

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

GERALD VERTIS KEMP,

Defendant-Appellee.

UNPUBLISHED

August 11, 2005

No. 252640

Wayne Circuit Court

LC No. 03-011258-01

Before: Cooper, P.J., and Fort Hood and R.S. Gribbs*, JJ.

PER CURIAM.

The prosecutor appeals as of right from the trial court's order dismissing a charge of carrying a concealed weapon, MCL 750.227, which was entered after the court granted defendant's motion to suppress evidence of the weapon. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

A trial court's resolution of factual issues at a suppression hearing is entitled to deference. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). We review the court's factual findings for clear error. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). However, the trial court's application of constitutional standards to its findings is not entitled to the same deference as factual findings. *Id.* The application of the Fourth Amendment's exclusionary rule is a question of law reviewed de novo. *Id.*

The parties agree that the validity of the police officers' initial encounter with defendant is governed by *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Under *Terry*, a police officer may approach and temporarily detain a person if the police officer has a reasonably articulable suspicion that criminal activity is afoot. *Jenkins, supra* at 32. The totality of the facts and circumstances are considered in determining if the police officer had a reasonable suspicion to make an investigative stop. *Id.* The police officer must have a "particularized suspicion, based on an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing." *People v Shabaz*, 424 Mich 42, 59; 378 NW2d 451 (1985). Commonsense judgments and inferences about human behavior must be considered. *Jenkins, supra* at 32. Because the test is an objective one, it is not material if the reason offered by a police officer for his action was a "pretext." See *Whren v United States*, 517 US 806, 813; 116 S Ct 1769; 135 L Ed 2d 89 (1996); see also *People v Arterberry*, 431 Mich 381, 384; 429 NW2d

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

574 (1988). The burden of proof is on the prosecution to show that the seizure of the defendant was justified. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003).

In the present case, the prosecutor's sole witness was one of the two police officers involved in stopping defendant. It is apparent based on the trial court's finding, that the police officers made a pretextual stop, that the officer's credibility was in question. Regardless of the police officer's subjective state of mind or credibility, the police officer's testimony was insufficient to establish a lawful investigative stop under the applicable objective standard.

Officer Wawrzynski testified that defendant was stopped because of suspected loitering, contrary to a city ordinance. Without evidence addressing the substance of any ordinance violation, the trial court appropriately questioned, "what is loitering?" The prosecutor's reliance on a dictionary definition of "loitering" on appeal is misplaced, inasmuch as "loitering is not a crime in itself and cannot be punished constitutionally." *People v Smith*, 75 Mich App 64, 67-68; 254 NW2d 654 (1977). Conduct deleterious to the public good must be connected to loitering in an ordinance. See *People v Morris*, 66 Mich App 514, 518; 239 NW2d 649 (1976); *Detroit v Wedlow*, 17 Mich App 134, 136; 169 NW2d 145 (1969).

The prosecutor failed to establish any loitering crime at the suppression hearing to substantiate a suspicion of criminal activity. Without such evidence, one could only speculate at the basis of any police officer's suspicion that such criminal activity was afoot.

The other objective circumstances identified by Officer Wawrzynski's testimony also failed to establish a reasonable suspicion that criminal activity was afoot. Officer Wawrzynski indicated that he and his partner had two brief observations of defendant at the gas station, separated by about two or three minutes. Although defendant departed on his bicycle after looking directly at the police officers during the second observation, there was no indication that defendant's flight was accompanied by any nervous behavior or other conduct to raise a suspicion of criminal activity. *People v Oliver*, 464 Mich 184, 197; 627 NW2d 297 (2001). The totality of the circumstances did not establish a lawful investigative stop. Hence, we uphold the trial court's decision to suppress evidence of the weapon seized during the stop. *Shabaz, supra* at 65.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs