

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JAMES STRIPLING,

Defendant-Appellee.

UNPUBLISHED

November 28, 2006

No. 263535

Wayne Circuit Court

LC No. 04-012773-01

Before: : White, P.J, and Zahra and Kelly, JJ.

PER CURIAM.

Defendant was charged with two counts of possession with intent to deliver a controlled substance, MCL 333.7401(2)(a)(iv), and one count of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). After the preliminary examination, defendant filed a motion to dismiss on the grounds that the underlying stop was not based on probable cause and that MCL 257.655, on which the stop was based, was unconstitutionally vague and overbroad. The trial court entered an order suppressing the evidence and dismissing the charges against defendant. The prosecutor appeals as of right. We reverse and remand.

A Detroit police officer testified at the preliminary examination that he was assigned to the Gang Enforcement Section of the Narcotics Unit. He went to 7754 Helen Street in Detroit on a Crime Stopper Complaint, which was an anonymous complaint that had been faxed into "Operation Gun Stop." Surveillance of the street lasted for a month or longer. Defendant was observed walking in the street even though a sidewalk was available so the officer detained him for violating MCL 257.655.¹ When the officer stopped defendant, defendant said that he was on

¹ MCL 257.655 provides:

(1) Where sidewalks are provided, a pedestrian shall not walk upon the main traveled portion of the highway. Where sidewalks are not provided, pedestrians shall, when practicable, walk on the left side of the highway facing traffic which passes nearest.

(2) A person who violates this section is responsible for a civil infraction.

the street because he had just purchased some drugs for his personal use. After defendant volunteered this, the officer conducted a pat down search of him. The officer felt no weapons on defendant's person but found cocaine, heroin and marijuana in the pockets of his shirt and sweater along with \$298 in cash.

Defendant argued in his motion to suppress that MCL 257.655 is constitutionally vague and overbroad, claiming that it placed too much control in the hands of the officer who could arbitrarily decide when to enforce it. Defendant also argued that the officer had used the violation of MCL 257.655 "as a pretext to stop and search individuals on residential streets that they would, otherwise, have no probable cause to stop and search."

At a hearing on the motion, the prosecutor argued that, even if the statute was found unconstitutional, it would not invalidate the stop of defendant in light of this Court's decision in *People v McLeod*, 254 Mich App 222, 231; 656 NW2d 844 (2002). The trial court apparently agreed with that argument,² but granted the motion to suppress on the alternative ground that the violation of MCL 257.655 had been a pretext for the stop. [deletion]

On appeal, the prosecutor argues the trial court erred in assessing the officer's credibility and intent from his testimony at the preliminary examination to determine that the officer had used the violation of MCL 257.655 as a pretext to stop and search defendant. We agree.

As long as the police are doing no more than they are legally permitted and objectively authorized to do, a stop or arrest is constitutional. *People v Haney*, 192 Mich App 207, 210; 480 NW2d 322 (1991). Hence, courts must apply an objective analysis of the facts and circumstances of a stop, and not inquire into an officer's subjective intent, to determine whether the stop was a pretext. *Id.* Under *Haney, supra*, the circuit court should not have speculated as to the officer's intent and should have simply determined whether he had probable cause to believe defendant had violated MCL 257.655, and whether the ensuing search happened as asserted by the officer. These findings necessarily depended on the credibility of the officer, as did the finding that defendant did not look "stupid" enough to volunteer that he had drugs on him. Absent an agreement of the parties to the contrary, the court was obliged to conduct an evidentiary hearing to determine these issues, and could not make these credibility determinations based solely on the preliminary examination transcript. *People v Talley*, 410 Mich 378; 301 NW2d 809 (1981), overruled in part by *People v Kaufman*, 457 Mich 266; 577 NW2d 466 (1998).

² Because the trial court was somewhat ambiguous in ruling on this point, we simply note our agreement with the prosecutor that, based on the holdings in *MacLeod, supra*, and *Michigan v DeFillippo*, 443 US 31; 99 S Ct 2627; 61 L Ed 2d 343 (1979), the stop of defendant was valid despite his constitutional challenge to the statute.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly