apply the attenuation exception, ruling that "the arresting police officers could not possibly have foreseen the causal sequence involved" and that the exclusion of the identification would not serve the public policy of deterring illegal police conduct because "the police cannot be deterred by circumstances which they cannot foresee." *Jones*, *supra* at 231-232. I find *Jones* to be distinguishable from the instant case because of the need to deter the police from making illegal stops of vehicles based on the race of the occupants of the vehicle. The need to deter the police from engaging in Fourth Amendment violations of this type mandates the suppression of the lineup identification in this case.

indirect, derived therefrom, would be admissible at trial. Excluding evidence obtained as a result of an illegal investigatory stop of a vehicle based on the occupants' race would help to deter police from basing the stop of a vehicle on the occupants' race. Thus, applying the exclusionary rule to the lineup identification evidence in this case is substantially likely to deter similar future violations of the Fourth Amendment.

2. In-court Identification

Citing *United States v Crews*, 445 US 463; 100 S Ct 1244; 63 L Ed 2d 537 (1980), the prosecution argues that the trial court erred by suppressing Jones's in-court identification of defendant. In *Crews*, a majority of the United States Supreme Court held that "an in-court identification of the accused by the victim of a crime should not be suppressed as the fruit of the defendant's unlawful arrest." *Id.* at 477. According to the Supreme Court, even if a pretrial identification of the defendant is tainted, the in-court identification is admissible if the victim had independent recollection of the defendant which antedated the unlawful police conduct. *Id.* This Court has similarly held that when a victim's in-court identification of an illegally arrested defendant is a product of the victim's opportunity to observe the defendant at the time of the offense, that identification is made independent from the police taint and is admissible. *People v Jackson*, 46 Mich App 764, 771; 208 NW2d 526 (1973). In *Crews*, the victim's recollection and identification of the defendant were shown to be untainted by the illegal conduct of the police. *Crews*, *supra* 445 US at 472-473. Similarly, in the present case, Jones's testimony at trial reveals that his in-court identification of defendant was independent of the tainted pretrial identification and Officer Tonti's illegal conduct. Jones testified that when defendant robbed him, defendant was less than a foot away from him, and he had an opportunity to look at defendant and was able to see what defendant looked like. He stated that although he did not look at defendant for the entire time, he had the opportunity to observe him for five to ten minutes. Jones testified that he gave a description of the perpetrator to the police, in which he described the perpetrator as being 20 to 22 years old, being 5'5" to 5'7" tall, weighing 150 pounds and being of thin build, having medium brown skin, wearing braids in his hair, and wearing a red shirt and gray jogging pants.

Jones's testimony sufficiently reveals that his in-court identification of defendant was based on his independent recollection of his encounter with defendant on August 5, 2005. The in-court identification was therefore not influenced by Jones's tainted lineup identification or by Officer Tonti's illegal conduct in stopping the vehicle. At the suppression hearing, at which Jones did not testify, the trial court stated that it could not recall Jones's trial testimony regarding whether he had an independent basis for his identification of defendant. Because Jones gave sufficient testimony at trial to establish an independent basis for his in-court identification of defendant, we find that the trial court erred in suppressing Jones's in-court identification. Jones's in-court identification of defendant should have been admitted into evidence.

IV. Conclusion and Holding

In sum, a majority of this panel finds that the trial court properly suppressed Jones's pretrial lineup identification of defendant because the evidence was obtained as a result of the

illegal search in which defendant was a passenger and is therefore fruit of the poisonous tree.[7] Furthermore, as explained in this opinion as well as in the opinion of Judge Davis, none of the exceptions to the exclusionary rule apply. However, because Jones had an independent basis for his in-court identification of defendant that was not tainted by Officer Tonti's misconduct or the tainted lineup identification, the trial court erred in excluding Jones's in-court identification of defendant. Positive identification by witnesses may be sufficient evidence to support conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Therefore, Jones's in-court identification of defendant alone may have been sufficient to sustain an armed robbery conviction, and the trial court erred in dismissing the armed robbery charge against defendant.

Affirmed in part, reversed in part, and remanded for proceedings consistent with the opinions set forth in this case. We do not retain jurisdiction.

/s/ Stephen L. Borrello

[7] I would hold that the initial stop of the vehicle violated defendant's constitutional rights for the reasons set forth above, whereas Judge Davis holds that the pretrial identification should be suppressed based on an illegal search of the vehicle. Judge Schuette dissents on this issue.