STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 2013
v	No. 298374 Oakland Circuit Court
STEVEN ALEXANDER JOHNSON, Defendant-Appellant.	LC No. 2009-227658-FH

Before: BECKERING, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of carrying a concealed weapon, MCL 750.227. The trial court, applying a third-offense habitual offender enhancement under MCL 769.11, sentenced him to one year in jail, with credit for 234 days served, and to two years' probation. Defendant's sole argument on appeal is that "the trial court erred when it denied the motion to suppress when the police searched a backpack after the police placed [defendant] in [a] patrol car." We disagree and affirm.

Defendant's conviction arose after Officer Gale Cook of the Madison Heights Police Department received a call on July 4, 2009, involving an assault at an apartment complex. Cook learned during the call that the suspect had left the scene on foot, carrying a backpack, and that there was a gun in the backpack. Cook drove to the apartment complex, arriving within approximately five minutes, and spotted an individual (defendant) who matched the description of the suspect and was carrying a backpack. After a struggle and after defendant was placed in the backseat of a patrol car, Cook found a loaded .38 caliber revolver in the backpack.

On December 30, 2009, defendant moved to suppress the evidence of the gun, arguing, in part, that "there were no exigent circumstances, that the police did not act on probable cause and [that the] police had no right to search the backpack without first securing a warrant . . . ."

An evidentiary hearing took place on January 20, 2010. Cook testified that, on the day in question, she received a report that "an assault had just occurred and it was involving a gun . . . ." She described in detail the events that took place upon her arrival at the apartment complex. As she approached the complex, another officer, Rick Zamojski, was attempting to pat down defendant. Cook attempted to remove the backpack from defendant but he clung to it and would not let her take it. He refused her verbal requests to surrender the backpack. Eventually Cook obtained the backpack and set it down as she helped Zamojski to walk defendant to a patrol car.

Defendant did not respond to Cook when she asked defendant if a gun was in the backpack. Cook testified:

> We were walking him over to the police car. There were several people standing outside the apartment complex that were arguing with him. They, they were yelling at the suspect. He was yelling back to them. He didn't want to get into the police car.
>
> * * *
>
> Our concern was that he was -- that the fight was going to continue out in the parking lot. We didn't know who they were. There were at least ten people that were out there.

When asked why defendant was placed in the back of the patrol car, she stated:

> We needed to find out exactly what the situation was. The call was that he had assaulted someone and also we wanted to put him back there for his own safety if the people around there wanted to fight with him. We were trying to prevent that from happening.

Cook stated that defendant was not free to leave at the time but that he was not "cuffed." Cook then searched the backpack and found the loaded gun.

The following colloquy occurred:

> *Q.* Okay, and at what point did you search the backpack, was it before he was placed in the patrol vehicle or after he was placed in the patrol vehicle?
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> *A.* It was after.
>
> *Q.* And why did you search the backpack at that time?
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> *A.* We, we had received a call that there was a gun in the backpack. We wanted to make sure that -- well, we had probably [sic] cause to, to, to search the backpack to make sure there was a weapon in there. We were also concerned if it wasn't in there, it may be somewhere else. He may have put it somewhere.
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> *Q.* So you, obviously, were concerned about your safety?
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> *A.* Yes.
>
> *Q.* Okay, safety of others?
>
> *A.* Yes.

On cross-examination, Cook admitted that once defendant was in the back of the car, "he [couldn't] get out of the backseat." Also, she answered "Correct" when asked: "[A]s long as you officers are watching the backpack, nothing's going to happen to any of the content of the

backpack either, true?" She also answered "No" when asked: "Was there anything to prevent you from taking the bag back to the police station with you without looking at it first and possibly applying for a warrant, was there anything stopping you from doing that?"

After the parties rested, the following colloquy occurred:

> THE COURT: You have ten people plus outside arguing with the Defendant.
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> MR. ARNKOFF (defense counsel): All right, he --
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> THE COURT: Hypothetically, if he had put -- thrown the gun on the grass or put it by the apartment building and then you have all these people that are fighting with him, isn't it possible that someone could go find the gun that he put somewhere, attempt to shoot him and shoot a police officer instead[?]
>
> MR. ARNKOFF: Is it possible? Sure, it's possible, okay.

At the conclusion of the hearing the court ruled, in part:

> [Cook] took the backpack from the Defendant with some fighting from the Defendant and . . . she helped the first officer take the Defendant and put, put him in the car and then she went back and searched the backpack and found the gun. Based on the information from dispatch and what she viewed at the scene, she had probable cause to believe that a crime had been committed and that there were exigent circumstances in terms of knowledge that this Defendant might well have a gun on his person or in his backpack and might have -- because he might have done something with the gun, she had probable cause to believe that there was a gun in the backpack and if, if it wasn't in the backpack that the officer might be in danger because he might have done something with the gun, put it somewhere where someone else could have gotten access to it and, therefore, put the Defendant -- put the officers in danger. So those are the exigent circumstances along with probable cause that a crime had been committed here.

The court also stated that the search was "a valid search incident to arrest" and that "it's inevitable that this evidence would have been discovered because . . . this Defendant was in fact placed under arrest . . . ."

As stated in *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005):

> This Court reviews a trial court's findings at a suppression hearing for clear error. But the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference; for this reason, we review de novo the trial court's ultimate ruling on the motion to suppress. [Citations omitted.]

In making his appellate argument, defendant relies in large part on *Arizona v Gant*, 556 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009). In *Gant*, *id.* at 335, the United States Supreme Court held:

> After Rodney Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car, police officers searched his car and discovered cocaine in the pocket of a jacket on the backseat. Because Gant could not have accessed his car to retrieve weapons or evidence at the time of the search, the Arizona Supreme Court held that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement . . . did not justify the search in this case. We agree with that conclusion.

We find that *Gant*, dealing with a search incident to an arrest, is not dispositive in the present case but that, instead, the exigent-circumstances exception to the warrant requirement existed. As noted in *In re Forfeiture of $176,598*, 443 Mich 261, 266, 271; 505 NW2d 201 (1993):

> The established exceptions to the warrant requirement include: (1) searches incident to a lawful arrest, (2) automobile searches, (3) plain view seizure, (4) consent, (5) stop and frisk, and (6) exigent circumstances. Each of these exceptions, while not requiring a warrant, still requires reasonableness and probable cause.
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> * * *
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> Pursuant to the exigent circumstances exception, we hold that the police may enter a dwelling[1] without a warrant if the officers possess probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime. The police must further establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to . . . (2) protect the police officers or others . . . . [Citations omitted.]

Probable cause requires a substantial basis for believing that a search will uncover evidence of wrongdoing. *People v Garvin*, 235 Mich App 90, 102; 597 NW2d 194 (1999). "The determination whether probable cause exists to support a search . . . should be made in a commonsense manner in light of the totality of the circumstances." *Id.*

Here, the police had been informed that an assault had occurred and that the perpetrator was carrying a gun in a backpack. The police found a person matching the description of the perpetrator who was carrying a backpack and who would not surrender the backpack. An ongoing altercation was occurring, involving numerous individuals, while the police were taking

[1] While obviously a backpack, and not a dwelling, was involved here, the doctrine is applicable by analogy.

defendant to the patrol car. We conclude that these circumstances sufficiently justified the application of the exigent-circumstances exception to the warrant requirement. The police had probable cause to believe that the backpack contained a gun, and they needed to *verify* that the gun was in the backpack and not located in the vicinity, where it could have endangered themselves and others. As noted by the prosecutor on appeal, "Had they not looked for and found the gun, the police would have put themselves and everyone present in danger and they would have been derelict in their duties." Even defense counsel admitted that it was possible that if defendant had "thrown the gun on the grass or put it by the apartment building," one of the persons who was fighting with him could have attempted to shoot him and hit a police officer instead. In light of the totality of the circumstances, the trial court did not err in denying the motion to suppress.

Affirmed.

/s/ Jane M. Beckering
/s/ Patrick M. Meter
/s/ Michael J. Riordan