STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK V. WILSON,

Defendant-Appellant.

UNPUBLISHED
July 2, 1996

No. 167567
LC No. 93-064989-FH

Before: Markman, P.J., and Marilyn Kelly and L. V. Bucci,* JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction for possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Police officers found cocaine in the shoe of defendant, a passenger in an automobile pulled over for a traffic stop. We reverse.

On appeal, defendant contends that the court erred in denying his motion to suppress the evidence of the cocaine found in his shoe because it was the product of an unreasonable search and seizure. This Court reviews trial court rulings at suppression hearings under a clearly erroneous standard. *People v Jordan*, 187 Mich App 582, 589; 468 NW2d 294 (1991).

Fourth Amendment rights are only implicated when governmental activity infringes on a "justifiable, or reasonable expectation of privacy." *People v Smith*, 420 Mich 1, 25; 360 NW2d 841 (1984). Black's Law Dictionary, (5th ed), p 1211, defines search as "[a]n examination of a person's house . . . person . . . or vehicle . . . with a view to the discovery of . . . some evidence of guilt to be used in the prosecution of a criminal action . . . ." Here, we find that defendant had a reasonable expectation of privacy in the contents of his shoe and that the police actions of instructing defendant to remove his shoe and inspecting it constituted a search subject to analysis under the Fourth Amendment. In *People v Toohey*, 438 Mich 265, 270; 475 NW2d 16 (1991), the Michigan Supreme Court stated:

---

* Circuit judge, sitting on the Court of Appeals by assignment.

> The constitutionality of any search and seizure conducted by the police depends on an analysis of the Fourth Amendment of the United States Constitution and art 1, 11 of the Michigan Constitution of 1963. Each requires that searches and seizures be conducted reasonably, and in most cases that requires issuance of a warrant supported by probable cause, in order for the results to be admissible.

"One situation in which neither a warrant nor probable cause is required is where the police obtain the suspect's consent to a search." *People v Catania*, 427 Mich 447, 453; 398 NW2d 343 (1986). The *Catania* Court, quoting *Schneckloth v Bustamonte*, 412 US 218; 93 S Ct 2041; 36 L Ed 2d 854 (1973), stated at 453-454:

> [W]hen... the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.

Here, the trial court conducted a Walker hearing. *People v Walker*, 374 Mich 331; 132 NW2d 87 (1985). The searching officer testified that he told defendant that he wanted to conduct a search of his person and that defendant did not give a negative response. The officer testified, "I don't remember what the response was, if there was any... I just asked him to take his shoes off, please, and he responded by taking his right shoe off first." The right shoe contained a bag of crack cocaine. Defendant testified, " [the officer] said, can you take off your shoe, and I just took off my shoe. I had no choice."

The trial court denied defendant's motion to suppress the evidence on the basis that there was "valid consent, freely given" based upon defendant's "affirmative response that [the officer] could search".

However, the evidence does not indicate that defendant gave an affirmative response to a request to search. At most, the evidence shows that defendant acquiesced to the search. Acquiescence to a claim of lawful authority does not constitute consent. *Bumper v North Carolina*, 391 US 543, 548-549; 88 S Ct 1788; 20 L Ed 2d 797 (1968). This Court has also distinguished between mere acquiescence to authority and consent to search. *People v Randle*, 133 Mich App 335, 339; 350 NW2d 253 (1984). Defendant's conduct here, acquiescence to the officer's instruction that he remove his shoe, does not demonstrate voluntary consent to the search. Neither was there any other expressed rationale for the search nor any probable cause basis for the search. Accordingly, we find that the cocaine was seized in a manner contrary to the Fourth Amendment.

Michigan Supreme Court precedent indicates that Michigan is bound by the federal exclusionary rule with respect to evidence unconstitutionally seized. *People v Chapman*, 425 Mich 245, 252; 387 NW2d 835 (1986). Accordingly, the trial court erred in denying defendant's

motion to suppress this evidence. We, therefore, have no alternative but to reverse defendant's conviction arising out of this evidence.

Reversed.

/s/Stephen J. Markman
/s/Marilyn Kelly
/s/Lido V. Bucci