STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 29, 2008
v	No. 276769 Osceola Circuit Court
CLARENCE BERNARD TYLER, Defendant-Appellant.	LC No. 05-003868-FH

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of one count of carrying a concealed weapon (CCW), MCL 750.227, one count of possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to prison terms of 18 to 60 months for the CCW and felon-in-possession convictions, and to a consecutive prison term of two years for the felony-firearm conviction. We affirm.

Defendant first argues that the initial traffic stop, which resulted in the search of his person and motorcycle, was not valid because although defendant was told that he was speeding, police officer Chad Jasman allegedly did not give this information to his dispatcher when reporting the traffic stop. Instead, defendant argues that Jasman told the dispatcher that defendant's license plate was not "readily visible." Further, defendant contends that if he was speeding, the prosecution was required to show that Jasman's use of the radar device met the guidelines set forth by this Court in *People v Ferency*, 133 Mich App 526; 351 NW2d 225 (1984).

We review for clear error a trial court's findings of fact at a suppression hearing, but review de novo as a question of law its ultimate ruling on a motion to suppress evidence. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). Officer Jasman testified that the reason for the traffic stop was that defendant was "going 65 in a 55 mile an hour zone." On cross-examination, when asked why he did not issue defendant a speeding ticket, Jasman testified that he "guess[ed he] decided not to write him a ticket." Jasman further testified that this was not unusual, as the decision to issue a citation is a matter of "officer discretion." Defendant did not argue below that Jasman had not told him the reason for the traffic stop or that the reason for the stop given to the dispatcher was different than the reason given at the scene.

Defendant argues that Jasman's search of his person and vehicle was unreasonable because there was no legitimate purpose for the initial traffic stop. Defendant first asserts that he was not speeding at the time he was stopped. This is a factual issue that defendant did not raise before the finder of fact. Defendant mentions only in passing that he disputed Jasman's reason for the stop during the evidentiary hearing, and does not cite any support for his assertion that his argument on this issue should be dispositive. Because defendant raises this matter in only cursory fashion and has failed to fully brief the issue of whether or not he was in fact speeding at the time of the traffic stop, the issue has been abandoned for purposes of this appeal. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004).

Defendant next asserts that if speeding was the true reason for the traffic stop, Jasman's testimony should have been subjected to the requirements set forth in *Ferency* regarding the due process rights of defendants in speeding cases involving "moving radar."[1] The prosecution contended that *Ferency* was not applicable to this case because it was not a speeding case.

Defendant argues that *Ferency* applies to this case because Jasman's initial stop was for speeding, despite the fact that the charges eventually brought against defendant were related to the weapon found during a search following the stop. This argument lacks merit. The charges that are the subject of this case are not related to speeding, nor was defendant ever issued a citation for speeding. Neither Jasman nor the prosecution sought to introduce evidence of the readings from Jasman's radar device. In addition, defense counsel did not object to Jasman's references to his radar device or to defendant's speed. In short, defendant was not tried for speeding. He is consequently not entitled to, nor does he require, the protections of *Ferency*. Defendant has not shown that the traffic stop, which resulted in the search, was improper under *Ferency*.

[1] "[M]oving" radar refers to situations in which "the radar speed detection unit . . . is moving, *i.e.*, being driven down the road as opposed to remaining in one spot (stationary mode)." *Ferency*, *supra* at 539 (italics and parentheses in original). In *Ferency*, this Court held that "in order to avoid any violation of the due process rights of a defendant in a speeding case involving 'moving' radar," seven specific guidelines must be established before allowing into evidence speed readings from a radar speedometer: (1) that the officer operating the device had adequate training and experience in its operation; (2) that the radar device was in proper working condition and properly installed in the patrol vehicle at the time of the issuance of the citation; (3) that the device was used in an area where road conditions were such that there was a minimum possibility of distortion; (4) that the input speed of the patrol vehicle was verified and that the speedometer of the patrol vehicle was independently calibrated; (5) that the speedometer was retested at the end of the shift in the same manner that it was tested prior to the shift and that the speedometer had been serviced by the manufacturer or other professional as recommended; (6) that the radar operator could establish that the target vehicle was within the operational area of the radar beam at the time the reading was displayed; and (7) that the particular unit had been certified for use by an agency with some demonstrable expertise in the area. These guidelines can be met by a showing that the issuing officer followed the recommendations contained in the Interim Guidelines and other recommendations issued by the Office of Highway Safety Planning. *Id.* at 542-544.

