

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DENIS LITVINENKO,

Defendant-Appellee.

UNPUBLISHED

February 2, 2010

No. 289100

Oakland Circuit Court

LC No. 08-008844-AR

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

The prosecutor appeals by leave granted a circuit court order affirming a district court order that dismissed a charge of possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v). We reverse and remand for reinstatement of the charge. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The charge in this case was instituted after the police found less than 25 grams of heroin in defendant's possession. At the preliminary examination, Farmington Hills police officer Ken Meier testified that on November 15, 2007, at approximately noon, he was in the area of Grand River and Seven Mile in Detroit. Numerous individuals whom Meier had previously arrested told him that they purchased narcotics in that area. Officer Meier observed defendant and his brother standing in the parking lot of a closed business. Officer Meier knew defendant and knew that he and his brother lived in Farmington Hills. Meier observed a black Explorer stop in the parking lot, and defendant and his brother entered it. The vehicle moved behind a closed business in an alley out of Officer Meier's view. The vehicle was out of his view for a couple of minutes. Officer Meier testified that, in his experience, drug transactions commonly occur in vehicles. Officer Meier saw the vehicle turn onto southbound Grand River and turn around to go northbound with defendant and his brother still inside. Officer Meier followed it approximately two miles to the Eight Mile and Grand River area, to the parking lot of a Wendy's restaurant in Livonia. The brothers left the Explorer, which then drove away. According to Officer Meier, he contacted the Farmington Hills police dispatch at some point to report that he needed a vehicle stopped. He did not say that he had witnessed a crime.

Farmington Hills police officer Shamoun testified that he received information from Meier regarding a drug transaction that he observed. Shamoun and his partner spoke to Meier, who said that he saw a drug transaction and that "the responsables" were in a black Explorer. Shamoun and his partner observed two occupants exit a vehicle and enter a Wendy's restaurant

on the south side of Eight Mile Road. When officer Shamoun, who was in his uniform, approached defendant, he appeared nervous and agitated. Shamoun asked him if they had any drugs or weapons on them. Defendant stated no and began to empty his pockets. Shamoun observed a white piece of paper fall out of his pocket. Based on Shamoun's experience as a police officer, he recognized the paper as a "dope fold," which is used for carrying heroin. Officer Shamoun then searched defendant and found a couple of more dope folds in his pocket. The substance field-tested positive for heroin. Officer Shamoun acknowledged that at the time he approached defendant, he did not observe a crime occurring in his presence.

The district court concluded that the evidence from defendant's pocket should be suppressed because there was no probable cause to arrest defendant initially and no reasonable suspicion to detain him. The district court then dismissed the case.

On appeal to the circuit court, the prosecutor argued that Officer Shamoun did not detain defendant by approaching him in a public place and asking him a question, and that once the "dope fold" fell out of his pocket, there was probable cause to arrest him. In response, defendant argued that the prosecutor's analysis was faulty because Officer Shamoun was outside his jurisdiction and was just a private citizen. According to defendant, as a private citizen, the officer did not have a right to even approach him. The circuit court agreed that there was a constitutional violation and affirmed the district court's dismissal order.

On appeal, the prosecutor argues that the district court erred in suppressing the evidence and dismissing the charge because Officer Shamoun did not seize defendant by approaching him in the restaurant and asking him questions.

This Court reviews a trial court's factual findings made in conjunction with a ruling on a motion to suppress for clear error, but the application of constitutional standards is not entitled to the same deference. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). We review questions of law de novo. *Id.*

"A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement, through means intentionally applied." *Brendlin v California*, 551 US 249, 254; 127 S Ct 2400; 168 L Ed 2d 132 (2007) (emphasis, citations, and internal quotation marks omitted). As explained in *Brendlin*, *supra* at 255:

When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in *United States v Mendenhall*, 446 U.S. 544[; 100 S Ct 1870; 64 L Ed 2d 497] (1980), who wrote that a seizure occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *id.*, at 554 (principal opinion). Later on, the Court adopted Justice Stewart's touchstone, but added that when a person "has no desire to leave" for reasons unrelated to the police presence, the "coercive effect of the encounter" can be measured better by asking whether "a reasonable

person would feel free to decline the officers' requests or otherwise terminate the encounter." [Citations omitted.]

Officer Shamoun's undisputed testimony concerning the conversation that preceded defendant's dropping the dope fold was as follows:

Q. Officer Shamoun, when you are approached [sic] Mr. Litvinenko how did he appear physically to you?

A. Nervous and agitated.

Q. And did you have an opportunity to speak with him?

A. Yes, ma'am, I did.

Q. And as a result of that -- actually, let me back up a second. Did you ask Mr. Litvinenko if he had anything on his person?

A. I asked him if they had any drugs or weapons on them.

Q. How did he respond?

A. He stated no and began to empty out his pockets.

Q. What, if anything, came out of his pockets at that point?

A. I observed a white piece of paper fall out of his pocket

In summarizing the facts, the district court stated, "Officer Shamoun went into the Livonia Wendy's and confronted the Defendant and had him empty his pockets and found that there was contraband in his pocket." To the extent that the district court's statement that Officer Shamoun "had him empty his pockets" constitutes a factual finding that Officer Shamoun ordered defendant to empty his pockets, it is clearly erroneous. There was no testimony that Officer Shamoun ordered or even requested that defendant begin emptying his pockets. Officer Shamoun only testified that he asked defendant if he was carrying drugs or weapons.

The encounter here is comparable to the encounter at an airport between police officers and the defendant in *People v Sasson*, 178 Mich App 257; 443 NW2d 394 (1989). In that case, the officers were assigned to the airport to look for drug couriers. They followed the defendant after he disembarked, approached on either side of him, showed their police identification, and asked to speak with him. They explained their purpose at the airport and asked to see the defendant's ticket, which he provided. They asked if he had any narcotics, and he answered affirmatively. *Id.* at 258-259. The trial court determined that the officers had stopped the defendant without reasonable suspicion and suppressed the evidence. This Court reversed and remanded because "nothing in the record suggests that defendant had any objective reason to believe that he was not free to end the conversation and proceed on his way. Accordingly, there was no seizure of defendant and the narcotics evidence was not tainted by an unlawful stop of defendant." *Id.* at 262.

Similarly, the record in this case does not provide any basis for concluding that officer Shamoun used physical force or a show of authority to terminate or restrain defendant's freedom through means intentionally applied. *Brendlin, supra* at 254-255. Nor is there evidence from which to conclude that a reasonable person would have believed that he was not free to end the conversation and proceed about his business at the restaurant or to leave the restaurant. Instead, defendant responded to officer Shamoun's inquiry by beginning to empty his pockets and dropping a dope fold. At that point, officer Shamoun had probable cause to seize the item in plain view, arrest defendant for possession of heroin, and search him incident to the arrest. See *People v Champion*, 452 Mich 92, 101-103, 115-117; 549 NW2d 849 (1996).

Defendant argued below, and the circuit court agreed, that the location of the encounter, which was outside of officer Shamoun's jurisdiction, affects the analysis. On appeal, defendant again cites MCL 764.2a, which specifies the circumstances under which a police officer may exercise police authority outside the officer's geographical boundaries. But even, assuming arguendo that defendant could establish a violation of this statute, and therefore officer Shamoun's authority was no greater than a private person's, he nevertheless had authority to arrest defendant for felony possession of heroin. *People v Hamilton*, 465 Mich 526, 530-531; 638 NW2d 92 (2002), overruled in part in *Bright v Ailshie*, 465 Mich 770, 775; 641 NW2d 587 (2002); MCL 764.16. Moreover, even if defendant could establish that the arrest were statutorily illegal, the exclusionary rule would not apply because the arrest did not violate the Fourth Amendment. *Hamilton, supra* at 532-533. Therefore, the location of officer Shamoun's encounter with defendant is not a basis for suppressing the seized contraband.

We reverse the decisions of the district court and the circuit court and remand for reinstatement of the charge against defendant. We do not retain jurisdiction.

/s/ Jane M. Beckering

/s/ Jane E. Markey

/s/ Stephen L. Borrello