STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FLOYD WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
October 31, 1997

No. 194130
Recorder's Court
LC No. 95-002686

Before: Holbrook, Jr., P.J. and White and R.J. Danhof,* JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and sentenced to lifetime probation. He appeals as of right. We affirm.

After receiving several complaints of drug trafficking near the intersection of Collingwood and Dexter in Detroit, the Detroit Police Department decided to monitor the location for suspected narcotics activity. Officer Johnson, an experienced narcotics officer, established a mobile surveillance post near the intersection. His attention became focused on a Pontiac automobile that circled the block twice before pulling over to the curb near the intersection. Defendant was the driver of the vehicle. With the aid of binoculars, Officer Johnson observed as the front seat passenger, James Burks, exited the vehicle and conducted an apparent narcotics transaction with a female bystander, giving her a tiny item in exchange for money. After the transaction was completed, Johnson followed the vehicle which, again, circled the block twice before stopping at the same location. This time, another passenger, Joseph Felder, exited the vehicle and engaged in an apparent narcotics transaction with another woman, giving her a tiny item in exchange for money. Felder returned to the vehicle and it once again circled the block once or twice before stopping at the intersection. This time defendant exited the vehicle and approached the driver of a pickup truck that was in the middle of the street. Officer Johnson observed the driver of the pickup truck hand defendant some money in exchange for a small object. Officer Johnson was in constant radio contact with a standby arrest team throughout the period of his surveillance and continually informed the arrest team of his observations. He gave the arrest team a

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

description of defendant, as well as the automobile he was driving. After the third transaction was completed, the arrest team moved in. Officer Jones, a member of the arrest team, recognized defendant from the description provided by Officer Johnson. After identifying himself as a police officer, Officer Jones searched defendant and found three ziplock packets of a rock-like substance later determined to be cocaine in defendant's front pants pocket, together with $855 in cash.

On appeal, defendant argues that the evidence seized from his person should have been suppressed as the fruit of an illegal warrantless search. Although defendant claims that he preserved this issue by raising it below in a motion to suppress, the record indicates that the suppression motion was brought by codefendant Felder and that defendant did not join in the motion or participate in the suppression hearing. Moreover, defendant did not object to the admission of the challenged evidence at trial. Accordingly, we conclude that defendant failed to preserve this issue for appeal. *People v Carroll*, 396 Mich 408, 411-412; 240 NW2d 722 (1976); *People v Gillam*, 93 Mich App 548, 552; 286 NW2d 890 (1979). Nonetheless, if it appears from the trial record that a motion to suppress would have been granted had it been made, this Court may properly grant relief even though the issue is raised for the first time on appeal. *People v Moore*, 391 Mich 426, 431; 216 NW2d 770 (1974); *People v Flores*, 92 Mich App 130, 133; 284 NW2d 510 (1979). Therefore, we will briefly address the issue.

Defendant argues that the search of his person exceeded the permissible scope of a *Terry*[1] investigative search. According to the record, however, defendant was not searched pursuant to a *Terry* investigative stop. Rather, the record indicates that the search of defendant was conducted incident to his arrest. Officers Johnson and Jones both testified at trial that the decision to arrest defendant was made before contact with defendant was initiated. The purpose in detaining defendant was not to conduct an investigative stop, but to effectuate an actual arrest.

A search incident to a lawful arrest does not violate either the Fourth Amendment or the Michigan Constitution.[2] *People v Chapman*, 425 Mich 245, 250-251; 387 NW2d 835 (1986). In *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996), our Supreme Court stated:

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment. By statute, an arresting officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it. MCL 764.15; MSA 28.874. Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar v United States*, 338 US 160, 175; 69 S Ct 1302; 93 L Ed 1879 (1949).
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> A search of a person incident to an arrest requires no additional justification. *United States v Robinson*, 414 US 218; 94 S Ct 467; 38 L Ed 2d 427 (1973).

Even a search conducted immediately before an arrest may be justified as incident to arrest if the police have probable cause to arrest the suspect before conducting the search. *Champion*, *supra* at 115-

116. Whether the police have probable cause is determined from the totality of the circumstances. *Illinois v Gates*, 462 US 213, 230-232; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

Viewing the previously described facts in their totality, we are satisfied that the police had probable cause to arrest defendant at the time he was searched. This conclusion is supported by several federal court decisions that have affirmed findings of probable cause under facts substantially similar to those in this case. See *United States v Taylor*, 997 F2d 1551, 1553-1554 (DC Cir, 1993) (police had probable cause after observing suspect exchange money for small object with person who had participated in two recent similar transactions); *United States v White*, 655 F2d 1302, 1303-1304 (DC Cir, 1981) (police had probable cause after observing suspect exchange currency for small object); *United States v Davis*, 561 F2d 1014, 1016-1017 (DC Cir, 1977) (police had probable cause after observing suspect engage in three identical suspicious currency and packet exchanges in high narcotics area). Accordingly, we conclude that the evidence seized from defendant's pockets was properly confiscated during a search incident to a lawful arrest.

Next, defendant claims that the prosecution presented insufficient evidence to support the intent to deliver element of his conviction for possession with intent to deliver less than fifty grams of cocaine conviction. We disagree.

When determining whether sufficient evidence was presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence, just as it can be established by direct evidence. *Id.* at 526. Intent to deliver may be inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding arrest. *Id.* at 524.

In this case, the police observed defendant and his two companions participate in three suspected narcotics transactions. Defendant directly participated in the last transaction, exchanging a small object for money. When defendant was apprehended shortly thereafter, he had three ziplock packets of cocaine and $855 in his possession. Viewed most favorably to the prosecution, this evidence was sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant possessed the cocaine with the intent to deliver it. See e.g., *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Robert J. Danhof

[1] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

[2] US Const, Am IV; Const 1963, art 1, § 11.