

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 15, 2015

v

LAURENCE JAMES,

No. 322876
Wayne Circuit Court
LC No. 14-001079-FH

Defendant-Appellant.

Before: JANSEN, P.J., and CAVANAGH and GLEICHER, JJ.

PER CURIAM.

Following a bench trial, the circuit court convicted defendant of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, possession of a firearm during the commission of a felony, MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d). Defendant challenges the constitutionality of the search that uncovered the handgun and marijuana, as well as the arresting officers' failure to video record the transaction. We discern no error and therefore affirm.

I. BACKGROUND

At approximately 10:00 p.m. on January 14, 2014, three Detroit police officers travelling in a marked patrol vehicle observed a Buick Regal with only one headlight illuminated. The driving officer activated the patrol car's lights and siren to effectuate a traffic stop, and the Buick pulled into a driveway. When the officers pulled behind the Buick and illuminated the stopped vehicle, Detroit Police Officer Ransom Williams saw that defendant, who was seated in the front passenger seat, "kept looking back over his shoulder at us, and he was moving toward his right arm [sic], toward his chest, frantically, as we – when I exited the vehicle." Williams "felt like [defendant] could possibly be trying to conceal something, mainly a firearm." As a result, Williams ran to the passenger window and pointed his flashlight at defendant. Williams observed defendant "placing a handgun inside his left sleeve." Officer Williams ordered defendant to exit the car. The officer handcuffed defendant and conducted a pat down search, during which he found a handgun tucked inside defendant's left sleeve. When the officer

conducted a more thorough search incident to arrest, he uncovered marijuana on defendant's person.¹

At trial, defendant moved to suppress the gun, arguing that the officers lacked reasonable suspicion to search him. The trial court denied the motion, finding that Officer Williams testified credibly and supplied reasonable grounds to support his search. Defendant also complained at trial that the officers had not captured the transaction on their dashboard video camera. The prosecution presented activity logs revealing that the camera's memory card reached capacity at 6:00 p.m. that evening and stopped recording. The parties stipulated to the validity of that report and the court admitted it into evidence. Thereafter, defendant and the driver claimed that the officers did not see defendant's weapon before they forcefully pulled him from the car. The court rejected that version of events and convicted defendant as charged.

II. ANALYSIS

On appeal, defendant challenges the trial court's failure to suppress the handgun evidence against him. We review de novo a trial court's ruling on a suppression motion. *People v Steele*, 292 Mich App 308, 313; 806 NW2d 753 (2011). We review the trial court's underlying factual findings for clear error, i.e., error that leaves this Court "with a definite and firm conviction that the trial court made a mistake." *Id.*

Both the United States and Michigan Constitutions protect against unreasonable searches and seizures. US Const Am IV; Const 1963, art 1, § 11. A police officer may conduct an investigative, or *Terry*,² stop if he "has a reasonable, articulable suspicion that criminal activity is afoot." *Steele*, 292 Mich App at 314. To determine if an officer had reasonable suspicion, the court should consider whether "the facts known to the officer at the time of the stop would warrant an officer of reasonable precaution to suspect criminal activity." *Id.* This determination is made case-by-case based on the totality of the circumstances. *Id.* The trial court should give deference to the "experience of law enforcement officers and their assessments of criminal modes and patterns." *Id.* at 315. An officer's subjective intent is irrelevant in determining whether a stop was supported by reasonable, articulable suspicion of unlawful activity. *People v Dillon*, 296 Mich App 506, 509; 822 NW2d 611 (2012). In addition, a search or seizure must be justified at its inception. *People v Williams*, 472 Mich 308, 314; 696 NW2d 636 (2005).

The officers in this case were justified in executing a traffic stop. The vehicle in which defendant was a passenger had a malfunctioning headlight. This violated MCL 257.685(1), which requires vehicles to "be equipped with at least 2 head lamps with at least 1 head lamp on each side of the front of the motor vehicle." MCL 257.683 authorizes police officers to execute traffic stops when they notice such a defect and to issue a traffic citation.

¹ The driver of the Buick was given a traffic ticket but was not otherwise detained.

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

Once stopped, one of the officers observed defendant making furtive gestures. The officer suspected that defendant was trying to hide something, possibly a weapon. As a result, the officer hastened his approach to the vehicle. Contrary to defendant's implication, the officer's approach of the vehicle was not a search, or even part of a search. Rather, it was part and parcel of the investigatory stop. When the officer lawfully approached the vehicle, he saw defendant tuck a handgun into his left sleeve. As the handgun was in the officer's "plain view" while he was "lawfully in a position from which [he] could view the item," the officer was entitled to immediately search defendant and seize the gun without first obtaining a search warrant. See *People v Wilkens*, 267 Mich App 728, 733; 705 NW2d 728 (2005). The officer was equally entitled to order defendant to exit the vehicle and conduct a pat down search as he reasonably feared (based on his direct observation) that defendant was armed and that the officers' safety could be in jeopardy. See *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001).

Defendant contends that Officer Williams did not testify truthfully and that although defendant possessed a weapon at the time of the traffic stop, it was never outside of his clothing where the officer could have seen it. However, the court considered the parties' divergent descriptions of events during the traffic stop and chose to credit the testimony presented by Officer Williams. We may not interfere with the court's assessment of witness credibility. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Defendant further contends that the trial court should have suppressed the evidence against him because the officers acted in "bad faith" in allowing the transaction to go unrecorded. On appeal, defendant posits that the officers knew the camera's memory was full when they began their shift and intentionally failed to rectify the situation. Defendant equates the officers' conduct with destroying exculpatory evidence and contends that due process requires suppression of the evidence obtained during the stop.

When the prosecution withholds exculpatory evidence from the defense, the prosecution violates the defendant's right to due process "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). If the defendant cannot definitively establish that the evidence would have been exculpatory, however, relief is warranted only if the defendant can show that the police officers "acted in bad faith." *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). The burden of establishing that the evidence was actually exculpatory or that the officers acted in bad faith falls on the defendant. *Id.*

In this case, the officers did not destroy or fail to preserve evidence. Rather, they failed to take steps to ensure that certain evidence (dash cam footage) was collected. A defendant has no due process right to have law enforcement "use a particular investigatory tool." *Arizona v Youngblood*, 488 US 51, 59; 109 S Ct 333; 102 L Ed 2d 281 (1988). Nor is the prosecution or law enforcement required to "seek and find exculpatory evidence." *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). In any event, the court considered the evidence presented by both sides and found that the officer credibly testified that defendant made furtive gestures in the vehicle and discredited defendant's testimony that Officer Williams unjustifiably removed him from the vehicle. This credibility assessment suggests that the trial court believed the evidence would not have been exculpatory. Moreover, the court expressly found that there was not "any

kind of intentional act by the Police Department in not having videoed the scene.” Again, we may not second guess the court’s assessment of witness credibility. *Kanaan*, 278 Mich App at 619. We discern no clear error in the trial court’s factual determination that the officers did not act in bad faith. Therefore, the trial court correctly concluded that defendant was not entitled to suppression of the evidence.

We affirm.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Elizabeth L. Gleicher