

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH RAY PAYNE,

Defendant-Appellant.

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UNPUBLISHED

August 3, 2010

No. 289824

Washtenaw Circuit Court

LC No. 07-001864-FH

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v). Because the trial court did not clearly err in rejecting defendant's story of coercion, neither did it err in concluding that the police officer did not seize defendant before searching him, and conducted that search with defendant's consent, and therefore, we affirm.

I. Facts

This case arose when the police discovered a small amount of cocaine concealed on defendant's person in April 2007. At the preliminary examination, the only witness was the arresting police officer, who testified that he had just assisted with a successful narcotics enforcement action in an area known for such traffic, and was putting his drug-sniffing dog into his patrol car, when he made eye contact with defendant, who then ducked behind a parked vehicle and walked out of sight. The officer stated that he followed defendant in his car and used its public address system to ask defendant to speak with him. According to the officer, defendant showed some acknowledgement, but continued walking away, at which point the officer left his vehicle. Defendant turned and walked toward him. The officer described defendant as appearing nervous at that moment, but stated that defendant gave his name when asked. The officer testified that defendant had his whole hand inside the unzipped fly of his pants, which defendant explained by saying he was trying to urinate. According to the officer, defendant then repeatedly invited him to check him for illegal items, and "kept pulling things out of his pockets and throwing them on the hood of my car." The officer then patted defendant down for weapons, detected something hard in defendant's crotch area, asked what it was, and obtained from defendant the admission that it was crack cocaine.

Defense counsel urged the district court not to bind defendant over for trial on the ground that the cocaine was unconstitutionally seized. The district court held that the confrontation that led to the discovery of the cocaine was not a seizure and bound defendant over for trial.

In a pretrial motion in the circuit court, defense counsel raised the same issue and asked the circuit court to quash the bindover or alternatively to suppress the cocaine. The circuit court heard and decided the motion, apparently with the agreement of the parties, on the basis of the transcript of the preliminary examination and arguments of counsel.<sup>1</sup> Defense counsel argued that the police had improperly seized defendant through a show of authority, without sufficient suspicion to do so, and described the officer's being in uniform with side arm, along with his use of his public address system, and repeatedly suggested that there was a barking police dog "as if to turn the dog loose on [defendant] unless he submitted." The circuit court asked, "What evidence do you have that this dog was going to be released other than mere speculation?" Defense counsel replied, "there is no explicit statement by [the officer] that he was going to . . . let the dog go." In denying the motion, the circuit court explained:

I believe that the interaction between the Defendant and the police is truly a first tier, that level of encounter where an officer is asking a person a question or questions in a public place and, therefore, is not a seizure and the reason for that is one of a totality of circumstances. . . . The fact that, that this was in a high-crime area, . . . in and of itself is not dispositive, the fact that there was a . . . raid going on by the police in the area, in and of itself is not dispositive, the fact that the Defendant acted, at least in the officer's mind, somewhat strangely in the fact that he ducked behind a car when first becoming aware of the presence of [a] police officer, the fact that he was noted as . . . what would have to be implied was walking quickly from the parking area once . . . having observed the police are all items that come together to lead to, not the necessity of finding reasonable suspicion or even getting to that point, but at least giving the police some indication that perhaps there was some reason to question the individual. That's what the first tier contact is all about, so I don't believe there is any reason to go beyond that initial analysis. But I will with regard to address the issue of consent to the search.

The . . . consent . . . is not being denied here. What is being argued is that in fact the consent was not voluntary, that it was not compliant, that in fact it was somehow forced . . . due to some intimidation and that was in part the purpose of the Court's questions with regard to the issue of the dog. There has to be something more than just some speculative claim as to what someone may or may not feel intimidated about. If in fact the police officer had made some statement that he was going to release the dog, if there was some evidence that the dog was able to get out, that would provide some evidence to support some claim that there may be some explicit intimidation but, frankly, I think that's belied by the

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<sup>1</sup> See *People v Kaufman*, 457 Mich 266, 276-277; 577 NW2d 466 (1998) (a suppression issue may be decided on the basis of earlier proceedings if the parties agree to that approach).

Defendant's own actions, . . . that he . . . in fact turned around after some period of time, walked directly back towards the police, essentially consented, began taking items out of his own clothing and placing them on the hood, certainly not someone who is either not compliant or someone who is questioning the authority of the police to, to act.

So, for all those reasons, the motion to quash, motion to suppress is denied.

At trial, the arresting police officer substantially reiterated his account given at the preliminary examination, including his assertion that defendant consented to being searched. The officer added that his police dog was a German Shepherd, and that it typically barked whenever the officer left the car. When the prosecution rested, defense counsel asked to renew the motion to suppress evidence on the ground that, "there was no articulable suspicion of any crime being committed or about to be committed," and for a directed verdict "for that reason." The prosecuting attorney asked the court to deny both motions. The trial court held:

Well, it is clear from the officer's testimony that he had no suspicion of a particular crime being committed but, his testimony was very clear that he had suspicion of some criminal activity given the circumstance that he found the Defendant, that the Defendant did, in response to just looking at the officer before the officer had done anything, walking away . . . quickly, when the officer came into contact with him, the fact that he did in fact consent to the search, and that the suspicions, based upon the area, the search that had just been completed . . . as well as the actions taken by the defendant, those all led the officer to the conclusion that there was some suspicious activity . . . , plus taken in the light most favorable to the People, . . . I believe there is enough evidence at this point that a reasonable trier of fact could find the Defendant guilty beyond a reasonable doubt . . . . For that reason, a motion for directed verdict is denied.

Defendant then took the stand in his own defense. His testimony included that he had felt "scared" as the police officer approached, but that he had walked away hurriedly not to avoid the officer, but because it was raining. Describing how the police officer approached him, defendant stated, "so either you run—I'm going, I'm going to let the gun—you can hear the dog barking in the background soon as (siren sound) and he's coming real fast. You do it I'm going to let the dog go. So I'm, like man, all right, man. I don't like dogs. I said, all right." Asked if he consented to the officer's search, defendant's replied, "Yeah, . . . long as he said he had the dog secure. I mean what could I do?"

In closing argument, defense counsel did not argue that the evidence failed to prove defendant's guilt, but instead reiterated objections to the search that turned up the cocaine. The trial court summarized the evidence in finding defendant guilty, and also reiterated its conclusion that defendant had not been seized, and had consented to the search, and so the cocaine was not unconstitutionally discovered.

## II. Standards of Review

“This Court reviews for an abuse of discretion both a district court’s decision to bind a defendant over for trial and a trial court’s decision on a motion to quash an information.” *People v Fletcher*, 260 Mich App 531, 551-552; 679 NW2d 127 (2004). This Court reviews “de novo a trial court’s ultimate decision on a motion to suppress,” but reviews for clear error “the trial court’s underlying findings of fact . . . .” *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001).

### III. Analysis

Evidence obtained in the course of a violation of a suspect’s rights under the Fourth Amendment of the United States Constitution is subject to suppression at trial. *People v Cartwright*, 454 Mich 550, 557-558; 563 NW2d 208 (1997). See also *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961) (incorporating the Fourth Amendment against the states under the Fourteenth Amendment).

Defendant argues that the police officer improperly detained him without justification, and then coerced defendant’s consent to a search of his person, and that the evidence thus discovered should have been suppressed as the fruit of a poisonous tree. See *Wong Sun v United States*, 371 US 471, 487-488; 83 S Ct 407; 9 L Ed 2d 441 (1963).

“Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions.” *People v Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999). Among these “is a search conducted pursuant to consent.” *Id.* at 294. A court deciding the question of consent must consider all the circumstances to determine whether consent was freely and voluntarily given. *Id.* “The presence of coercion or duress normally militates against a finding of voluntariness.” *Id.*

“A ‘seizure’ within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave.” *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). A police officer’s brief and noncoercive questioning, or mere request for identification, does not constitute a seizure of the person asked. *Id.* at 33. Such questioning constitutes a seizure of the person only where intimidating circumstances reasonably lead the person approached to believe that he or she is not free to leave. *People v Shankle*, 227 Mich App 690, 693; 557 NW2d 471 (1998). Further, the Fourth Amendment permits police to stop and briefly detain, and conduct a limited search of the outer clothing of, a person in response to a reasonable suspicion that criminal activity may be at hand. *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

The district court judge at the preliminary examination, and the trial court in the motion to quash or suppress evidence, concluded on the basis of the arresting officer’s testimony that when the officer asked to talk to him, defendant ultimately elected to approach the officer, removed items from his pockets on his own initiative, and then invited the officer to search him. Only after those earlier proceedings did defendant put his own testimony into the record, finally asserting that the police officer expressly threatened to send his barking police dog after him, and that only through such coercion did defendant submit to detention and consent to a search.

The bench trial in fact focused more on the circumstances of the discovery of cocaine on defendant’s person than on the cocaine itself, or defendant’s responsibility for it. A trial court

has wide discretion to supplement the evidentiary record from earlier proceedings when entertaining a motion to suppress evidence that has earlier been deemed admissible. See MCR 6.110(D). The trial court reiterated its earlier conclusions that defendant had not been seized, and had consented to the search, the trial court did not make specific factual findings concerning defendant's assertions at trial. Defendant suggests that this indicates that the court ignored important evidence. We, however, think it obvious from the court's simple reiteration of its earlier conclusions that it was unpersuaded by defendant's theory concerning the dog, and its effect on him, placed as it was on the record only at the third opportunity to do so. "Credibility is a matter for the trier of fact to ascertain. We will not resolve it anew." *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

Because the trial court did not clearly err in rejecting defendant's story of coercion, neither did it err in concluding that the police officer did not seize defendant before searching him, and conducted that search with defendant's consent.

Affirmed.

/s/ Kathleen Jansen  
/s/ Pat M. Donofrio