STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 13, 2011
v	No. 300225 Wayne Circuit Court
CHRISTOPHER WILLIAM JOHNSON, Defendant-Appellee.	LC No. 10-004288-FH

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

The prosecution appeals as of right from a circuit court order dismissing a charge of carrying a concealed weapon, MCL 750.227, after the trial court granted defendant's motion to suppress evidence. We reverse and remand.

On March 10, 2010, at approximately 11:55 p.m., Sergeant Jason Sloan and his partner, Sergeant Decker, were travelling in a fully marked police car. Sergeant Sloan observed defendant standing with another person in the middle of a residential street. Defendant and the other person looked in the direction of the scout car and walked in different directions. As Sergeant Sloan turned left, defendant crossed the intersection at an angle, walked within ten feet of the front of the squad car, and walked toward the sidewalk. Sergeant Sloan rolled down his window and asked defendant what he was doing standing in the middle of the street. Defendant stopped, turned so that his right side was facing away from the car, and responded that he was going to his girlfriend's house. Then defendant "almost instantaneously kind of turned away from [Officer Sloan] and then turned around and ran" between some houses. Sergeant Sloan got out of his car and chased defendant. During the pursuit, Sergeant Sloan identified himself as a police officer, yet defendant ignored Sergeant Sloan's directives to stop. As Sergeant Sloan continued to pursue defendant, he saw defendant remove a gun from his waistband and drop it. Sergeant Decker later detained defendant approximately two blocks from where he began running, while Sergeant Sloan went back and recovered the gun that defendant had discarded.

Defendant filed a motion to suppress the gun, arguing that the police lacked reasonable suspicion to stop him before the police pursuit. The prosecutor argued that the initial interaction did not implicate the Fourth Amendment. The trial court determined that defendant was seized when Sergeant Sloan "asked where was he going; what was he doing," because he "was not free to leave" at that point. The court determined that "there was no reasonable suspicion to stop the

defendant at that point" and, therefore, the seizure violated the Fourth Amendment. Accordingly, the trial court granted defendant's motion to suppress the evidence as the fruit of the poisonous tree and then granted defendant's motion to dismiss.

This Court reviews de novo a trial court's ultimate determination on a motion to suppress evidence, but reviews its factual findings for clear error. *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008).

"The United States and the Michigan Constitution guarantee the right of persons to be free from unreasonable searches and seizures." *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005); US Const, Am IV; Const 1963, art 1, § 11.

> A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement through means intentionally applied. . . . A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned.
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> When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in [*United States v Mendenhall*, 446 US 544; 100 S Ct 1870; 64 L Ed 2d 497 (1980)], who wrote that a seizure occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." [*Id.* at 554] (principal opinion). Later on, the Court adopted Justice Stewart's touchstone, but added that when a person has no desire to leave for reasons unrelated to the police presence, the coercive effect of the encounter can be measured better by asking whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. [*Brendlin v California*, 551 US 249, 254-255; 127 S Ct 2400; 168 L Ed 2d 132 (2007) (citations and internal quotations omitted).]

In *Muehler v Mena*, 544 US 93, 101; 125 S Ct 1465; 161 L Ed 2d 299 (2005), the Court emphasized:

> We have "held repeatedly that mere police questioning does not constitute a seizure." *Florida v Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (1991); see also *INS v Delgado*, 466 U.S. 210, 212, 80 L. Ed. 2d 247, 104 S. Ct. 1758 (1984). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." *Bostick, supra*, at 434-435, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (citations omitted).

The Michigan Supreme Court has likewise stated, "[w]hen an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized." *Jenkins,* 472 Mich at 33.

In *Jenkins,* an officer approached the defendant while he was sitting on a porch step of a housing unit and engaged in general conversation. *Id.* at 28. An occupant of the unit emerged and asked the defendant why he was on her porch. The officer then asked the defendant if he lived in the complex, and when the defendant responded that he did not, the officer asked to see his identification. The defendant produced his identification, and the officer began making a LEIN (Law Enforcement Information Network) inquiry. The defendant became nervous and made furtive gestures. He began to walk away, while the officer was holding his identification and speaking to him. The officer and his partner walked alongside the defendant, "encouraging" him to wait for the response to the LEIN inquiry. The defendant did not stop, and the officer placed a hand on his back and told him that he was not free to leave. *Id*. at 28-29. The Supreme Court held that the trial court erred in finding that the defendant was seized when the officer asked for his identification. *Id*. at 30. The Court explained:

> Here, Officer Spickard's initial encounter with defendant was consensual. Officer Spickard did not seize defendant when he asked whether defendant lived in the housing complex, nor did he seize defendant when he asked for identification. No evidence indicated that Officer Spickard told defendant at this juncture to remain where he was or that defendant was required to answer the officer's questions.
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> Asking such questions to elicit voluntary information from private citizens is an essential part of police investigations. . . .
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> The Fourth Amendment was not implicated until Officer Spickard actually hindered defendant's attempt to leave the scene, thereby "seizing" him within the meaning of the Fourth Amendment. Specifically, this "seizure" occurred when Officer Spickard followed defendant as he tried to walk away, orally discouraged him from leaving, and, finally, put a hand on his back and told him to wait for the results of the LEIN inquiry. This point—when Officer Spickard physically hindered defendant's departure and instructed him to stay in the officer's presence—is the earliest at which a reasonable person might have concluded that he was not free to leave. [*Id.* at 33-34.]

United States v Beauchamp, ___ F3d ___; 2011 WL 5041918 (CA 6, Docket No. 10-5102, issued October 25, 2011), is an example of a situation in which a police encounter with a defendant was deemed a seizure. In that case, Officer Dees saw the defendant in a high-crime area at 2:30 a.m. The defendant quickly walked away. Officer Fain saw the defendant two blocks away. Officer Fain sped up and parked by the defendant, who walked around a fence near the side of the road. Fain instructed the defendant to walk around the fence and toward him. The defendant complied, but seemed very nervous. Officer Fain asked the defendant where he had been and where he was going, frisked him, and asked if he could conduct a search. The defendant agreed. During the search, Officer Fain saw some plastic, which he believed contained drugs, wedged in the defendant's buttocks. Officer Dees grabbed the defendant's

jeans, Officer Fain grabbed his boxer shorts, and the defendant unsuccessfully attempted to run. The officers recovered the plastic, which contained cocaine.

The Sixth Circuit Court of Appeals concluded that "[a] reasonable person in [the defendant's] position would not have felt free to leave, when after walking away from the police two times, an officer targeted [him] by driving up to him, instructed him to stop, and then instructed him to turn around and walk toward the officer." *Id*. at ___, slip op at 3. The court explained:

> [A] reasonable person in [the defendant's] position would perceive that the officer's instruction that he stop and that he move around the fence required compliance and restricted his ability to walk away. By this point, [the defendant] had indicated that he did not want to speak with the police by walking away two times; a reasonable person would not have felt free to walk away a third time after an officer had given him express instructions to do otherwise. [*Id*. at ___, slip op at 4.]

The court explained the significance of the defendant's compliance with the officer's instructions:

> The interaction at the fence is also the moment of the seizure because it was when [the defendant] complied with the officer's instructions and submitted to the officer's show of authority. "[W]hat may amount to submission depends on what a person was doing before the show of authority. . . ." *Brendlin*, [551 US at 262]. Here, [the defendant] was walking away from the officer and was separated from him by a wrought iron fence. Upon the officer's instruction, he stopped and walked toward the officer, and again upon the officer's instruction, walked around the fence that separated them. Just as "[s]topping after being ordered to stop triggers the Fourth Amendment," [*United States v Johnson*, 620 F3d 685, 691 (CA 6, 2010)], so too does changing course and complying with an officer's requests. See also [*United States v Jones*, 562 F3d 768, 774-775 (CA 6, 2009)] (holding that defendant was not seized until he complied with officer's order to stop); [*United States v Smith*, 594 F3d 530, 539 n 4 (CA 6, 2010)] (holding that defendant was seized when officers instructed him to stop and he complied); cf. [*California v Hodari D*, 499 US 621, 625-626; 111 S Ct 1547; 113 L Ed 2d 690 (1991)] (holding that, assuming that officer's car pursuit constituted a "show of authority," defendant was not seized when he ran away). For these reasons, we conclude that [the defendant] was seized when, in compliance with Officer Fain's instructions, he stopped, turned around, faced the uniformed officer and the marked patrol car, and began to walk toward the officer. [*Beauchamp*, ___ F3d ___, slip op at 4.]

Although *Beauchamp* illustrates the type of police conduct that may constitute a seizure, no equivalent conduct occurred in this case. Sergeant Sloan approached the area where defendant was walking and asked him why he had been standing in the street. There was no evidence that Sergeant Sloan instructed defendant to stop or to approach the squad car during this initial encounter, and no evidence that defendant complied with such a request. The inquiry

was the officer's request for "voluntary cooperation through noncoercive questioning"; it did not restrain defendant's liberty, and he was not seized. *Jenkins*, 472 Mich at 33. Defendant's voluntary cessation of walking to respond to a question is not legally significant. After defendant ran, Sergeant Sloan pursued him and ordered him to stop, but defendant did not comply. Therefore, he was not seized during the pursuit; there was "at most an attempted seizure." *Brendlin*, 551 US at 254-255. Defendant was not seized until he was physically apprehended by Sergeant Sloan's partner, but by that time, the police had probable cause to arrest defendant because Sergeant Sloan had seen defendant discard a gun from his waistband. Accordingly, the trial court erred in granting defendant's motion to suppress and dismissing the case.

Reversed and remanded for reinstatement of the charge against defendant. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens