

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KARL BASHI,

Defendant-Appellee.

UNPUBLISHED

October 13, 2009

No. 286239

Wayne Circuit Court

LC No. 08-004251-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TOSHIRO TERENCE GERMANY,

Defendant-Appellee.

No. 286240

Wayne Circuit Court

LC No. 08-004251-FH

Before: M. J. Kelly, P.J., and K. F. Kelly and Shapiro, JJ.

PER CURIAM.

Defendant Toshiro Germany was charged with carrying a concealed weapon (CCW), MCL 750.227(2), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant Karl Bashi was also charged with CCW for aiding and abetting Germany by supplying him with the gun. Bashi and Germany both moved to suppress the evidence on the ground that it was obtained pursuant to an illegal search and seizure. The trial court granted the motion to suppress and dismissed the charges against both defendants. In these consolidated appeals, the prosecutor appeals as of right. We affirm. These appeals have been decided without oral argument pursuant to MCR 7.214(E).

This Court reviews a trial court's factual findings at a suppression hearing for clear error but reviews the ultimate ruling on a motion to suppress de novo. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). "A finding of fact is clearly erroneous if, after review of the entire record, an appellate court is left with a definite and firm conviction that a mistake had been made." *People v Wilkens*, 267 Mich App 728, 732; 705 NW2d 728 (2005) (internal quotation marks and citation omitted). In reviewing the trial court's determination, this Court defers to its

decisions with respect to conflicting evidence and the credibility of witnesses. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

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The trial court concluded that the gun that Germany allegedly possessed was the product of a search for which there was no reasonable suspicion and, therefore, suppressed the gun. The prosecutor argues on appeal that Germany was not seized and that the search was proper based on Germany's voluntary statements to the officers present.

"The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). "An investigatory stop, which is limited to a brief and nonintrusive detention, constitutes a Fourth Amendment seizure." *People v Jones*, 260 Mich App 424, 429; 678 NW2d 627 (2004). To conduct an investigatory stop, a police officer must have specific and articulable facts sufficient to create a reasonable suspicion of criminal activity. *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). A police approach for questioning on the street does not amount to an investigatory stop "unless there exist intimidating circumstances leading the person to reasonably believe he was not free to leave or the person rebuffs the police officer by refusing to answer and walking away." *People v Daniels*, 160 Mich App 614, 619; 408 NW2d 398 (1987).

"A person is seized within the meaning of the Fourth Amendment if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *People v Armendarez*, 188 Mich App 61, 69; 468 NW2d 893 (1991) (internal quotation marks and citation omitted). A seizure occurs when there is an application of physical force to restrain movement or where the defendant submits to an officer's display of authority. *People v Lewis*, 199 Mich App 556, 559; 502 NW2d 363 (1993). A display of authority includes such circumstances as where the police activate their lights and siren, display their weapons, or issue orders to a person as they approach. See *People v Mamon*, 435 Mich 1, 12; 457 NW2d 623 (1990).

The trial court found and evidence at the hearing showed that at least six, but potentially as many as 12, officers arrived at the scene. As two officers approached Germany where he was standing outside on the sidewalk, Germany moved inside to the vestibule of the club. The officers entered the vestibule and one of them asked Germany "whether he was armed." The officer testified that he did so because "we were entering a bar location and I didn't know if he was armed or not. And I didn't want to turn my back on him while walking in the bar location."

It is true that "[w]hen an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized." *People v Jenkins*, 472 Mich 26, 33; 691 NW2d 759 (2005). However, under these circumstances, we conclude that Germany was seized. Although only two officers approached Germany, there were four to 10 other officers present, all of whom were in uniform. When the officers arrived, they appeared to approach Germany, at which time he retreated into his place of work. The officers agreed that Germany did nothing suspicious or aggressive. However, after Germany had retreated into the club away from the officers, the officers followed Germany by entering the vestibule of club. Given that Germany had no reason to know that the officers were

present to check the club's business license, it was reasonable for Germany to assume that they were specifically interested in him, particularly since he had attempted to walk away and they had followed him into the vestibule. And, because the officers had appeared to follow him after he walked away from their approach, the police conduct communicated to Germany that he was not free to decline the officers' requests or otherwise terminate the encounter. Indeed, the heavy police presence, coupled with the officer's statement that he needed to know whether Germany was armed for his safety, was a show of authority to which any reasonable citizen would feel compelled to submit. *Lewis, supra*. These facts establish that Germany was seized and the police approach constituted an investigatory stop. *Armendarez, supra; Daniels, supra*.

As previously noted, the officers indicated that Germany did nothing suspicious, he was not rude, he made no sudden moves and exhibited no aggression. We agree with the trial court that the police had no reasonable suspicion that Germany had done or was about to do anything illegal and, therefore, had no basis for their seizure and investigatory stop. Accordingly, the trial court properly concluded that Germany was searched and the gun seized in violation of the Fourth Amendment, the proper remedy for which was suppression of the evidence, in this case, the gun. See *People v Bloxon*, 205 Mich App 236, 248; 517 NW2d 563 (1994).

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The trial court dismissed the aiding and abetting count against Bashi on three grounds. First, it held that Bashi was not in possession of a gun himself, and therefore could not be guilty of CCW. Second, it concluded that because the gun was suppressed as to Germany, Bashi could not be charged with aiding and abetting. Third, it held that "there is no statement by anyone or evidence that Mr. Bashi ever told or knew that Mr. Germany would have the gun concealed on or about his person." On appeal, the prosecutor has only challenged two of these grounds. The prosecutor contends that the fact that Bashi had a permit to carry a gun did not preclude a charge of aiding and abetting CCW because Bashi's permit did not make it legal for Germany to possess the gun on Bashi's behalf. The prosecutor also argues that because the gun was illegally suppressed, the charge against Bashi should be reinstated.¹ However, the prosecutor has failed to challenge the trial court's holding that there was no evidence that Bashi ever told or knew that Germany "would have the gun concealed on or about his person." One of the elements of aiding and abetting is a requirement that the defendant "ha[ve] knowledge that the principal intended its commission at the time the defendant gave the aid or assistance."

¹ Obviously, our conclusion in Docket No. 286240 that the gun was properly suppressed precludes this argument.

People v Jones (On Rehearing), 201 Mich App 449, 451; 506 NW2d 542 (1993). Because the prosecutor failed to challenge one of the bases for the trial court's ruling, an issue that necessarily must be reached, plaintiff is entitled to no relief with respect to Bashi. *Riverview v Sibley Limestone*, 270 Mich App 627, 638; 716 NW2d 615 (2006); *Derderian v Genesis Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

Affirmed.

/s/ Michael J. Kelly

/s/ Douglas B. Shapiro