STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED February 11, 2010
v	No. 287306 Wayne Circuit Court
TOREESE HODGERS, Defendant-Appellee.	LC No. 08-003628-01

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

The prosecution appeals by leave granted an order of the Wayne County Circuit Court that affirmed a district court's order declining to bind over defendant on the charges of carrying a concealed weapon (CCW), MCL 750.227; possession of a firearm by a felon, MCL 750.224f; and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. Because an officer conducting a traffic stop is not prohibited from asking whether there are weapons or narcotics in the vehicle, and because an officer who has a reasonable suspicion that a weapon is in fact present in the vehicle may conduct a protective patdown search, we reverse and remand.

This Court reviews a district court's decision to bind over a defendant for prosecution for an abuse of discretion. *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000). The circuit court's decision is not entitled to deference because the circuit court applies the same abuse of discretion standard. *Id.* A trial court's application of the exclusionary rule to Fourth Amendment violations is a question of law that is reviewed de novo. *People v Custer*, 465 Mich 319, 326; 630 NW2d 870 (2001). Whether an officer's suspicion is reasonable under the Fourth Amendment is a question of law that is reviewed de novo. *People v Bloxson*, 205 Mich App 236, 245; 517 NW2d 563 (1994).

On appeal, the prosecutor contends that when an officer conducts a traffic stop there is no prohibition against asking whether there are weapons in the vehicle, and when an officer is thereafter presented with facts leading to reasonable suspicion that a weapon is in fact present, a protective patdown search is appropriate. We agree.

A police officer may lawfully conduct a traffic stop when the officer has probable cause to believe that a traffic violation has occurred. *People v Davis*, 250 Mich App 357, 363; 649 NW2d 94 (2002). Following a traffic stop for a traffic violation, a detention is usually justified

only for the length of time necessary to issue a citation. *People v Burrell*, 417 Mich 439, 453; 339 NW2d 403 (1983). "[A] person may not be detained for roadside questioning beyond the scope of a stop, absent at least an articulable basis for suspecting other criminal activity." *Burrell*, s*upra*, 417 Mich at 441. Thus, an officer is justified in extending the detention when "presented with additional suspicious circumstances that [warrant] further investigation." *People v Williams*, 472 Mich 308, 317; 696 NW2d 636 (2005). "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." *Williams, supra,* 472 Mich at 315. However, "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop … do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Arizona v Johnson*, ___ US ___; 129 S Ct 781, 788; 172 L Ed 2d 694 (2009). "The determination whether a traffic stop is reasonable must necessarily take into account the evolving circumstances with which the officer is faced." *Williams, supra,* 472 Mich at 315.

There is no dispute that Officer O'Shea had probable cause to stop defendant's vehicle for failing to stop at a defective traffic light. Therefore, no further inquiry into the justification of Officer O'Shea's actions "at the inception" is necessary. *Terry v Ohio*, 392 US 1, 20; 88 S Ct 1868; 20 L Ed 2d 889 (1968). There is also no dispute that Officer O'Shea did not initially have reason to believe that defendant had narcotics or weapons in the vehicle when he stopped defendant for the traffic violation. The focus of the inquiry then turns to whether, by asking defendant if there were any narcotics or firearms in the vehicle, Officer O'Shea unreasonably extended the scope of the traffic stop beyond the investigation of the underlying traffic violation.

In *Johnson*, *supra*, 129 S Ct 781, the Supreme Court was faced with facts somewhat similar to those in the present case. There, officers stopped a vehicle, in an area known for gang involvement, for a civil infraction that would warrant a citation. At the time of the stop, the officers had no reason to suspect that the driver or the two passengers in the vehicle were involved in criminal activity. The defendant, who was a passenger in the vehicle, was nevertheless questioned about criminal activity that was not related to the reason for the traffic stop. Based upon the responses provided and other articulable factors, the defendant was asked to exit the vehicle and, when patted down for weapons, was found to have a handgun. The Arizona Court of Appeals found that when the officer "undertook to question Johnson on a matter unrelated to the traffic stop… patdown authority ceased to exist, absent reasonable suspicion that Johnson had engaged, or was about to engage, in criminal activity." *Johnson, supra*, 129 S Ct at 787. In a unanimous decision, the Supreme Court reversed, and held, in part, "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Id.* at 788. Thus, the United States Supreme Court's analysis of traffic stop questioning focuses on the *length of time* of the questioning, not the *subject* of the questioning.

The encounter between Officer O'Shea and defendant does not appear to be unreasonable in length. While the record contains no specific reference to the time the questioning took before Officer O'Shea became suspicious, the record reveals that the encounter consisted of two or three questions asked of defendant at the driver's side door immediately after defendant handed Officer O'Shea his driver's license and registration. Had Officer O'Shea returned to his patrol

car, checked defendant's license through LEIN, and written defendant a citation for the traffic violation instead of asking defendant a few simple questions, the time that would have elapsed would likely not have been shorter in comparison so as to make the actual encounter unreasonably lengthy in this case. Therefore, under *Johnson*, the questioning of defendant about narcotics and weapons was not unlawful, and the time it took to question defendant was not unreasonable. The inquiries at issue did not measurably extend the traffic stop. *Johnson, supra,* 129 S Ct 788. As a result, the district court should not have implicitly suppressed the handgun on this basis.

We next turn to whether Officer O'Shea had reasonable suspicion to believe that defendant was armed and dangerous and whether his patdown search of defendant was therefore reasonable. A police officer may conduct:

> a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. *Terry, supra,* 392 US at 27.

"[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* An officer may conduct a patdown search of a person if he has reason to believe the person is armed and dangerous, but the scope of the patdown is limited to what could reasonably lead to the discovery of a weapon. *People v Champion*, 452 Mich 92, 99; 549 NW2d 849 (1996).

Here, Officer O'Shea testified that he pulled defendant over in a high crime neighborhood at approximately 10:30 p.m. Officer O'Shea further testified that when asked if there were narcotics or weapons in the vehicle, defendant became very nervous and made an adjustment with his hand near the waist of his right side. According to Officer O'Shea, based on his training and experience as a police officer, these actions were consistent with someone who was carrying or about to pull a weapon. When Officer O'Shea then asked to search the vehicle, defendant's voice cracked. Defendant exited the vehicle when asked but, despite the fact that defendant was told to keep his hands up, pulled at his coat near the right side of his waist. When viewed in the totality of the circumstances as "understood by law enforcement officers," the actions gave rise to a reasonable suspicion that defendant was armed and dangerous. *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993).

While nervousness alone is "insufficient to create a reasonable suspicion of criminal activity," *Bloxson, supra,* 205 Mich App at 247, "[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion." *People v Oliver*, 464 Mich 184, 197; 627 NW2d 297 (2001), quoting *Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d 570 (2000). Likewise, while presence in a high-crime neighborhood does not, standing alone, create a reasonable suspicion, this fact may nonetheless be taken into account in assessing reasonable suspicion. *People v Shabaz*, 424 Mich 42, 60; 378 NW2d 451 (1985). Suspicious movements also contribute to a finding of reasonable suspicion. See, e.g., *People v Muro*, 197 Mich App 745, 748; 496 NW2d 401 (1993).

Defendant's presence in a high crime area at night, his becoming nervous when asked about the presence of weapons or narcotics, and his hand movements around his waist immediately after he was asked whether there was anything in the vehicle, and again after exiting the vehicle, when viewed together, through Officer O'Shea's perspective, gave rise to a particularized suspicion that defendant was armed. Officer O'Shea was thus justified in conducting a limited, patdown for weapons. *Champion, supra,* 452 Mich at 99.

The above being true, the remaining issue for our consideration is whether, at preliminary examination, there was "evidence regarding each element of the crime charged or evidence from which the elements may be inferred" in order to bind over defendant. *Hudson, supra*, 241 Mich App at 278, quoting *People v Selwa*, 214 Mich App 451, 457; 543 NW2d 321 (1995). The prosecution need not prove an offense beyond a reasonable doubt at preliminary examination, but must establish that a felony has been committed and "there is probable cause to believe that the defendant was the perpetrator." *Selwa, supra,* 214 Mich App at 456-457, citing MCL 766.13.

> The elements of carrying a concealed weapon, MCL 750.227, are:
> 1) Carrying a concealed pistol or other dangerous weapon on one's person, or carrying the same in a vehicle whether concealed or otherwise; 2) without a license; 3) unless in his dwelling house, place of business, or on his own land.

The prosecutor presented evidence in this matter that Officer O'Shea discovered a handgun that was concealed on defendant's person while defendant was operating his vehicle, and that defendant did not have a permit to possess the weapon.

> The elements of felon in possession of a firearm, MCL 750.224f, are:
> 1) Possession of a firearm; 2) when ineligible to do so due to a conviction of a felony; and, 3) the requirements for regaining eligibility to possess a firearm had not been met.

The prosecutor presented evidence that defendant possessed a handgun and had been convicted of carjacking, MCL 750.529a, a felony punishable by life in prison. And, the elements of felony firearm, MCL 750.227b, are:

> 1) Possession of a firearm; 2) during the commission or attempted commission of a felony.

A felon in possession of a firearm charge can constitute the underlying felony for felony firearm. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). The prosecutor presented evidence that defendant possessed a firearm while committing the underlying offense of felon in possession of a firearm.

With the handgun properly considered as evidence, the prosecutor provided evidence on the elements of each charged offense. Because the district court should not have suppressed the handgun, evidence was presented on all of the elements of the three charges and, therefore, the district court abused its discretion in failing to bind over defendant as charged.

Reversed and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood