STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF MERIDIAN TOWNSHIP, Plaintiff-Appellant,	UNPUBLISHED February 22, 2018
v	No. 338298 Ingham Circuit Court
JASON BANAS, Defendant-Appellee.	LC No. 16-000708-AR

Before: RONAYNE KRAUSE, P.J., and FORT HOOD and O'BRIEN, JJ.

PER CURIAM.

In this expedited appeal, plaintiff appeals by leave[1] granted the circuit court's opinion and order overturning defendant's misdemeanor jury-trial conviction of obstructing or opposing law enforcement.[2] We reverse and remand for reinstatement of the jury's verdict.

I. FACTS AND PROCEDURAL HISTORY

After drinking earlier in the day and attending a Michigan State University football game on August 29, 2014, defendant went to the home of two friends and continued socializing and drinking alcohol.[3] In the early morning hours of August 30, 2014, he decided to walk home because there was a lengthy wait for a taxi. After he had walked approximately two miles and while he was walking on the sidewalk on Lake Lansing Road, defendant was stopped by Meridian Township Police Officer Michael Hagbom. Officer Hagbom acknowledged that he did not suspect criminal activity when he stopped defendant, but explained that he saw defendant stumble once, go to his knee, get up and keep walking, fall into a ditch, and stand up. According to defendant's version of events, he had merely dropped his cellular telephone. Initially,

[1] *People of Meridian Twp v Banas*, unpublished order of the Court of Appeals, entered August 28, 2017 (Docket No. 338298).

[2] Defendant was charged pursuant to Charter Township of Meridian Ordinance § 50-141, which provides that "[i]t shall be unlawful for any person to knowingly or recklessly obstruct, resist, hinder or oppose any member of the Police Department or any peace officer while on duty."

[3] These facts were gleaned from defendant's second trial on August 26, 2016.

defendant stood mute when confronted by Officer Hagbom, but he eventually told the officer he was going home and gave him his address. Officer Hagbom testified that defendant's speech was slurred, that he smelled of alcohol, and that he wavered back and forth while standing. Officer Hagbom also stated that defendant's cognitive abilities were initially "very poor." To gauge defendant's level of intoxication, Officer Hagbom administered a preliminary breath test (PBT) multiple times but it failed to render a result. According to Officer Hagbom, defendant was unable to comply with the PBT because of his intoxication. Officer Hagbom recalled that after he attempted to give another PBT to defendant, defendant began to walk away.

Officer Hagbom testified that he told defendant to stop numerous times but defendant did not comply, and that he jogged to catch up with defendant and grabbed defendant's arm. Officer Hagbom testified that he wanted to escort defendant back to his patrol car and call an ambulance for him. As Officer Hagbom led defendant to his patrol car, defendant sat down in his "center of gravity," like he was "try[ing] to sit down in a chair." Officer Hagbom subsequently warned defendant to not resist, took him to the ground and gave him a "knee strike" to his thigh area, and then tased him.

On April 10, 2015, following a jury trial, defendant was convicted of the charged offense. On May 27, 2015, defendant was sentenced to 93 days in jail with credit for one day served, and received a 92-day suspension of the sentence upon successful completion of probation. After defendant appealed to the circuit court (the first appeal), the circuit court issued an opinion and order on December 1, 2015, holding that the community caretaker exception to the Fourth Amendment warrant requirement for detaining a person applied. However, the circuit court overturned defendant's conviction on the basis of an instructional error. The circuit court remanded the case to the district court for a retrial. While plaintiff sought leave to appeal in this Court, this Court denied plaintiff's application. *People of Meridian Twp v Banas*, unpublished order of the Court of Appeals, entered June 2, 2016 (Docket No. 331235).

On August 26, 2016, defendant was once again tried before and convicted by a jury. Defendant again appealed his conviction to the circuit court, and on February 27, 2017, the circuit court entered an order overturning defendant's conviction. The circuit court determined that while Officer Hagbom was engaged in the exercise of a community caretaking function when he initially stopped defendant, defendant's detention was unreasonable where Officer Hagbom used unnecessary force, and defendant therefore had a right to resist Officer Hagbom. Accordingly, the circuit court overturned defendant's conviction. Plaintiff now appeals by leave granted.

II. ANALYSIS

A. LAW OF THE CASE DOCTRINE

Plaintiff first argues that pursuant to the law of the case doctrine, the circuit court erred in failing to adhere to its initial determination, in defendant's first appeal to the circuit court, regarding the application of the community caretaking exception. We disagree.

The question whether the law of the case doctrine is applicable presents an issue of law that we review de novo. *KBD Assoc, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 679; 816 NW2d 464 (2012).

Under the doctrine of the law of the case, where an appellate court has decided a legal question and remanded the matter for further proceedings, the legal questions resolved by the appellate court during the initial appeal cannot be "differently determined on a subsequent appeal in the same case where the facts remain materially the same." *People v Goliday*, 153 Mich App 29, 32-33; 394 NW2d 476 (1986) (citation and quotation marks omitted). However, this Court has concluded that the doctrine does not apply "where different questions of law are presented in the first and second appeals[,]" and "where the issue in the subsequent appeal was not squarely presented in the first appeal[.]" *Id*. at 33.

In defendant's first appeal following his first jury trial conviction, the circuit court rejected his argument that the community caretaking exception did not apply on the facts of this case. Plaintiff argues that in finding that the community caretaking exception applied in defendant's first appeal, the circuit court implicitly found that Officer Hagbom acted reasonably. According to plaintiff, the circuit court was therefore bound to conclude both that the community caretaking exception applied and that Officer Hagbom acted reasonably when considering defendant's second appeal to the circuit court. However, in our view, whether the community caretaking exception applied to permit Officer Hagbom's conduct and the inquiry into whether Officer Hagbom acted reasonably involve two distinct legal questions. A brief background of the community caretaking exception is of assistance in our analysis.

The Michigan Supreme Court addressed the community caretaking exception to the Fourth Amendment search warrant requirement in *People v Davis*, 442 Mich 1; 497 NW2d 910 (1993).[4] Specifically, the *Davis* Court recognized that "[c]ommunity caretaking activities are varied and are performed for different reasons," and the levels of intrusion permitted under the exception are different depending on the nature of the situation. *Id*. at 25. Subsequently, in *People v Hill*, 299 Mich App 402, 406; 829 NW2d 908 (2013) (citations omitted), this Court noted that "[r]endering aid to persons in distress is a community-caretaking function[.]" Moreover, in *People v Slaughter*, 489 Mich 302, 316; 803 NW2d 171 (2011), the Michigan Supreme Court instructed that "courts must consider the reasons that officers are undertaking their community caretaking functions, as well as the level[ ] of intrusion the police make while performing these functions, when determining whether a particular intrusion to perform a community caretaking function is reasonable." (Quotation marks omitted.)

In defendant's first appeal to the circuit court, he argued that the community caretaking exception did not apply under the facts of this case because he was not in need of immediate assistance. The circuit court disagreed, finding "that the community caretaking exception was appropriately applied to [the facts of] this case." However, whether Officer Hagbom acted reasonably was outside the scope of the circuit court's determination, and we therefore disagree

[4] The *Davis* Court also noted the counterpart to the Fourth Amendment in the Michigan Constitution. Const 1963, art 1, § 11. *Davis*, 442 Mich at 9-10.

with plaintiff's contention that the circuit court's December 1, 2015 ruling "implicitly address[ed] the issue of reasonableness." Thus, we disagree with plaintiff that the circuit court in defendant's second appeal was bound by the law of the case doctrine.

B. THE CIRCUIT COURT'S DECISION TO OVERTURN DEFENDANT'S CONVICTION

Plaintiff next argues that the circuit court erred in overturning defendant's conviction where it (1) employed an incorrect standard of review, (2) ultimately concluding that defendant was justified in resisting Officer Hagbom, (3) therefore substituting its factual findings for that of the district court. We agree.

While couched in constitutional terms, the thrust of defendant's argument in his second appeal to the circuit court giving rise to this appeal was that the record evidence did not support his conviction where (1) Officer Hagbom did not act reasonably in seizing him, and (2) his subsequent resistance was lawful. Thus, defendant's appeal essentially presented a challenge to the sufficiency of the evidence supporting his conviction. However, the circuit court instead reviewed the matter using the standard for reviewing a decision on a motion to suppress evidence.

A reviewing court reviews de novo a defendant's challenge to the sufficiency of the evidence. *People v Gaines*, 306 Mich App 289, 296; 856 NW2d 222 (2014). The reviewing court examines the evidence presented to the jury in a light most favorable to the prosecution to determine whether the jury could have found that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *Id.* "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

In *People v Moreno*, 491 Mich 38, 52; 814 NW2d 624 (2012), the Michigan Supreme Court recognized a common law right to resist an unlawful arrest, stating that "the prosecution must establish that the officers' actions were lawful[ ]" to prove the offense of resisting and obstructing a police officer. Likewise, in *People v Quinn*, 305 Mich App 484, 494; 853 NW2d 383 (2014), this Court, in the context of a case where the defendant was charged with resisting or obstructing a police officer in contravention of MCL 750.81d, concluded that following *Moreno*, consistent with the common law rule, the prosecution must establish that an officer acted lawfully to prove the charge of resisting and obstructing a police officer. Generally, the lawfulness of an arrest is a question of law for the trial court. *Quinn*, 305 Mich App at 494. However, "if the lawfulness of the arrest is an element of the criminal offense, it becomes a question of fact for the jury." *Id*. As the Michigan Supreme Court observed, where a police officer is acting pursuant to the community caretaking exception to the warrant requirement, the police officer must act reasonably. *Slaughter*, 489 Mich at 316. Accordingly, in determining whether the threshold of reasonableness was met, it must be determined why the officer undertook the community caretaking function, as well as the level of intrusion engaged in. *Id*. Specifically, "[t]he police must be primarily motivated by the perceived need to render assistance or aid and may not do more than is reasonably necessary to determine whether an individual is in need of aid and to provide that assistance." *Hill*, 299 Mich App at 406, citing *Slaughter*, 489 Mich at 315 n 28.

Viewed in the light most favorable to plaintiff, we conclude that the record evidence amply supported defendant's conviction of knowingly or recklessly obstructing, resisting, hindering or opposing Officer Hagbom during their interaction on August 30, 2014. Officer Hagbom initially stopped defendant to ascertain his safety, as well as to ensure that defendant did not present a threat to the safety of the public given his visible intoxication. Defendant knew that Officer Hagbom was a police officer. Officer Hagbom continued to detain defendant where he viewed defendant as a potential threat to himself and public safety, and he planned to call an ambulance for defendant. Specifically, Officer Hagbom was concerned about how defendant would make it home safely given his visible intoxication and inability to stand up straight. After an attempt to administer a PBT was unsuccessful, defendant abruptly walked away from Officer Hagbom, ignoring the officer's multiple verbal commands to stop. Officer Hagbom attempted to take defendant over to his patrol car so that he could call an ambulance for him, but defendant resisted his efforts by moving into a seated position. Officer Hagbom eventually took defendant to the ground when defendant was "pushing against [Officer Hagbom]." Once on the ground, and as they struggled in a ditch, defendant continued to resist Officer Hagbom by reaching forward while Officer Hagbom attempted to take defendant's hands behind his back. After Officer Hagbom used a knee strike in an attempt to distract defendant, he eventually tased defendant after giving him three warnings that defendant would be tased if he did not comply with Officer Hagbom's directives to stop resisting.[5] Thus, the record evidence supported the conclusion that Officer Hagbom's detention of defendant was lawful, and therefore defendant's resistance was not justified or permissible under Michigan law. *Moreno*, 491 Mich at 52; *Quinn*, 305 Mich App at 494. Put another way, where defendant knowingly or recklessly obstructed, hindered, resisted or opposed Officer Hagbom by walking away from him, struggling with him physically and refusing to submit to his authority following 20 verbal commands to stop resisting, his conviction for obstructing and opposing a police officer was supported by the record evidence. Accordingly, the circuit court erroneously overturned defendant's conviction.

III. CONCLUSION

We reverse the circuit court's order overturning defendant's conviction and remand for reinstatement of the jury's verdict. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Karen M. Fort Hood
/s/ Colleen A. O'Brien

[5] Officer Hagbom used the "dry stun" function on his taser.