

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RICKEY FRANKLIN SMITH,

Defendant-Appellee.

UNPUBLISHED

April 27, 2001

No. 227799

Oakland Circuit Court

LC No. 99-007322-AR

Before: Bandstra, C.J., and Wilder and Collins, JJ.

PER CURIAM.

The prosecution appeals by leave granted from the circuit court’s opinion and order affirming the district court’s dismissal of charges of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and open intoxicants in a vehicle, MCL 257.624a; MSA 9.2324(1), filed against defendant. In refusing to bind defendant over, the district court held that defendant’s statement was made in violation of his *Miranda*¹ rights and that the officers conducted an illegal search and seizure of defendant. The circuit court affirmed, holding that all the evidence seized after the unlawful stop must be suppressed as “fruits” of the unlawful seizure, and defendant’s statement was made in violation of *Miranda*. We reverse and remand.

The prosecution’s assertion that the district court erred by refusing to bind defendant over on the charged offenses is reviewed under an abuse of discretion standard. *People v Beasley*, 239 Mich App 548, 552; 609 NW2d 581 (2000). This Court reviews the decision of the circuit court de novo to determine whether the district court abused its discretion. *Id.*

First, the prosecution argues that the officers were justified in stopping defendant because they had reasonable suspicion that defendant was engaged in criminal activity. Police officers may make a valid investigatory stop of a suspect if they possess a reasonable suspicion that criminal activity is afoot. *Terry v Ohio*, 392 US 1, 30; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). Reasonable suspicion is

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

something more than an inchoate or unparticularized suspicion or hunch, but is less than probable cause. *United States v Sokolow*, 490 US 1, 7; 109 S Ct 1581; 104 L Ed 2d 1 (1989); *Champion, supra*. Reasonable suspicion must be based on “an objective manifestation that the person stopped was or was about to be engaged in criminal activity as judged by those versed in the field of law enforcement when viewed under the totality of circumstances.” *Champion, supra*.

In the instant case, the district court properly ruled that the officers did not have reasonable suspicion to stop and detain defendant. The vehicle that defendant was seen getting out of was legally parked. Although Officer Bell had made arrests in the area before, usually for lewd behavior and drug use, being in a high crime area or an area of expected criminal activity, alone, is not enough to establish reasonable suspicion. *Illinois v Wardlow*, 528 US 119, ___; 120 S Ct 673, 676; 145 L Ed 2d 570 (2000); *People v Nelson*, 443 Mich 626, 636; 505 NW2d 266 (1993). The prosecution argues that defendant’s act of walking away from the vehicle while stuffing something into his pocket when the officers approached was evasive behavior that aroused suspicion. Although nervous, evasive behavior is a relevant factor in determining reasonable suspicion, *Wardlow, supra*, defendant’s behavior in the instant case was not necessarily nervous or evasive. There is no evidence that defendant saw the officers approaching the car or that he was walking away in response to their approach. The officers did not have any particularized suspicion concerning what defendant may have been stuffing into his pocket, and they had no evidence that defendant was engaged in any criminal activity. Looking at the totality of the circumstances, the officers did not have a reasonable suspicion of criminal activity to stop defendant.

The prosecution argues that, even if the officers’ stop of defendant was not justified, the seizure of the drug paraphernalia from the vehicle was justified under the plain view doctrine and, therefore, the subsequent search of defendant’s person and the seizure of the drug paraphernalia from his person were also justified. We agree. When a defendant claims that evidence should be suppressed as a result of an unlawful seizure of his person, the court must determine whether the evidence was procured by an exploitation of the illegality or, instead, by means sufficiently distinguishable to be purged of the primary taint. *People v Lambert*, 174 Mich App 610, 616-617; 436 NW2d 699 (1989). The exclusionary rule does not bar the admission of evidence that has been acquired by means of legal, independent means or when its discovery would have been inevitable. *People v LoCicero (After Remand)*, 453 Mich 496, 508-509; 556 NW2d 498 (1996).

In this case, the officers lawfully approached an already stopped vehicle and after looking in the vehicle, one of the officers saw, in plain view, two crack pipes and several beer cans. The plain view exception to the warrant requirement allows police officers to seize items in plain view if the officers are lawfully in a position from which they view the item, and if the item’s incriminating character is immediately apparent. *Horton v California*, 496 US 128, 136-137; 110 S Ct 2301; 110 L Ed 2d 112 (1990); *Champion, supra* at 101. When the officers lawfully approached the vehicle, the incriminating character of the crack pipes and beer cans was immediately apparent. Thus, the evidence was lawfully seized as a result of the plain view observations of the officers, not as a result of the unlawful seizure of defendant. Accordingly, the trial court erred in suppressing evidence of the crack pipe and beer cans found in the vehicle.

The next question is whether evidence found on defendant's person was properly suppressed as a "fruit" of the unlawful detention. As noted above, although defendant was unlawfully detained by the police, the evidence found in the vehicle was lawfully seized pursuant to the plain view exception to the warrant requirement. This evidence then gave the officers probable cause to arrest defendant and search him incident to the arrest. *Champion, supra* at 115. A search supported by probable cause may be valid whether the search occurred before or after the arrest. *People v Arterberry*, 431 Mich 381, 384; 429 NW2d 574 (1988). The search of defendant that yielded the crack pipe and lighter was lawful because it was supported by probable cause gained from the evidence in the vehicle. Likewise, the subsequent search of defendant at the police station that revealed the crack cocaine in defendant's sock was a valid search incident to arrest. Because these searches of defendant were lawful, they were not products of the initial unlawful detention of defendant and the crack pipes, lighter and crack cocaine should not have been suppressed.

The prosecution next argues that the statement made by defendant, that he had been smoking crack, should not have been suppressed because defendant was neither in custody nor being interrogated at the time he made the statement, so *Miranda* warnings were not required. *Miranda* warnings only need to be given in situations involving custodial interrogation. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). A custodial interrogation is a questioning initiated by law enforcement officers after the suspect has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda, supra* at 444; *Zahn, supra*. To determine whether a person is in custody, this Court looks at the totality of the circumstances. *Zahn, supra*. The key question is whether the accused could have reasonably believed that he was not free to leave. *Id.* This determination depends on the objective circumstances of the interrogation. *Id.*

In the instant case, when defendant began to walk away from the vehicle, the officers asked him to stop and come back, acknowledging that they would have gone after defendant if he did not return to the car. Defendant walked back to the car, but did not get inside the car. The officers got out of their vehicle and Officer Bell walked around to the driver's side of defendant's vehicle, while Officer Reed walked over to talk to defendant, who was standing outside the car on the passenger side. Though defendant was not handcuffed or physically restrained in any way, Officer Bell testified that defendant was in custody, detained, and not free to leave. Therefore, looking at the totality of the circumstances, particularly the officers' request that defendant return to the vehicle and Officer Bell's testimony stating that defendant was in custody, we conclude that defendant could have reasonably believed that he was not free to leave and thus in custody at the time he made the statement. See *Zahn, supra*.

We also conclude that defendant's statement that he had been smoking crack was the result of an interrogation, and was not a voluntary statement. Interrogation refers to express questioning and to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). Volunteered statements of any kind are not barred by the Fifth Amendment and are admissible. *Miranda, supra* at 478; *Anderson, supra*.

Officer Bell asked the person in the driver's seat of the vehicle, "[w]hose crack pipes are those?" When he asked this question, Officer Bell was standing on the driver's side of the vehicle, while defendant was standing outside of the passenger side of the vehicle, in front of Officer Reed, with his back to Officer Bell. Defendant and the two occupants of the vehicle responded that they had just finished smoking crack. The driver made the statement first, followed by defendant. Under these circumstances, Officer Bell should have known that his question was reasonably likely to elicit an incriminating response from defendant because he was facing defendant's back and knew that defendant may not have realized that the question was directed at the driver, not him. Furthermore, defendant was only the width of the car away from Officer Bell and was in custody when Officer Bell asked the question. On this record, we conclude that defendant's statement was the result of an interrogation by Officer Bell. Thus, because defendant's response was the result of custodial interrogation and he was not given his *Miranda* warnings, his statement was properly suppressed. See *Miranda, supra* at 478-479; *People v Cheatham*, 453 Mich 1, 11; 551 NW2d 355 (1996).

Although we conclude that defendant's statement during custodial interrogation was properly suppressed, we also conclude that the beer cans and one crack pipe were admissible under the plain view doctrine, and the lighter, crack cocaine, and other crack pipe were admissible as a search incident to arrest. Therefore, we hold that the district court abused its discretion in dismissing the charges. Accordingly, we reverse the circuit court's opinion and order affirming the district court's order of dismissal, and remand this case to the district court with instructions to bind defendant over on the charged offenses.

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

/s/ Richard A. Bandstra

/s/ Kurtis T. Wilder

/s/ Jeffrey G. Collins