# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>December 28, 2010 |
| v | No. 290094<br>Ingham Circuit Court |
| KENNETH DEWAYNE ROBERTS,<br><br>Defendant-Appellee. | LC No. 08-000838-FH |

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

BORRELLO, J. (*concurring in part and dissenting in part*).

I agree with the majority's holding that the trial court erred in suppressing the evidence. I write separately because I disagree with the majority's assumption that the police officers' detention of defendant was improper. I would hold that the conduct of the police officers in this case did not violate the Fourth Amendment rights of defendant.

## I. FACTS

On the evening of July 10, 2008, Officers Brian Rasdale and Jason Spoelma of the Lansing Police Department were patrolling near Pinebrook Manor Apartments around 12:30 a.m. The officers were in full uniform and were driving a marked police vehicle. There had been problems with drug trafficking, narcotics, weapons offenses and fights in the vicinity of the apartment complex, and there was a valid trespass letter for the apartment complex. According to Officer Rasdale, "[a] trespass letter enables the Lansing Police Department to initiate criminal complaints on any subjects that do not reside in that apartment complex." Officer Rasdale stated that he had been to the apartment complex 50 or 60 times in the past eighteen months, and Officer Spoelma stated that he had been to the apartment complex numerous times to investigate complaints of drug dealing, fights and disorderly persons.

As the officers pulled into the parking lot of the apartment complex, they observed defendant standing outside and next to his vehicle in the parking lot; Officer Spoelma stated that defendant "quickly ducked in . . . the driver's side of the vehicle for a little while and then exited again, and that was kind of suspicious. It looked like, um, he had gone into the vehicle as soon as he saw us." According to the officers, defendant was in the car for ten to 15 seconds. Officer Spoelma characterized defendant's ducking into the car as "a furtive gesture, like maybe he was trying to hide something or maybe retrieving something out of the vehicle."

After defendant got out of the car, he stood next to the car, and the officers approached him, made contact with him and asked him for identification, which defendant provided. Both officers testified that defendant was not free to leave at this time because they were investigating whether he was trespassing. Defendant's identification indicated that he did not reside at Pinebrook Manor Apartments; therefore, defendant was trespassing. According to Officer Rasdale, defendant told the officers that they could search his person and that he didn't have anything on him. Officer Spoelma conducted a *Terry*[1] pat-down search of defendant's person, which did not uncover anything. After the *Terry* search, the officers asked defendant for consent to search his automobile, but defendant refused. The officers then placed defendant in the back seat of the police vehicle. According to Officer Spoelma, it was routine for police to detain someone in the back seat of the police car while they complete an investigation. Defendant asserted that he was placed in handcuffs at this time; however both police officers asserted that defendant was not placed in handcuffs when they initially placed him in the back of the police car.

At some point during their encounter with defendant, the officers observed a box of sandwich baggies on the back seat of defendant's vehicle. Because such baggies often indicate narcotics activity, the officers called a K-9 unit. Also at some point during their encounter with defendant, some of defendant's friends talked to the officers about defendant, apparently indicating that they were friends and were meeting defendant. According to Officer Rasdale, he heard the friends say that defendant had permission to be there and meet them.

While defendant was in the back seat of the police vehicle, Officer Spoelma ran a LEIN check on defendant. The LEIN check came back clean. As Officer Spoelma ran the LEIN check, Officer Rasdale walked around defendant's car and observed a handgun underneath the driver's seat of the car. According to Officer Rasdale, he could see the rear sights of a handgun as well as the handle of the handgun underneath the seat. Officer Rasdale went back to the police vehicle and told Officer Spoelma about the gun, the officers went to defendant's vehicle together, officer Rasdale "removed the gun and made it safe." The gun was not loaded, but it had 12 rounds inside the magazine. Thereafter, the officers handcuffed defendant and arrested him for carrying a concealed weapon.

The trial court granted defendant's motion to suppress the weapon. In so doing, the trial court ruled that the facts of this case were distinguishable from the facts in *People v Jenkins*, 472 Mich 26; 691 NW2d 759 (2005), and stated:

> I think that—the Court rules that there is just—um, wasn't adequate reasonable suspicion of a crime. Um, the testimony was clear that when the police officer approached the car from a perpendicular angle and the Defendant was on the far side of the car, um, the police—the squad car was 50 to 60 feet away with headlights on, but no other, um, police car lights were activated at that point.

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[1] *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

So, um, the Court finds that the subsequent detention and the search were unlawful and grants the motion to suppress.

## II. STANDARD OF REVIEW

We review a trial court's findings of fact in a suppression hearing for clear error. *Jenkins*, 472 Mich at 31. However, the "'[a]pplication of constitutional standards by the trial court is not entitled to the same deference as factual findings.'" *Id.*, quoting *People v Nelson*, 443 Mich 626, 631 n 7; 505 NW2d 266 (1993). Therefore, "[a]pplication of the exclusionary rule to a Fourth Amendment violation is a question of law that is reviewed de novo." *Jenkins*, 472 Mich at 31.

## III. ANALYSIS

Officers Spoelma and Rasdale's first contact with defendant occurred when they approached him and asked him for identification after witnessing him outside his car in the parking lot of the apartment complex. "In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment." *Hiibel v Sixth Judicial Dist Court of Nevada*, 542 US 177, 185; 124 S Ct 2451; 159 L Ed 2d 292 (2004). Allowing identification checks promotes the strong governmental interest of solving crimes and bringing offenders to justice. *Id.* When defendant supplied his identification, it revealed that he did not live in the Pinebrook Manor Apartments. In light of the trespass letter, the fact that defendant did not live in the apartment complex meant that he was trespassing. At some point after the officers requested his identification, defendant indicated that he did not have anything on him and consented to the officers searching his person. Officer Spoelma then conducted a *Terry* pat-down search of defendant, which did not uncover any evidence. The pat-down search of defendant was a valid search under *Terry* because it was based on a reasonable suspicion that defendant was engaged in trespassing; therefore the officers were permitted to stop defendant for a brief time and take additional steps to investigate further. *Terry*, 392 US at 30-31; *People v Oliver*, 464 Mich 184, 193; 627 NW2d 297 (2001). Moreover, the pat-down search of defendant's person was constitutionally permissible based on defendant's consent. A person may consent to a search. *People v Chowdhury*, 285 Mich App 509, 524; 775 NW2d 845 (2009). Defendant acknowledged at the suppression hearing that he that he consented to the officers searching his person. Furthermore, he does not argue on appeal that his consent to the search of his person was the result of coercion or duress. *Id.*

After conducting the pat-down search of defendant, the officers placed defendant in the back seat of their patrol car while they investigated further. The officers' conduct of temporarily detaining defendant in the back of the patrol car did not violate defendant's Fourth Amendment rights. Under *Terry*, a police officer may approach and temporarily detain a person for the purpose of investigating possible criminal behavior even if there is not probable cause to arrest the person. *Terry*, 392 US at 22; *Jenkins*, 472 Mich at 32. Such a detention does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot. *Jenkins*, 472 Mich at 32. The reasonableness of an officer's suspicion of criminal activity must be determined on a case by case basis considering the totality of all the facts and circumstances. *Oliver*, 464 Mich at 192. "[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 . . . .'" *Id.*, quoting *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). A determination regarding whether there is reasonable suspicion to support an investigatory stop "'must be based on commonsense judgments and inferences about human behavior.'" *Oliver*, 464 Mich at 197, quoting *Illinois v Wardlow*, 528 US 119, 125; 120 S Ct 673; 145 L Ed 2d 570 (2000).

In this case, the circumstances that provide reasonable suspicion to justify the investigative detention of defendant include the fact that the officers observed defendant in an area that was known to have a high level of criminal activity, including drug trafficking, narcotics offenses, weapons offenses and fights, that Officer Rasdale had been called out to the apartments 50 or 60 times in the past eighteen months, that the police knew there was a valid trespass letter, that the police confirmed by examining defendant's identification that defendant did not reside at the apartment complex, and that defendant acted suspiciously and made a furtive gesture, like he was trying to hide something or retrieve something out of the vehicle. Under these circumstances, a brief investigatory detention was lawful under *Terry*.

Moreover, the duration of defendant's detention in the back seat of the police car did not render the detention unreasonable. "[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion." *United States v Place*, 462 US 696, 709; 103 S Ct 2637; 77 L Ed 2d 110 (1983). Officer Rasdale testified that it would take the K-9 unit, on average, five to ten minutes to arrive. According to defendant's testimony, he was in the back seat of the police vehicle for approximately 15 to 20 minutes. A 15 to 20 minute detention is not unreasonable as long as the officers were diligently pursuing a means of investigation that was likely to quickly confirm or deny their suspicions. See *People v Yeoman*, 218 Mich App 406, 413; 554 NW2d 577 (1996) (a 45-minute detention was not improper when the investigating officer was diligently pursuing a means of investigation likely to confirm or deny quickly his suspicions); *People v Chambers*, 195 Mich App 118, 123-124; 489 NW2d 168 (1992) (a 20-minute detention was reasonable when the police were diligently pursuing a means of investigation that was likely to confirm or dispel their suspicions quickly). In this case, the evidence indicated that Officers Spoelma and Rasdale were diligently pursuing their investigation of defendant. Thus, the 15 to 20 minute detention was not unreasonable.

About a minute or two after the officers placed defendant in the back seat of the police car, Officer Rasdale walked around defendant's vehicle and observed through a window "the rear sights of a black colored handgun" and the handle of a handgun underneath the driver's seat of the vehicle. Officer Rasdale did not have to open a door to defendant's vehicle to see the gun; it was in plain view. In situations where the initial intrusion that brings the police within plain view of evidence is supported by one of the recognized exceptions to the warrant requirement, the police may seize evidence in plain view without a warrant. *Arizona v Hicks*, 480 US 321, 326; 107 S Ct 1149; 94 L Ed 2d 347 (1987). In this case, Office Rasdale discovered the handgun in plain view in defendant's automobile during the course of a lawful *Terry* detention. Thus, the handgun was properly seized without a warrant.

For the reasons explained above, I believe that the police conduct in this case did not violate defendant's Fourth Amendment rights. To the contrary, I would conclude that the police in this case engaged in good police work in compliance with the Fourth Amendment. I therefore

dissent from the majority opinion's assumption that the detention of defendant was improper. However, albeit for different reasons, I concur with the majority's conclusion that the trial court erred in granting defendant's motion to suppress.

/s/ Stephen L. Borrello