RECEIVED by MSC 1/12/2023 2:36:02 PM

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee

v

MATTHEW SCOTT DUFF, **No. 163961**
Defendant-Appellant.

L.C. No. 2018-267140-FH
COA No. 347603

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

THOMAS WEICHEL
President
Prosecuting Attorneys
Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA
Chief, Research, Training, and Appeals

TIMOTHY A. BAUGHMAN (P 24381)
Special Assistant Prosecuting Attorney
11TH Floor
Detroit, Michigan 48226
Phone: (313) 224-5792

RECEIVED by MSC 1/12/2023 2:36:02 PM

Table of Contents

Page

Index of Authorities . . . . . -ii-

Statement of the Question . . . . . -1-

Statement of Facts . . . . . -1-

Argument

I. In a motion to suppress based on an unconstitutional seizure of the person, the defendant must first demonstrate that he was seized, in the circumstances here meaning that a reasonable person would not have felt free to decline the officer's requests or otherwise terminate the encounter. Defendant was parked at night in the parking lot of a closed elementary school, was highly intoxicated, could, had he so desired, backed his vehicle out of the parking space without striking the officer's vehicle by simply turning the wheel, and there is no evidence that defendant even knew where the officer's vehicle was. Defendant has not demonstrated that he was seized from the outset of the encounter . . . . . -2-

A. Introduction . . . . . -2-
B. The Court of Appeals correctly held that defendant was not seized . . . . . -3-

1. The burden of demonstrating a Fourth Amendment seizure of the person is on the defendant before the burden then shifts to the prosecution to justify that seizure . . . . . -3-
2. A court determines whether defendant has established by a preponderance of the evidence that he was seized by considering the objective facts known to the officer, not his or her subjective intent or motive . . . . . -4-
3. The appropriate test. . . . . -5-
4. The test applied: defendant has not carried his burden of showing by a preponderance of evidence that under the circumstances a reasonable person would not have felt free to decline the officers' requests or otherwise terminate the encounter . . . . . -9-
5. Should the Court find a seizure occurred, the Court should consider whether reasonable suspicion existed, including whether a brief detention to investigate is justified especially by the place and time of a person's presence . . . . . -13-

Relief . . . . . -16-

RECEIVED by MSC 1/12/2023 2:36:02 PM

Index of Authorities

Cases **Page**

FEDERAL CASES

Ashcroft v. al-Kidd,
563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) 15

Brendlin v. California,
551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) 5, 7, 8

Brower v. County of Inyo,
489 U.S. 593, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989) 5

California v. Hodari D.,
499 U.S. 621,111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991). 5, 6

Demarest v. City of Vallejo, California,
44 F.4th 1209 (CA 9, 2022) 4

Florida v. Bostick,
501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) 6, 8

Haberle v. Troxell,
885 F.3d 170 (CA 3, 2018). 4

I.N.S. v. Delgado,
466 U.S. 210, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984) 6, 8, 9

Michigan v. Chesternut,
486 U.S. 567, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988) 5

O'Malley v. City of Flint,
652 F.3d 662 (CA 6, 2011). 9

Torres v. Madrid,
141 S. Ct. 989, 209 L. Ed. 2d 190 (2021). 4

United States v. Carr,
674 F.3d 570 (CA 6, 2012). 11

RECEIVED by MSC 1/12/2023 2:36:02 PM

United States v. Hernandez,
847 F.3d 1257 (CA 10, 2017) 3

United States v. Kim,
25 F.3d 1426 (CA 9, 1994) 13

United States v. Mattarolo,
209 F.3d 1153 (CA 9, 2000) 15

United States v. Mendenhall,
446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) 4, 5, 6

United States v. Shrum,
908 F.3d 1219 (CA 10, 2018) 3

United States v. Tafuna,
5 F.4th 1197 (CA 10, 2021) 8,12

United States v. Tatum,
548 F.3d 584 (CA 7, 2008) 4

Upper Skagit Indian Tribe v. Lundgren,
138 S. Ct. 1649, 200 L. Ed. 2d 931 (2018) 13

STATE CASES

Commonwealth v. Livingstone,
174 A.3d 609 (Pa, 2017) 9

People v Anthony,
327 Mich. App. 24 (2019) 2, 14

People v. Duff,
979 N.W.2d 858 (2022) 2

People v. Duff,
2021 WL. 5504189 (Mich. Ct. App. Nov. 23, 2021) 3

People v. Hendrickson,
459 Mich. 229 (1998) 4

People v Lucynski,
--- Mich. ----, 2022 WL 2964546 (2022) 2, 4, 7, 8,

9, 10

People v. Mamon,
435 Mich. 1 (1990) 4

People v. Pacheco,
182 P.3d 1180 (Colo.,2008) 15

State v. Gerry,
150 A.3d 810 (Me, 2016) 15

State v. Merlen,
2002 UT App. 181, 2002 WL 1122059 (2002). 11

State v. Noteboom,
758 N.W.2d 457 (S.D.,2008) 15

State v. Rodriguez,
248 P.3d 850 (Mont., 2011) 15

State v. Schwab,
2001 WL. 88198 (Ohio Ct. App., Jan. 29, 2001) 12

Vance v. Frymaster Corp.,
449 Mich. 909 (1995) 4

York v. State,
342 S.W.3d 528 (Tex.Crim.App., 2011) 15

OTHER

LaFave, Search & Seizure. 3, 4, 13, 15

RECEIVED by MSC 1/12/2023 2:36:02 PM

RECEIVED by MSC 1/12/2023 2:36:02 PM

Statement of the Question

I.

In a motion to suppress based on an unconstitutional seizure of the person, the defendant must first demonstrate that he was seized, in the circumstances here meaning that a reasonable person would not have felt free to decline the officer's requests or otherwise terminate the encounter. Defendant was parked at night in the parking lot of a closed elementary school, was highly intoxicated, could, had he so desired, backed his vehicle out of the parking space without striking the officer's vehicle by simply turning the wheel, and there is no evidence that defendant even knew where the officer's vehicle was. Has defendant demonstrated that he was seized from the outset of the encounter?

Defendant answers: YES

The People answer: NO

Amicus answers: NO

Statement of Facts

Amicus joins the statement of facts supplied by the People.

RECEIVED by MSC 1/12/2023 2:36:02 PM

Argument

I.

In a motion to suppress based on an unconstitutional seizure of the person, the defendant must first demonstrate that he was seized, in the circumstances here meaning that a reasonable person would not have felt free to decline the officer's requests or otherwise terminate the encounter. Defendant was parked at night in the parking lot of a closed elementary school, was highly intoxicated, could, had he so desired, backed his vehicle out of the parking space without striking the officer's vehicle by simply turning the wheel, and there is no evidence that defendant even knew where the officer's vehicle was. Defendant has not demonstrated that he was seized from the outset of the encounter.

A. Introduction

This Court has, on defendant's application, directed that supplemental briefs be filed addressing:

- whether the totality of the circumstances surrounding the officers' conduct of partially obstructing the defendant's ability to move his vehicle would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter, see *People v Lucynski*, ––– Mich. ––––, ––– N.W.2d ––––, 2022 WL 2964546 (Docket No. 162833, decided July 26, 2022); and

- whether *People v Anthony*, 327 Mich App 24, 40, 932 N.W.2d 202 (2019), correctly held that "only if officers completely block a person's parked vehicle with a police vehicle is the person seized."[1]

[1] *People v. Duff*, 979 N.W.2d 858 (2022).

RECEIVED by MSC 1/12/2023 2:36:02 PM

Amicus answers that the defendant was not seized under the circumstances of the encounter here, that *Anthony* was correctly decided, and that the conduct of the officers was reasonable in all events. Further, amicus submits that the observations of the officers "that defendant's eyes were bloodshot and glossy, and that he was slurring his speech" and the smell of the "odor of alcohol"[2] are not subject to suppression and justified a detention by the time defendant admitted he had been drinking, and that the blood alcohol test was the result of *this* seizure and justified arrest.

B. The Court of Appeals correctly held that defendant was not seized

1. The burden of demonstrating a Fourth Amendment seizure of the person is on the defendant before the burden then shifts to the prosecution to justify that seizure

This Court asks "whether the totality of the circumstances surrounding the officers' conduct of partially obstructing the defendant's ability to move his vehicle would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." The inquiry begins with an ascertainment of where lies the burden of persuasion—and it lies with defendant. The defendant "bears the burden of proving whether and when the Fourth Amendment was implicated (i.e., the point at which he ... was 'seized)."[3] The standard of persuasion does not appear to be any place stated, but, as with all preliminary questions regarding the admissibility of evidence under MRE 104(a), the preponderance of the evidence standard should apply. The rule provides that "preliminary questions concerning the admissibility

---

[2] *People v. Duff*, 2021 WL 5504189, at 1 (Mich. Ct. App. Nov. 23, 2021).

[3] *United States v. Hernandez*, 847 F.3d 1257, 1263 (CA 10, 2017). And see also *United States v. Shrum*, 908 F.3d 1219, 1229 (CA 10, 2018) ("If the defendant meets his burden of establishing a warrantless seizure, the burden then shifts. The Government must establish the warrantless seizure was reasonable"); LaFave, 6 Search & Seizure (6th ed.), § 11.2(b) ("The defendant also has the burden of proof as to whether there was sufficient government involvement in seemingly private conduct and whether a seizure occurred").

RECEIVED by MSC 1/12/2023 2:36:02 PM

of evidence shall be determined by the court," and it is established that these preliminary questions "must be established by a preponderance of proof."[4] And so the defendant here must establish by a preponderance of the evidence—that under the totality of the objective circumstances it is more likely than not[5]—that he was seized by the police, before the question of reasonable suspicion is considered.[6]

2. A court determines whether defendant has established by a preponderance of the evidence that he was seized by considering the objective facts known to the officer, not his or her subjective intent or motive

To clear the underbrush, any subjective intention of the officers is not relevant to the inquiry. As to whether a seizure under the Fourth Amendment has occurred at all, "[t]he subjective intention of the [officers] ... is irrelevant except insofar as that may have been conveyed to the respondent."[7] As a 9th Circuit case puts it, "[i]n construing the Fourth Amendment's prohibition against 'unreasonable' searches and seizures . . . the Supreme Court has 'almost uniformly rejected invitations to probe subjective intent" and has instead held that "[l]egal tests based on reasonableness

---

[4] *United States v. Tatum*, 548 F.3d 584, 587 (CA 7, 2008). See also *People v. Hendrickson*, 459 Mich. 229, 241 (1998) (Boyle, J., concurring); *People v. Mamon*, 435 Mich. 1, 19 (1990) (Brickley, J., concurring: In my view, the burden of proof was on the defendant to show by a preponderance of the evidence that a "seizure" occurred. See generally 4 LaFave, Search & Seizure (2d ed), §§ 11.2(b), 11.2(c)").

[5] See *Vance v. Frymaster Corp*., 449 Mich. 909 (1995) ("Plaintiff had to prove his case by a preponderance of the evidence, that is, that it was more likely than not)

[6] The allocation of the burden of proof, and the standard applied, were not discussed in *People v. Lucynski*, —Mich.—, 2022 WL 2964546 (2022).

[7] *Haberle v. Troxell*, 885 F.3d 170, 176 (CA 3, 2018), citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (n.6).

RECEIVED by MSC 1/12/2023 2:36:02 PM

are generally objective."[8] And the United States Supreme Court has only very recently said that "the appropriate inquiry is whether the challenged conduct objectively manifests an intent to restrain."[9]

3. The appropriate test

A seizure occurs when law enforcement intentionally gains physical control over someone. This may occur in one of two ways: 1) by the application of physical force, which subdues the individual, or 2) by a show of authority or force, to which the individual acquiesces or submits.[10] What of what might be termed "passive acquiescence"?[11] In *United States v. Mendenhall*[12] after a woman had flown to Detroit she was approached by DEA agents in the terminal, who, after identifying themselves, asked to see her identification and ticket. These bore different names, which she explained by saying she just "felt like" using different names. An agent identified himself as a narcotics agent, which he believed provoked a nervous reaction in the woman. The identification and ticket were returned to her, and she was asked if she would accompany them to their airport office for further questioning, which she did. She there consented to a search of her person and handbag, after having been told that she had the right to refuse. Narcotics were found. Had she been seized under the Fourth Amendment, and if so, without cause? Justice Stewart for a plurality said no:

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of the circumstances

---

[8] See also *Demarest v. City of Vallejo, California*, 44 F.4th 1209, 1221 (CA 9, 2022)

[9] *Torres v. Madrid*, 141 S. Ct. 989, 209 L. Ed. 2d 190, 998 (2021).

[10] *Brower v. County of Inyo*, 489 U.S. 593, 596, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989); *Michigan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988); *California v. Hodari D.* 499 U.S. 621,111 S.Ct. 1547, 113 L.Ed.2d 690 (1991).

[11] *Brendlin v. California*, 551 U.S. 249, 249, 127 S. Ct. 2400, 2402, 168 L. Ed. 2d 132 (2007).

[12] *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

RECEIVED by MSC 1/12/2023 2:36:02 PM

> surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of the circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled. . . . In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure.[13]

In *Florida v. Bostick*[14] two police officers, boarded a bus bound from Miami to Atlanta while it was on a stopover in Fort Lauderdale. Their clothing and badges identified them as police officers, and one possessed a pistol. Without any particularized suspicion, one asked a passenger if they could see his ticket and identification, which were returned to the passenger, who was asked if he would consent to a search of his luggage, the police telling him they were looking for drugs and he could refuse the request. He consented, and cocaine was found.

The state court held that the police conduct was necessarily a seizure, but the United States Supreme Court, citing *Hodari*, disagreed. The distinguishing feature between *Bostick* and cases holding that simply approaching and asking questions is not a seizure was the confined space in which the questioning occurred on the bus. But the Court observed that even if Bostick did not feel free to leave the bus, this did not mean that the police had seized him, for he was a passenger on a bus that was scheduled to depart, so that what mattered was not that Bostick did not feel free to leave the bus, but *why*; that is, had the police done something to lead him reasonably to believe that he

[13] Id, 100 S.Ct. at 1878.

[14] *Florida v. Bostick*, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991).

RECEIVED by MSC 1/12/2023 2:36:02 PM

could not do so. If so, then he was seized. But the fact that the questioning had occurred in a confined space—a bus—did not necessarily lead to that conclusion.[15]

Also of importance is the *Brendlin* case.[16] Deputies saw a vehicle on the road with a temporary operating permit and decided to pull it over to verify that the permit matched the vehicle, though they had no cause to believe otherwise. After the vehicle was stopped a deputy recognized defendant Brendlin, and remembered that either Brendlin or a brother had dropped out of parole supervision. He asked Brendlin, then, to identify himself, and verified he was a parole violator with an outstanding no-bail warrant for arrest. Brendlin was arrested, and a search revealed drug paraphernalia in the car, resulting in Brendlin being charged.

A motion to suppress was premised on the traffic stop, but the California Supreme Court found that Brendlin, as a passenger, could not object because a passenger "is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority."[17] Because the driver was the exclusive target of the stop, said the state court, a passenger cannot submit to an officer's show of authority, as the passenger does not control the car, and once a car has been pulled off the road, a passenger "would feel free to depart or otherwise to conduct his or her affairs as though the police were not present."[18]

---

[15] See also *I.N.S. v. Delgado*, 466 U.S. 210, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984).

[16] *Lucynski* is obviously important as well, and amicus will return to it later.

[17] *People v. Brendlin*, 136 P.3d 845, 846 (CA, 2006), vacated sub nom. *Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

[18] Id., 136 P.3d at 852.

RECEIVED by MSC 1/12/2023 2:36:02 PM

The Supreme Court unanimously disagreed. When an individual's submission to a show of governmental authority takes the form of passive acquiescence, the Court said, the test for a seizure is whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[19] But when a person "has no desire to leave" for reasons unrelated to the police presence, the "coercive effect of the encounter" can be measured better by asking whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[20] In terms of a passenger in a stopped vehicle, the Court concluded that "any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission …. It is also reasonable, after all, for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety."[21]

Finally, taking note of *Brendlin*, the 10th Circuit has wisely observed that "we sometimes ask whether 'a reasonable person would have believed that he was not free to leave,'. . . . [b]ut when a person has no desire to leave for reasons unrelated to the police presence, the better question is whether a reasonable person 'would feel free to decline the officers' requests or otherwise terminate

[19] *Brendlin v. California*, 127 S. Ct. at 2405.

[20] Id., 127 S.Ct. at 2406.

[21] Id., 127 S.Ct at 2407.

RECEIVED by MSC 1/12/2023 2:36:02 PM

the encounter,'" as the test is stated in *Florida v. Bostick*[22] and by this Court in *Lucynski*.[23] The present case is such a case.

4. The test applied: defendant has not carried his burden of showing by a preponderance of evidence that under the circumstances a reasonable person would not have felt free to decline the officers' requests or otherwise terminate the encounter

Amicus begins with *Lucynski*, a very recent case from this Court, and one cited in the Court's MOAA order, with which amicus vigorously disagrees, but which is distinguishable from the present case. Lucynski was blocked by the police vehicle parked behind him on the single-lane driveway (though he had alighted from his vehicle, and, had he requested the officer to move the police vehicle and been refused, *then* a seizure would have unquestionably occurred—but this is not what happened).[24] Had he desired, he could not have otherwise departed in his vehicle. Though the police when pulling into the driveway behind him had not activated their lights or siren, something generally found determinative of a seizure,[25] this Court found that Lucynski was seized. Nothing other than this mattered, for this Court found that "[Lucynski] was seized *at the moment Robinson, in his marked police vehicle, blocked defendant's car*, resulting in no means for defendant to exit the

---

[22] *United States v. Tafuna*, 5 F.4th 1197, 1200 (CA 10, 2021) (cleaned up); *Bostick*, 115 S.Ct. at 2387.

[23] *Lucynski*, 2022 WL 2964546, at 8. See also *I.N.S. v. Delgado*, 104 S. Ct. at 1765 (a person may only litigate what happened, not that which the police hypothetically might have done had the person acted differently).

[24] See *O'Malley v. City of Flint*, 652 F.3d 662, 669 (CA 6, 2011), and also *I.N.S. v. Delgado*, 466 U.S. 210, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984) (

[25] See *Commonwealth v. Livingstone*, 174 A.3d 609, 624 (PA, 2017) ("Numerous other jurisdictions, including Arkansas, California, Connecticut, Florida, Idaho, Maryland, Montana, North Dakota, Oregon, Tennessee, Vermont, Virginia, Washington, and Wyoming, have likewise concluded that a seizure occurs when a police officer pulls his police vehicle, *with its emergency lights activated*, behind a parked or stopped vehicle")(emphasis supplied).

RECEIVED by MSC 1/12/2023 2:36:02 PM

single-lane driveway."[26] The Court said that "[i]f a reasonable person in [Lucynski's] place did not have an independent desire to leave, but nevertheless did not want to interact with [the officer], the other options available to them would have been to attempt to enter a home that they did not own (and without knowledge whether the owner was home) or wander off into a frozen field some distance from town in a rural area. Neither would be a viable option from the perspective of a reasonable person after having been followed and then blocked in by a police officer."[27] But there was no record evidence that Lucynski knew the officer had been following him at all, the home was that of a friend and it was reasonable to believe that Lucynski was there to visit (and the burden of demonstrating a seizure was his), and a third option existed—telling the officer he declined to talk to him.

But be that as it may, here Duff was *not* followed by the police at all, need not have walked off into a frozen field in a rural area, and was not blocked in—and his departure would not have required extensive maneuvering, but a simple turn of the steering wheel while backing up.[28] And it is quite likely that Duff had no idea where the police vehicle was in relation to his; there is no evidence—none at all—that he did, and he was *extremely* intoxicated,[29] and the officer immediately noticed that Duff's eyes were bloodshot and glossy, and smelled the odor of alcohol. *Lucynski* does not govern.

---

[26] *Lucynski*, 2022 WL 2964546, at 12.

[27] Id., at 13.

[28] Appellee's appendix 116b.

[29] Defendant's BAC was .339. Appellee's appendix 42b. It is a wonder that he was conscious. And he did not testify at the evidentiary hearing.

RECEIVED by MSC 1/12/2023 2:36:02 PM

Cases from other jurisdictions demonstrate that no seizure occurred here before reasonable suspicion—and indeed, probable cause—developed by the officer's use of visual, aural, and olfactory senses.

- While Officer Allred parked in front of Defendant's vehicle at a forty-five degree angle, he testified that he did not block the vehicle in, and that it was possible for Defendant to drive away. Thus, we conclude that Officer Allred's initial encounter with Defendant was not a seizure.[30]

- As one of the officers testified, Carr had "ample room to steer and maneuver around our vehicle." Because the police vehicle allowed Carr to exit the carwash, albeit with "some maneuvering," Carr's car was not blocked for Fourth Amendment purposes. To conclude otherwise would be an endorsement of a "simplistic, bright-line rule" that a detention occurs "any time the police approach a vehicle and park in a way that allows the driver to merely drive straight ahead in order to leave."[31]

- Officer Jeffrey Nelson noticed the parked car and its occupants. Officer Nelson pulled up to the car at an angle, with the front of his police vehicle pointed toward the driver's side door. He did not block in the parked car with his police vehicle or otherwise obstruct its path of egress. The police vehicle's "takedown lights"—bright lights arranged across the top of a police vehicle designed to illuminate the area in front of the vehicle—were activated, but the vehicle's flashing red and blue lights were not. . . . nothing in the record indicates he drove his vehicle aggressively when he pulled up near the parked car in which Defendant sat. True, Officer Nelson was driving a marked police vehicle, the very presence of which might be "somewhat intimidating." . . . . But Officer Nelson did not activate a siren, turn on his vehicle's flashing red and blue lights, or issue any commands to the occupants of the parked car. . . . And while Officer Nelson's police vehicle was parked at an angle so that it faced the driver's side of the car, it did not obstruct the car's path of exit or otherwise impede Defendant's movement. . . . .These circumstances would not have made a reasonable person feel unable to ignore the police presence and go about his business. . . . Officer Nelson's use of his police vehicle's takedown lights to illuminate the parked car—as opposed to turning on flashing emergency lights—does not change that conclusion. Other circuits have agreed that shining a bright light into a vehicle is not inherently

[30] *State v. Merlen*, 2002 UT App 181, 2002 WL 1122059, at 1 (2002) (unpublished).

[31] *United States v. Carr*, 674 F.3d 570, 573 (CA 6, 2012).

RECEIVED by MSC 1/12/2023 2:36:02 PM

coercive. . . . no other coercive behavior or circumstances accompanied Officer Nelson's use of his vehicle's takedown lights. . . . Officer Nelson, instead, merely parked his vehicle in a way that allowed him to use the takedown lights to illuminate the car Defendant occupied—conduct incident to an officer's performance of his job after dark. This police conduct and the setting in which it occurred would not have caused a reasonable, law-abiding person in Defendant's position to feel that his liberty was restrained. . . . Considering all the circumstances described above, Officer Nelson's conduct—parking his police vehicle at an angle to the car Defendant occupied, activating the takedown lights, approaching the car on foot, and asking for the car's occupants' names and birth dates—would not have communicated to a reasonable person that he was unfree to "decline Officer [Nelson's] requests or otherwise terminate the encounter."[32]

- [W]e find that Officer Blankenship's actions did not constitute a seizure. The facts of this case show that the officer shined the spotlight into the car, parked at an angle behind the vehicle, and began to approach. Nothing in these actions constitutes a show of authority or constitutes a use of physical force. . . . approaching the occupants of a parked car to ask questions does not constitute a seizure. The fact that the officer shined the spotlight into the car does not change the analysis, nor does the fact that the officer parked at an angle behind the vehicle. The trial court found that the officer limited, if not blocked, the vehicle's exit, although noting that it was unclear from the testimony to what extent the police cruiser actually prevented the vehicle from leaving the scene. . . . even if exit was limited or blocked, this court has previously found that a police officer's act of parking his patrol car behind and perpendicular to a citizen's vehicle does not, in and of itself, turn a consensual encounter into an investigatory stop.[33]

- As Agent Aiu arrived in response to Agent Barlow's call, he parked his unmarked car so as to block partially the egress of Kim's vehicle. Agent Aiu then approached the driver's side of the car opposite Kim, identified himself as a DEA agent, and requested leave to ask some questions.

  We are mindful that police interrogation of automobile occupants typically involves a greater degree of intrusiveness than questioning of pedestrians and thus more readily impinges on the Fourth Amendment. . . . However, where, as here, officers come upon an already parked car, this disparity between

[32] *United States v. Tafuna*, 5 F.4th 1197, 1199-1202 (CA 10, 2021).

[33] *State v. Schwab*, 2001 WL 88198, at 3 (Ohio Ct. App. Jan. 29, 2001) (unpublished).

RECEIVED by MSC 1/12/2023 2:36:02 PM

> automobile and pedestrian stops dissipates and the driver is not clearly stopped in any sense ab initio, except of his own volition.
>
> To be sure, where officers detain an already stationary suspect by hindering his future as opposed to ongoing progress, that they did not stop the suspect as the term is commonly understood does not foreclose inquiry into whether their conduct constitutes an investigatory stop. . . . However, that Officer Aiu partially blocked Kim's egress with his automobile informs but does not alter our conclusion that Kim was not stopped in the constitutional sense before his surrender of the vial setting the foundation for the subsequent search and seizure of Kim and his automobile. . . .The phrasing of Agent Aiu's request for permission to question Kim left open the possibility of a refusal and the positions in which DEA agents were posted did not entirely bar Kim's egress. . . . we agree with the district court that Kim was not seized by the time the DEA discovered incriminating evidence in his possession.[34]

Defendant has not shown by preponderance of the evidence that, under the totality of the circumstances, a reasonable person would not have felt free to decline the officer's requests or otherwise terminate the encounter. This Court should so hold; "that is work enough for the day."[35]

5. Should the Court find a seizure occurred, the Court should consider whether reasonable suspicion existed, including whether a brief detention to investigate is justified especially by the place and time of a person's presence

---

[34] *United States v. Kim*, 25 F.3d 1426, 1427, 1430–1431 (CA 9, 1994).

[35] *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1655, 200 L. Ed. 2d 931 (2018).

Though this Court's MOAA order included a direction for the parties to brief "whether *People v Anthony* . . . correctly held that 'only if officers completely block a person's parked vehicle with a police vehicle is the person seized,' and Professor LaFave has said that police "boxing the car in"—implying denying any path away from them—"will likely convert the event into a Fourth Amendment seizure," LaFave, § 9.4(a), and though it may—or may not—be the case that arranging police vehicles or personnel so that under the circumstances departure by the person in the vehicle would take intricate or extensive maneuvering constitutes a seizure, this is not the case to reach the question, it being unnecessary to decision, though amicus believes that *Anthony* was correctly decided, and decided that where egress was not blocked there was no seizure: "The photograph on which the dissent relies, taken from the video, shows that defendant could have driven forward or in reverse to leave, with little maneuvering, let alone 'with 'some maneuvering.' . . . Defendant's vehicle was not blocked in; the police car was parked beside it." *Anthony*, at 40.

RECEIVED by MSC 1/12/2023 2:36:02 PM

The Court of Appeals did not address reasonable suspicion before the interaction between the officer and the defendant, having—correctly—found that defendant was not seized before reasonable suspicion (and probable cause) arose. But if the Court finds otherwise, any "seizure," such as it was, was reasonable, and this Court should consider the point, or direct the Court of Appeals to do so. And either this Court or the Court of Appeals should consider whether a seizure may be reasonable because of the time and place at which the police come upon a person—particularly where the place is particularly sensitive, such as a closed school, courthouse, or the like. It may—or may not—be true that, absent additional circumstances, that an occupied vehicle is parked in the parking lot of a closed business does not always provide reasonable suspicion for a stop, but the nature of the place and the potential danger should be a factor.

The matter is analogous to "special needs" searches or detentions, which require no level of suspicion. The Fourth Amendment protects the People from "unreasonable" seizures of their persons.[36] Seizures that are arrests require probable cause, and, when not made in a public place, a warrant—and a warrant can only be obtained on probable cause. But not all seizures amount to arrests, and some are reasonable on less than probable cause (reasonable suspicion), and some on no suspicion at all. At the least, whether reasonable suspicion exists should take into account the nature of the place where defendant is found, and the time, and may be justified—reasonable—where a sensitive location is involved, where explosives or weapons may be set up to cause substantial

[36] "The right of the people to be secure in their persons . . .against unreasonable searches and seizures, shall not be violated."

RECEIVED by MSC 1/12/2023 2:36:02 PM

harm and injury later.[37] Either this Court or the Court of Appeals should consider the reasonable suspicion question, but if, and only if, a detention is found—and it should not be.

[37] See *Ashcroft v. al-Kidd*, 563 U.S. 731, 736, 131 S. Ct. 2074, 2081, 179 L. Ed. 2d 1149 (2011) ("A judicial warrant and probable cause are not needed where the search or seizure is justified by 'special needs, beyond the normal need for law enforcement,' such as the need to deter drug use in public schools, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) . . . , or the need to ensure that railroad employees engaged in train operations are not under the influence of drugs or alcohol, *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)"). And see LaFave, § 9.5(e), fn 193, noting, among other cases, *United States v. Mattarolo*, 209 F.3d 1153 (9th Cir.2000) (stop justified when officer on secluded country road saw defendant's pickup nosed into driveway of fenced construction storage area, and defendant was backing out with a crate in the back of the pickup, and this occurred at midnight, when "there was no business activity" and it "was not the customary time for pickups or deliveries"); *People v. Pacheco*, 182 P.3d 1180 (Colo.,2008) (reasonable suspicion where vehicle parked at 1 a.m. behind closed insurance office); *State v. Gerry*, 150 A.3d 810 (Me, 2016) (reasonable suspicion of burglary where car pulled into and remained in "parking lot of a drug store, which had been closed for several hours"); *State v. Rodriguez*, 248 P.3d 850 (Mont., 2011) (reasonable suspicion where officer, "well after the business had closed," observed "vehicle, with its headlights off, rolling slowly through the parking lot of a business that contained a significant amount of expensive inventory"); *State v. Noteboom*, 758 N.W.2d 457 (S.D.,2008) (reasonable suspicion where at 2 a.m. vehicle pulled off highway onto private properly to where storage buildings located, vehicle found parked by one building with its lights off but upon appearance of police car driver suddenly turned on lights and quickly drove off); *York v. State*, 342 S.W.3d 528 (Tex.Crim.App., 2011) (reasonable suspicion of burglary where at 3 a.m. at closed gas station previously burglarized, defendant was parked close to station with headlights shining into the store portion).

RECEIVED by MSC 1/12/2023 2:36:02 PM

Relief

Wherefore, amicus requests that this Court affirm the decision of the Court of Appeals or deny leave to appeal.

Respectfully submitted,

THOMAS WEICHEL
President
Prosecuting Attorneys
Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA
Chief, Research, Training, and Appeals

/S/
TIMOTHY A. BAUGHMAN
Special Assistant Prosecuting Attorney
11TH Floor
Detroit, Michigan 48226

Certificate of Compliance

It is hereby certified that the brief filed here consists of 5128 countable words.