

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TERRELL BANKS,

Defendant-Appellee.

UNPUBLISHED

March 29, 2002

No. 233934

Wayne Circuit Court

LC No. 98-009716

Before: Hood, P.J., and Gage and Murray, JJ.

PER CURIAM.

The prosecution appeals as of right from the trial court's order dismissing the charge¹ against defendant after granting defendant's motion to suppress the evidence. We reverse and remand.

The prosecution argues that the trial court abused its discretion in granting defendant's motion for rehearing. Motions for rehearing or reconsideration are governed by MCR 2.119(F). MCR 2.119(F) is a rule of civil procedure, but also applies to criminal cases. *People v Turner*, 181 Mich App 680, 682-683; 449 NW2d 680 (1989). MCR 2.119(F)(3) states:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

However, if a trial court wants to give a "second chance" to a motion it has previously denied, it has every right to do so, and MCR 2.119(F)(3) does not prevent this exercise of discretion. *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000), quoting *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986). Rather, MCR 2.119(F)(3) "allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Id.* This Court reviews a trial court's decision

¹ Defendant was charged with possession with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i).

regarding a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

The prosecution first argues that Judge Thomas abused her discretion in granting defendant's motion for rehearing on the issue of standing because, when the case was before Judge Brookover, defendant failed to request that the proofs be reopened before the standing issue was decided. The prosecution does not argue why defendant's failure to request the reopening of proofs before the trial court's decision would defeat his attempts at rehearing. The prosecution also cites no legal authority in support of its argument. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), quoting *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Thus, the prosecution's failure to cite any supporting legal authority constitutes an abandonment of this issue. *Id.*

Second, the prosecution argues that, if Judge Thomas did decide the issue of whether there was probable cause to stop and search the Lexus, she abused her discretion in granting defendant a rehearing on this issue. The prosecution argues that there was no basis to grant a rehearing on this issue because defendant knew that probable cause was one of the issues at the evidentiary hearing before Judge Brookover. However, once again, the prosecution cites no legal authority in support of its argument, which constitutes an abandonment of this issue. *Id.*

The prosecution also argues that Judge Thomas erred in revisiting the issue of Officer Tolbert's credibility when it granted defendant's motion for rehearing. In support of this argument, the prosecution cites *People v Ulman*, 244 Mich App 500; 625 NW2d 429 (2001). However, we find that *Ulman* is distinguishable from the instant case and disagree with the prosecution's argument. *Ulman* involves a case where the successor judge revisited the issue of the officers' credibility in the context of a motion for relief from judgment, which was filed almost twelve years after the original judge's determination of the officers' credibility in regard to the defendant's motion to suppress. *Id.* at 504-508, 511-512. In making a new determination of credibility, the second judge was not relying on any new or substantively different conflicting testimony. *Id.* at 511. As a result, the *Ulman* Court held that the trial court must defer to the factfinder's determination of the credibility of the witnesses *in the context of a motion for relief from judgment*. *Id.* (emphasis added).

By contrast, the instant case does not involve an appeal or post judgment proceeding where the court must defer to the fact finder's determination of credibility. Rather, the instant case involves a pretrial rehearing of a motion to suppress where new testimony was given and new evidence submitted.

After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous. [MCR 6.435(B).]

A successor judge has the authority to enter whatever orders the predecessor judge could have entered had he continued to preside in the case. *People v Herbert*, 444 Mich 466, 471-472; 511 NW2d 654 (1993), overruled in part on other grounds *People v Lemmon*, 456 Mich 625; 576

NW2d 129 (1998). A successor judge has full authority to reconsider the prior judge's earlier rulings. *Id.* at 472. Therefore, a successor judge may make different findings of fact when rehearing a motion to suppress. Accordingly, we find that Judge Thomas did not err in revisiting the issue of Officer Tolbert's credibility during the rehearing on defendant's motion to suppress.

Next, the prosecution argues that, even if Judge Thomas did not abuse her discretion in granting defendant's motion for rehearing, she erred in finding that defendant had standing to challenge the search of the Lexus because defendant abandoned the vehicle on the expressway. Generally, an issue is not properly preserved if it is not raised before the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Although the prosecution argued to the trial court that defendant lacked standing, it never raised the argument that defendant lacked standing because he abandoned the Lexus. Judge Thomas found that defendant had standing to challenge the search of the Lexus and that the evidence should be suppressed, but she never made a finding regarding whether defendant had abandoned the Lexus because the prosecution did not present that argument to Judge Thomas. Therefore, this issue was not preserved for appeal. This Court reviews unpreserved, constitutional error for plain error affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

On appeal the prosecution does not dispute that defendant had a reasonable expectation of privacy in the Lexus, but argues that defendant deprived himself of standing by abandoning the Lexus when he fled up the embankment of the expressway. "A person can deprive himself of standing by abandoning the object of the search or seizure." *People v Zahn*, 234 Mich App 438, 448; 594 NW2d 120 (1999). One cannot manifest a reasonable expectation of privacy in an item once it has been abandoned. *Abel v United States*, 362 US 217, 241; 80 S Ct 683; 4 L Ed 2d 668 (1960). The prosecution cites various cases from different jurisdictions where a defendant was found not to have standing to challenge the search of a car when the defendant abandoned the car to flee police on foot. See, e.g., *United States v Edwards*, 441 F2d 749, 751 (CA 5, 1971). The prosecution also cites *United States v Barlow*, 17 F3d 85, 88 (CA 5, 1994), which states:

The test for determining when an object has been abandoned is one of intent, which "may be inferred from words spoken, acts done, and other objective facts." The accused need not have abandoned the searched item in the strict property sense, where an intent to relinquish ownership must be shown; merely an intent voluntarily to relinquish his privacy interest is sufficient. A defendant has abandoned his reasonable expectation of privacy when he leaves an item in a public place.²

During the evidentiary hearing before Judge Brookover, the testimony revealed that defendant was pulled from the vehicle, resisted arrest, and tried to flee up the embankment of the expressway leaving the vehicle with the keys in the ignition, but was subsequently tackled by

² Federal cases decided under the Fourteenth Amendment to the U.S. Constitution provide useful guidance in construing the analogous state constitutional provision. *People v Bloxson*, 205 Mich App 236, 240; 517 NW2d 563 (1994). In addition, because this case involves the suppression of narcotics evidence, only the federal constitutional guarantees against unreasonable searches and seizures (which are identical to those provided by the State Constitution) apply. *People v Toohey*, 438 Mich 265, 271; 475 NW2d 16 (1991).

police. The evidence before Judge Brookover as to defendant's actions in trying to escape from the police was uncontroverted and available to Judge Thomas. However, Judge Thomas never made a finding in regard to whether defendant abandoned the Lexus, because the prosecutor did not argue that particular issue to her. Based on the law set forth above, if the trial court were to find that defendant abandoned the vehicle when he attempted to flee, the subsequent search would not be a violation of the right against unreasonable searches and seizures. *Edwards, supra*. Accordingly, we remand this case to the trial court to make findings as to whether defendant abandoned the vehicle.

Next, the prosecution argues that, after Judge Thomas found that defendant had standing to challenge the search of the Lexus, she improperly suppressed the evidence without determining whether the police had probable cause for the search independent of the search warrant. We agree. A trial court's factual findings in regard to a motion to suppress are reviewed for clear error. *Zahn, supra* at 445. "However, a trial court's ruling on a motion to suppress the evidence is reviewed under the de novo standard for all mixed questions of fact and law, and for all pure questions of law." *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). After the evidence was submitted, Judge Thomas found that defendant had standing to challenge the stop and search of the Lexus and found that the search of the Lexus was improper in light of her findings as to the validity of the search warrant. However, Judge Thomas never made specific findings in regard to any probable cause that may have existed independent of the search warrant. Therefore, we remand the case to the trial court to make specific findings of fact as to whether probable cause to search the vehicle existed independent of the search warrant.

Reversed and remanded for findings of fact and an explanation regarding whether defendant abandoned the Lexus when attempting to flee the scene and whether the police had probable cause without the search warrant to stop and search the Lexus. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ Christopher M. Murray