STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

OMAR ROIG and MARGARET K. CRINER,

Defendants-Appellees.

UNPUBLISHED
April 8, 1997

No. 184599
Recorder's Court
LC No. 92-008588
ON REMAND

Before: Hood, P.J., and Saad and T.S. Eveland*, JJ.

PER CURIAM.

The prosecutor appeals from the trial court's directed verdict of acquittal for defendants on charges of possessing 650 grams or more of cocaine, MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i). At the close of proofs, both defendants moved for a directed verdict on the ground that evidence of the cocaine was obtained during an illegal search and seizure and, therefore, should be suppressed. The court initially denied the motions but, following closing arguments, it held that the evidence was the product of an unconstitutional search and seizure. The court therefore suppressed the evidence, found both defendants not guilty and dismissed the charges. The prosecutor appealed and this Court dismissed the case finding that regardless of whether the trial court's suppression of evidence was proper or whether the defendants' motions to suppress were untimely, their retrial was barred by double jeopardy since they were found not guilty of the charges following a bench trial. *People v Roig*, unpublished opinion memorandum of the Court of Appeals, issued August 19, 1994 (Docket No. 162338). The Michigan Supreme Court reversed, holding that there was no double jeopardy violation where defendants' acquittals were not on the merits and remanded the case to this Court for consideration of the substantive issues raised by the prosecutor. *People v Roig*, 448 Mich 883; 527 NW2d 780 (1995). We affirm.

The prosecutor first argues that the trial court erred by entertaining defendants' motions for directed verdict which averred that the evidence was the product of an illegal search and seizure, and

should be suppressed. The prosecutor asserts that a mid-trial motion to suppress should only be heard when facts not known to opposing counsel appear, and that a separate record should have been made so that evidence inadmissible at trial, but admissible at a suppression hearing could be presented.

Where, as here, a defendant has knowledge of facts constituting an illegal search and seizure before trial, a motion to suppress evidence on the basis of a claimed illegal search and seizure should be made prior to trial. *People v Ferguson,* 376 Mich 90, 95; 135 NW2d 357 (1965); *People v Smith,* 19 Mich App 359, 364; 172 NW2d 902 (1969). Although the trial court in the instant case may well have been justified in refusing to hear defendants' motion, we find that it did not abuse its discretion in doing so. *Id.* The interest in the orderly conduct of a trial, which is the basis of the rule requiring that a motion to suppress be made in advance of trial, must be balanced against the defendant's constitutional right to have illegally seized evidence suppressed. *Smith, supra* at 366. Assuming the motions were meritorious, serious problems would arise as to ineffective assistance of counsel. Moreover, strict adherence to procedure in a case where the penalty for the defendants is life imprisonment exalts form over substance to a degree no appellate court should willingly accept. Finally, we note that the prosecutor did not request a separate hearing in the trial court and fails to state in this Court what evidence it would have presented at such a hearing that was not presented at trial.

The prosecutor next argues that the trial court erred in finding that defendant Roig had standing to challenge the search and seizure. Whether a defendant has standing to attack the propriety of a search and seizure of property and receive the panoply of Fourth Amendment safeguards depends upon whether, in light of the totality of the circumstances, the defendant had an expectation of privacy in the object of the search and seizure and whether that expectation is one that society is prepared to recognize as reasonable. *People v Armendarez,* 188 Mich App 61, 70-71; 468 NW2d 893 (1991). Fourth Amendment rights are personal; an individual does not have standing to challenge a search and seizure unless that person was present at the time of the search or asserts a possessory *or* proprietary interest in the thing searched or seized. *People v Romano,* 181 Mich App 204, 214; 448 NW2d 795 (1989). Here, defendant Roig owned the car and thus had a proprietary interest in the car. He therefore had standing to challenge the search and seizure.

The case cited by the prosecution, *United States v Padilla,* 508 US 77, 113 S Ct 1936; 123 L Ed 2d 635 (1993), remanded 993 F2d 721 (CA 9, 1993), is distinguishable. In that case, the United States Supreme Court rejected the "conspirator's standing" proposition on the ground that a reasonable expectation of privacy in the vehicle could not be established by maintaining a supervisory role in the criminal enterprise. *Id.* at 82. Here, defendant Roig's standing is not based on a conspirator's standing theory. Rather, it is based on his ownership of the car.

Finally, we reject the prosecution's argument that defendant Roig surrendered his car to defendant Criner and therefore failed to establish any continued expectation of privacy at the time of its stop. There is no indication that defendant Roig "abandoned" his car by simply allowing defendant Criner to use the car. Therefore, he did not lose any expectation of privacy he had in his vehicle. *Cf., Romano, supra* at 214-215.

Affirmed.[1]

/s/ Harold Hood
/s/ Thomas S. Eveland

[1] We do not address the merits of the search and seizure issue because the prosecutor has neither briefed nor argued the issue, and has therefore abandoned it. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).