

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KENNETH DEWAYNE ROBERTS,

Defendant-Appellee.

UNPUBLISHED

December 28, 2010

No. 290094

Ingham Circuit Court

LC No. 08-000838-FH

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

STEPHENS, J. (*dissenting*).

I would remand this matter for an evidentiary hearing to determine whether defendant was lawfully detained at the time the firearm was discovered in his car.

As the majority states, conflicting evidence was presented below regarding the circumstances surrounding defendant's detention, including the timing of the detention and the type of the confinement. The trial court did not resolve the inconsistencies nor did it make any determinations regarding the credibility of the various witnesses. These unresolved issues control whether the detention was lawful under the standards set forth in *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968). I disagree with the majority's conclusion that the legality of the detention in this case is irrelevant in determining whether the exclusionary rule applies. As the majority recognizes, "The exclusionary rule is a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of constitutional rights" and "should be used only as a last resort." *People v Frazier*, 478 Mich 231, 247; 733 NW2d 713 (2007) (quotations and citations omitted). "It is only when an 'unlawful detention has been employed as a tool to procure any type of evidence from a detainee' that the evidence is suppressed under the exclusionary rule." *People v Kelly*, 231 Mich App 627, 634; 588 NW2d 480 (1998), quoting *People v Mallory*, 421 Mich 229, 240-241, 243, n 8; 365 NW2d 673 (1984) (emphasis in original). Here, defendant is arguing that the police asked his consent to search his vehicle. When consent was denied, defendant was placed in custody, perhaps unlawfully. At that point, the officers observed a firearm in the vehicle while they were waiting for a K-9 unit to arrive. Based on those facts, it could certainly be concluded that an unlawful detention was utilized for the purpose of obtaining the evidence in question. Consequently, it would be proper to apply the exclusionary rule.

Likewise, if the detention was unlawful, the plain view doctrine would not apply. “The plain view doctrine allows police officers to seize, without a warrant, items in plain view if the officers are *lawfully* in a position from which they view the item, and if the item's incriminating character is immediately apparent.” *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996). In the present case, whether the officers were in a lawful position is dependent upon the legality of the detention. If the detention was unlawful, the officers were only in a position to discover the evidence directly because of their improper conduct. Conversely, if the detention was lawful the plain view doctrine renders the search constitutional.

Finally, I disagree with the majority’s reliance on the inevitable discovery doctrine. The majority correctly explains that exclusion is unnecessary if discovery of the evidence was inevitable despite the unconstitutional conduct. *People v Stevens (After Remand)*, 460 Mich 626, 637; 597 NW2d 53 (1999). If defendant was improperly detained, it follows that discovery was not inevitable. As explained above, the firearm was not discovered until after defendant was detained. Had defendant not been detained, the record demonstrates that defendant would have departed from the scene and the officers would not have had the opportunity to discover the evidence.

Because I conclude that each of the prosecution’s theories of admissibility are dependent on the legality of the detention, I would remand this matter for an additional hearing to determine the circumstances surrounding the decision to place defendant in custody and the nature of the detention. I would direct the trial court to exclude the evidence if it is determined that the detention was unlawful.

/s/ Cynthia Diane Stephens