Defendant argues that even if the traffic stop was legitimate, the search of his person was unreasonable (1) because "the basis of the seizure was no longer related to the [initial] circumstances which justified the stop," (2) because Jasman failed to inform him that he was free to leave, and (3) because Jasman essentially restrained him from leaving by retaining his license, registration, and proof of insurance. Defendant further argues that Jasman's uncertainty concerning whether defendant was dangerous and carrying a weapon was not enough to justify a *Terry*[2] stop in this case.

"The Michigan Constitution protects against unreasonable searches and seizures, and further provides that no warrant shall issue without probable cause . . . ." *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999); see also Const 1963, art 1, § 11. Similarly, the Fourth Amendment of the United States Constitution "'generally requires police to secure a warrant before conducting a search.'" *Levine, supra* at 178, quoting *Maryland v Dyson*, 527 US 465, 466; 119 S Ct 2013; 144 L Ed 2d 442 (1999). However, voluntary consent is an exception to the warrant requirement. *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). Jasman testified that defendant consented to the search of his motorcycle and bag, and defendant does not challenge this fact.

Nevertheless, defendant assets that even if the initial traffic stop for speeding was valid, the discovery of the gun was tainted because his continued detention was so unreasonably long as to constitute an unconstitutional seizure. We disagree. As our Supreme Court has stated:

> A traffic stop is reasonable as long as the driver is detained only for the purpose of allowing an officer to ask reasonable questions concerning the violation of law and its context for a reasonable period. The determination whether a traffic stop is reasonable must necessarily take into account the evolving circumstances with which the officer is faced. As we observed in *People v Burrell*, 417 Mich 439, 453; 339 NW2d 403 (1983), when a traffic stop reveals a new set of circumstances, an officer is justified in extending the detention long enough to resolve the suspicion raised. [*Williams, supra* at 315.]

Jasman testified at the suppression hearing that after he made the traffic stop, defendant's female passenger informed him that she had "a warrant out of Cadillac." Thus, Jasman was justified in extending the detention for the purpose of contacting his dispatcher and conducting LEIN inquiries. From those inquiries, Jasman learned that there was a valid outstanding warrant for the female passenger and that there was an outstanding "officer safety caution" regarding defendant. Jasman testified that it was 2:45 a.m. at the time of the stop and that two state police troopers contacted him by radio to inform him that they were en route to his location. Jasman waited about ten minutes and then exited his vehicle when the troopers arrived. Given that the traffic stop occurred at an early morning hour, that defendant's passenger had an outstanding arrest warrant, and that an "officer safety caution" had been issued against defendant based on a prior assault conviction, it was reasonable for Jasman to wait ten minutes for the troopers to arrive before proceeding to further interact with defendant and his passenger.

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

Jasman arrested the female passenger, and after the troopers arrived, Jasman asked her whether there were any drugs or weapons in the motorcycle's saddlebags or in defendant's possession. According to Jasman, the passenger replied, "'Ah, ah, I don't think so,' and just stutter[ed] like that." The manner in which the passenger answered the question raised Jasman's suspicions. Jasman then discussed the situation with the troopers, and they asked defendant for permission to conduct searches of his motorcycle and bag. In light of the information that Jasman had received by way of the LEIN inquiries, we cannot conclude that Jasman acted unreasonably by waiting for troopers to arrive before confronting defendant and his passenger. Defendant has not established that the extent of his detention prior to the consensual search—which ultimately led to the discovery of the gun—was so unreasonably long as to constitute an unconstitutional seizure.

During defense counsel's cross-examination of Jasman, counsel stated that he wanted to "set[] the scene: There's three officers, there's one individual getting off the motorcycle, and you are looking to search the defendant; is that correct?" The prosecutor objected, stating that defense counsel was "trying to set the stage that there was some coerciveness to this stop and search, when that is a legal decision that has already been made by this Court that there was nothing wrong with this traffic stop . . . [or] with the search of the defendant." The court agreed, and sustained the prosecutor's objection.

On appeal, defendant argues that the trial court's action in this regard prevented him from establishing that the officers' search of his person was unreasonable or nonconsensual. We disagree, and perceive no error. Contrary to the premise of defendant's argument, defendant had no right to argue before the jury that the gun at issue was found during an illegal search. Controlling case law clearly establishes that the determination whether evidence should be suppressed as the fruit of an illegal search is a question for the trial court—not for the jury. In particular, such determinations are typically made by the trial court at a suppression hearing, outside the presence of any jury. The trial court did not err by precluding defense counsel from questioning the witnesses in such a way as to suggest that the search of defendant and his vehicle had been illegal.

Defendant lastly argues that his right to the protection against double jeopardy was violated by his convictions of both felony-firearm and felon-in-possession. On appeal, defendant argues that his convictions of both felony-firearm and felony-in-possession violate the prohibition against double jeopardy (1) because the charge of felon-in-possession was used as the predicate offense for the charge of felony-firearm, and (2) because the two offenses share the same elements in violation of the test of *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). He contends that his sentences for both convictions constitute multiple punishments for the same crime in violation of the Double Jeopardy Clauses of both the Michigan and federal Constitutions. In support of his arguments, defendant cites our Supreme Court's opinion in *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007).

In *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004), our Supreme Court observed:

> The United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after

> acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense.

The *Nutt* Court addressed the meaning of the term "same offense" as it is used in the Michigan Constitution, and ultimately concluded that the term should be construed consistently with the United States Supreme Court's opinion in *Blockburger*. *Nutt*, *supra* at 573-575. The *Blockburger* test "focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Id.* at 576 (citations and quotation marks omitted).

However, where the Legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same conduct," our task is at an end. *People v Dillard*, 246 Mich App 163, 166; 631 NW2d 755 (2001); see also *Missouri v Hunter*, 459 US 359, 368; 103 S Ct 673; 74 L Ed 2d 535 (1983). Stated differently, the double jeopardy protection does not bar the imposition of multiple punishments for the "same offense" when the Legislature has clearly expressed its intent that multiple punishments be imposed. *People v Ream*, 481 Mich 223, 228 n 3; 750 NW2d 536 (2008). Of particular relevance here, this Court has previously recognized that "the Legislature clearly intended to permit a defendant charged with felon-in-possession to be properly charged with an additional felony-firearm count." *Dillard*, *supra* at 167-168; see also *People v Calloway*, 469 Mich 448; 671 NW2d 733 (2004). Defendant's argument must accordingly fail.

Defendant essentially acknowledges *Dillard* and *Calloway*, but asserts that in light of our Supreme Court's opinion in *Smith*, *supra*, these opinions should be overturned as wrongly decided. In *Smith*, our Supreme Court commented that "in adopting Const 1963, art 1, § 15, the ratifiers of our constitution intended that our double jeopardy provision be construed consistently with then-existing Michigan caselaw and with the interpretation given to the Fifth Amendment by federal courts at the time of ratification." *Id.* at 315. According to defendant, because the "legislative intent" approach to analyzing double jeopardy claims "did not surface until the late 1970's," and thus was not in existence at the time our state Constitution was ratified, it should not apply to the instant double jeopardy analysis. We cannot agree.

As already noted, the double jeopardy protection does not bar imposition of multiple punishments for the "same offense" when the Legislature has clearly expressed its intent that multiple punishments be imposed. Although perhaps not as well defined as it is today, this "legislative intent" concept has existed since long before "the late 1970s" as defendant asserts. See, e.g., *Albrecht v United States*, 273 US 1, 11; 47 S Ct 250; 71 L Ed 505 (1927). At the time of the ratification of the Michigan Constitution, the federal courts already routinely focused on legislative intent when analyzing double jeopardy claims. Defendant cannot validly argue that the legislative intent concept had not yet been developed at the time our present Constitution was adopted.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra