STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MELVIN W. BRYANT,

Defendant-Appellee.

UNPUBLISHED
August 19, 1997

No. 194592
Oakland Circuit Court
LC No. 95-139792-FH

Before: Corrigan, C.J., and Markey and Markman, JJ.

PER CURIAM.

The prosecutor appeals as of right from the trial court's order granting defendant's motion to suppress evidence which resulted in the dismissal of charges of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii), possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), carrying a concealed weapon, MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We reverse.

The prosecutor argues that the trial court erred in finding that defendant did not voluntarily consent to the search during which drugs, cash, and a weapon were discovered. We agree.

On appellate review of the trial court's decision granting or denying a motion to suppress evidence on Fourth Amendment grounds, we review findings of historical fact under the clearly erroneous standard. *Ornelas v United States*, 517 US ___; 116 S Ct 1657; 134 L Ed 2d 911, 919-920 (1996); *People v Goforth*, 222 Mich App 306, 310 n 4; ___ NW2d ___ (1997). Applications of Fourth Amendment jurisprudence to these determinations of historical fact with respect to issues such as whether consent to search was given and whether such consent was voluntary are mixed questions of law and fact subject to de novo review. *Id.* at 920*; Goforth*, *supra*.

The validity of a defendant's consent to a search is determined under the "totality of circumstances." *Goforth, supra* at 309 To be valid, consent to a search must be unequivocal and specific, and freely and intelligently given. *People v Kaigler*, 368 Mich 281, 294; 118 NW2d 406 (1962); *People v Malone*, 180 Mich App 347, 355-356; 447 NW2d 157 (1989). Consent need not

be verbal but may be implied from conduct. *United States v Mejia*, 953 F2d 461, 466 (CA 9, 1991); *United States v Griffin*, 530 F2d 739, 742 (CA 7, 1976). An investigative stop is not so inherently coercive as to render involuntary a consent to search given during the stop. *People v Acoff*, 220 Mich App 396, 400; 559 NW2d 103 (1996). Further, a consent can be valid even if the person is not apprised of his right to refuse consent. *Malone, supra*, 180 Mich App at 356. The defendant must show more than a subjective belief of coercion, i.e., some objectively improper action on the part of the police. *United States v Crowder*, 62 F3d 782, 787 (CA 6, 1995).

In evaluating whether a consent to search is voluntary, the United States Supreme Court independently reviewed the factual aspects of the issue, other than the historical facts, in *United States v Watson*, 423 US 411, 424-425; 96 S Ct 820; 46 L Ed 2d 598, 609 (1976), where the court identified various factors relevant to such an evaluation: (1) whether there was an overt act or threat of force against the defendant, (2) whether any promises were made to defendant, (3) whether more "subtle forms of coercion that might flaw his judgment" were employed, (4) whether the defendant had been arrested and was in custody, (5) whether consent was given while on a public street, rather than in the confines of the police station, or (6) whether defendant was a new comer to the law, mentally deficient, or unable in the fact of custodial arrest to exercise a free choice. Neither the custodial environment nor the absence of proof that the defendant could withhold his consent are enough, without more, to demonstrate a coerced confession or consent to search. *Id.* at 425 (finding that the trial court erred in determining the consent was involuntary where Watson was under arrest and had not been informed of his right to withhold consent).

Here, the trial court determined that after defendant was stopped for a traffic infraction, he emerged from his vehicle, was instructed by the officer to return to his vehicle for a few minutes until backup assistance arrived, was slow to comply, and that defendant's behavior prompted the officer to ask defendant for permission to search his person and the car. Defendant did not dispute the officer's testimony regarding these facts. According to defendant, he gave no verbal response to the officer's request to conduct a search but raised his hands and assumed a posture that would facilitate a search of his person. When the officer frisked defendant, he found a small object which, upon examination, was a vial containing rock cocaine. This led to a search of the car that uncovered marijuana and an unlicensed handgun

Notably, it is uncontested that the officer did observe a traffic infraction, and this observation gave the officer probable cause to effectuate the stop. *Whren v United States*, 517 US ___; 116 S Ct 1769; 135 L Ed 2d 89, 100-101 (1996). The court nevertheless questioned the officer's credibility because it believed that the officer had motives, other than a concern about defendant being armed, for wanting to detain and search him.

Because this case does not involve an evaluation of whether there was probable cause, *Whren, supra*, the officer's motives for asking defendant's consent are irrelevant to the validity of the subsequent search. Although defendant denied having said "Yeah, sure" when he was asked to consent to the search, defendant admittedly "throwed [his] hands up in the air . . . and dropped [his] head and then didn't say anything from that time on." Defendant also did not dispute the officer's testimony that defendant looked down, turned around, faced his vehicle; nor does he dispute that the officer asked him

to step closer and place his hands on the vehicle, and patted him down. Defendant further testified that he did not feel threatened.

Considering the totality of circumstances, even if defendant did not verbally consent to the search, his behavior would have indicated uncoerced, unequivocal consent to any reasonable person. *Mejia*, *supra*; *Griffin*, *supra*. Where, as here, the officer asked defendant for permission to search him and his vehicle, on a public street, without taking defendant into custody, without threats or bluster or other promises, under circumstances where defendant admits he did not feel intimidated, and given defendant's past experience with the law, we believe that defendant is deemed to have consented to the search and to have done so voluntarily. *Watson*, *supra*. Thus, the trial court erred in finding otherwise.

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

/s/ Maura D. Corrigan
/s/ Jane E. Markey
/s/ Stephen J. Markman