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STATE OF MICHIGAN

IN THE SUPREME COURT

STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

MATTHEW SCOTT DUFF,

Defendant-Appellee.

S Ct Case No.
COA Case No. 347603
Cir Ct Case No. 2018-267140-FH
Dist Ct Case No. 1873027FD

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DEFENDANT-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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STATEMENT OF JURISDICTIONAL BASIS

This is an appeal from a circuit court Order Granting Defendant's Motion to Suppress.

On October 29, 2019, this Court, in lieu of granting leave to appeal, remanded this case to the Oakland Circuit Court for reconsideration of the defendant's motion to suppress. *People v Duff*, 504 Mich 995; 934 NW2d 214 (2019).

On July 15, 2020, the circuit court entered the Order Granting Defendant's Motion to Suppress.

On August 3, 2020, the prosecution filed a timely Claim of Appeal with the Michigan Court of Appeals.

On November 23, 2021, the Michigan Court of Appeals issued a two-judge majority Opinion with the third judge dissenting.

Jurisdiction is conferred by MCL 600.215(2)-(3); MCR 7.303(B)(1); and MCR 7.305(C)(2).

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STATEMENT OF QUESTION INVOLVED

I. WHETHER INVESTIGATING DEPUTIES SEIZED APPELLANT WITHOUT THE REQUISITE REASONABLE, ARTICULABLE SUSPICION TO EFFECTUATE AN INVESTIGATORY STOP WHEN THE DEPUTIES POSITIONED THEIR MARKED PATROL VEHICLE BEHIND APPELLANT'S VEHICLE IN SUCH A MANNER AS TO BLOCK APPELLANT'S MEANS OF EGRESS, ILLUMINATED APPELLANT'S VEHICLE WITH THEIR PATROL VEHICLE'S HIGH POWER SPOTLIGHT, EXITED THEIR PATROL VEHICLE, APPROACHED APPELLANT WHILE ARMED AND IN FULL POLICE REGALIA, SHINED A FLASHLIGHT INSIDE APPELLANT'S VEHICLE, AND BEGAN QUESTIONING APPELLANT AS HE SAT IN HIS LAWFULLY PARKED VEHICLE IN A PARKING LOT AT APPROXIMATELY 10:00 P.M.?

Appellant Answers: Yes.

Appellee Answers: No.

The Circuit Court Answered: Yes.

The Court of Appeals Answered: No.

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STATEMENT IN SUPPORT OF REVIEW

Recent events have made clear that citizen conduct even minimally resistant to law enforcement officers' investigative endeavors all too often proves fatal for citizens who erroneously believe that they are free to disengage from police encounters when in fact they are not free to do so. Such fatal outcomes have unfortunately become so commonplace in contemporary society that when United States District Judge Carlton W. Reeves penned his Opinion in *Jamison v McClendon*, 476 F Supp 3d 386, 390-91 (SD Miss, 2020) he began by handily listing the names of no less than 19 citizens killed in the recent past at the hands of law enforcement officers during which these citizens apparently believed that they were free to disengage from police contact.

The Court of Appeals' ruling in this case continues to perpetuate legal fictions that shamelessly result in needless deaths, bodily harm, violence, and avoidable arrests of otherwise law-abiding citizens. The first legal fiction is the false premise that citizens sitting in lawfully parked vehicles who are approached by law enforcement officers must attempt to evade, oppose, or resist the law enforcement officers in order to activate their Fourth Amendment rights. The first legal fiction is the false premise that if law enforcement officers do not completely block every means of egress of a lawfully parked motor vehicle, then the occupants of that vehicle have not been seized for Fourth Amendment purposes. Clearly, this is not the law.

Rather, the law requires that Courts consider the totality of the circumstances and that they determine whether a reasonable person would have felt free to leave under all of the attendant circumstances that existed at the moment of the seizure. The two-judge majority of the Court of Appeals in this case failed in this regard when they focused primarily upon the maneuverability of every means of egress that theoretically remained after investigating Deputies

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positioned their marked patrol vehicle in a manner that blocked Appellant Matthew Duff's lawfully parked automobile. By placing primary emphasis upon the relative positions of the vehicles vis-à-vis one another, the two-judge majority of the Court of Appeals failed to consider the totality of the circumstances when they concluded that a reasonable person in Mr. Duff's position would have felt that they were free to leave considering all of the attendant circumstances.

More specifically, the two-judge majority of the Court of Appeals failed to consider the fact that, after the Deputies had positioned their marked patrol vehicle in such a manner as to obstruct, at least partially, the egress of Mr. Duff's lawfully parked vehicle, the Deputies illuminated Mr. Duff and his vehicle with their patrol vehicle's headlights and further illuminated Mr. Duff and his vehicle with their patrol vehicle's high-powered spotlight and then began approaching Mr. Duff's lawfully parked vehicle while visibly armed and in full police regalia. The two-judge majority of the Court of Appeals further failed to consider the fact as that Oakland County Sheriff's Department Field Training Officer Flaviani approached the passenger's side door of Mr. Duff's vehicle he used a flashlight to search inside Mr. Duff's vehicle. People's Exhibit 1 (Court of Appeals Appendix E) at 00:35. Had these factors properly been considered, precedent provides that a reasonable person would not have felt free to leave under the circumstances.

Judge Douglas B. Shapiro dissented from the two-judge Court of Appeals' Opinion. In his dissent, Judge Shapiro wisely recognized: "The conclusion that defendant should have believed he was free to leave is one that only lawyers and judges could reach given that it can exist only in argument and not in reality." **Appendix A** (*People v Duff*, unpublished opinion *per*

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curiam of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 5 (Shapiro, P.J., dissenting). Judge Shapiro further explained:

> No reasonable person, and likely few unreasonable persons, would conclude that they are free to leave when a police car parks behind them so as to block or significantly hinder their ability to drive away and directs the police vehicle's headlights and spotlight at the person's vehicle. [**Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 5 (Shapiro, P.J., dissenting).]

Judge Shapiro further noted that, to the extent Court of Appeals precedent can be read for the proposition that the position of a police vehicle is irrelevant as to whether a seizure occurred so long as it does not block every possible path of egress, such precedent was "wrongly decided" and "should be overruled by the Michigan Supreme Court." **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 5 (Shapiro, P.J., dissenting).

Judge Shapiro's dissenting opinion reflects the day-to-day reality of police-citizen encounters and promotes the health, safety, and welfare of officers, citizens, and bystanders. The two-judge majority of the Court of Appeals' Opinion ignores these realities and requires that citizens sitting in lawfully parked vehicles who are approached by law enforcement officers must attempt to evade, oppose, or resist the law enforcement officers in order to activate their Fourth Amendment rights.

High Courts have repeatedly acknowledged the difficulty in developing so-called bright-line or *per se* rules in the context of Fourth Amendment encounters, acknowledging that the contours of such fact-specific inquiries do not readily lend themselves to simplistic legalistic heuristics.[1] Yet the two-judge majority of the Court of Appeals' Opinion encumbers lay citizens

[1] See *e.g. United States v Drayton*, 536 US 194, 201; 122 S Ct 2105; 153 L Ed 2d 242 (2002) ("[F]or for the most part *per se* rules are inappropriate in the Fourth Amendment context."); *Ohio v Robinette*, 519 US 33, 34; 117 S Ct 417; 136 L Ed 2d 347 (1996) ("The [Fourth] Amendment's touchstone is reasonableness, which is measured in

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to fully understand the grey, unnavigable waters between an investigatory stop and a so-called consensual encounter, a task which with many learned jurists struggle, under pain of death, bodily harm, violence, and arrest if their lay analysis made at the spur of the moment ultimately proves to be incorrect.

This appeal raises important questions of constitutional magnitude that affect the everyday lives of millions of law-abiding citizens in this State. Almost 40 years ago, this Court made clear that "[a] lone automobile idling in a darkened parking lot late at night does not, without more, support a reasonable suspicion of criminal activity."[2] This Court noted that "[p]eople may temporarily stop their automobiles in such locations for a variety of reasons: to rest, to check directions, to rendezvous with others, to converse, etc." and further acknowledged that "[i]t is not an offense for an individual to be upon the private property of another unless he has entered 'after having been forbidden so to do by the owner or occupant' or refused to depart after having been told to do so."[3]

Since that time, however, circuit courts have repeatedly resorted to characterizing investigatory stops of parked automobiles as "consensual" based upon theoretical avenues of egress that the driver could have taken had they hypothetically attempted to disengage from the ostensible "consensual" encounter. Such precedent is heedless and requires that citizens place themselves at risk of death, bodily harm, violence, and arrest simply to receive the protections that the Founders envisioned and codified as sacrosanct in the Fourth Amendment. This case provides the perfect vehicle for this Court to flesh out its ruling in *Freeman* and to delineate

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objective terms by examining the totality of the circumstances. In applying this test, the Court has consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."); *People v Mead*, 503 Mich 205, 212; 931 NW2d 557 (2019) ("The Fourth Amendment demands nothing more or less than reasonableness. And reasonableness does not lend itself to bright-line rules.")

[2] *People v Freeman*, 413 Mich 492, 496–97; 320 NW2d 878 (1982).

[3] *Id*.

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when occupants of parked vehicles have been seized for Fourth Amendment purposes and what attempts, if any, they must make to evade, oppose, or resist law enforcement officers in order to activate their Fourth Amendment rights during such encounters.

For these reasons, the issues in the present case involve legal principles of major significance to the State's jurisprudence. MCR 7.305(B)(3). The issues further have significant public interest, and the case is one by the State or one of its subdivisions. MCR 7.305(B)(2). Moreover, as set forth in greater detail below, the Court of Appeals Opinion is clearly erroneous and will cause material injustice. MCR 7.305(B)(5)(a). Accordingly, leave to appeal or other peremptory relief should be granted to address these important questions of constitutional magnitude that affect the everyday lives of millions of law-abiding citizens.

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STATEMENT OF FACTS

A. Introduction

This is the second time this case has been before this Court. The first appeal was taken by Appellant Matthew Duff after the circuit court denied his motion to suppress. After the Court of Appeals affirmed the circuit court's denial of his motion to suppress, Mr. Duff appealed to this Court. In lieu of granting leave to appeal, this Court remanded this case to the Oakland Circuit Court for reconsideration of the defendant's motion to suppress. This Court directed that "[o]n remand, the circuit court shall determine when the defendant was first seized for Fourth Amendment purposes," noting that "[t]his is the relevant point in time for assessing whether the deputies had probable cause to justify an arrest or a reasonable suspicion of criminal activity to justify a stop under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)."[4]

On remand, the circuit court granted Mr. Duff's motion to suppress, finding that Mr. Duff had been seized when a Deputy parked his patrol car 10 feet away at a 45-degree angle behind Mr. Duff's lawfully parked vehicle, activated his spotlight, pointed his spotlight at Mr. Duff who was sitting in the driver's seat of his lawfully parked automobile. **Appendix B** (Order Granting Motion to Suppress, p 2). The Deputy testified that if Mr. Duff were to back his vehicle straight out, he would have hit the patrol car that the deputy had positioned and parked behind Mr. Duff's lawfully parked vehicle. *Id*. The circuit court thus concluded that "[t]he defendant's only means to exit is driving over the grass in front of him," so "[u]nder those circumstances, a reasonable person would have believed that he or she was not free to leave; thus constituting a seizure." *Id*.

The prosecution appealed the circuit court's ruling, and a two-judge majority of the Court of Appeals reversed with the third judge dissenting. The basis of Judge Stephen L. Borrello and

[4] *People v Duff*, 504 Mich 995; 934 NW2d 214 (2019).

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Judge Colleen A. O'Brien's decision was that the circuit court clearly erred when it "found that 'defendant's only means to exit [was] driving over the grass in front of him'" because this ruling appeared to be based on representations of counsel on remand rather than evidence adduced at the previous evidentiary hearing. **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 2. Judge Borrello and Judge O'Brien further concluded that because Mr. Duff "could exit his parking space, 'albeit with "some maneuvering"'" the position of the Deputy's patrol vehicle alone did not turn this encounter into a seizure. *Id*. at 3. Judge Borrello and Judge O'Brien further found that there was no evidence of other coercive behavior sufficient to turn the Deputy's actions into a seizure of Mr. Duff for Fourth Amendment purposes. *Id*. "As such, defendant's Fourth Amendment rights were not implicated when the deputy parked behind him." *Id*.

B. <u>The Investigatory Stop</u>

On Sunday, March 4, 2018, Oakland County Sheriff's Deputy Jason Pence was on routine patrol with Oakland County Sheriff's Department Field Training Officer Paul Flaviani.[5] **Appendix C** (Evidentiary Hearing Transcript ("EHT"), p 11). Although Deputy Pence had prior law enforcement experience, at the time of the stop in question, this was Deputy Pence's first day on the Oakland County Sheriff's Department road patrol. *Id*. at 9-10. Deputy Pence and Field Training Officer Flaviani were donning full police regalia, visibly armed with handguns, and riding in a visibly marked patrol vehicle. *Id*. at 11.

At approximately 10:00 p.m., Deputy Pence and Field Training Officer Flaviani drove by the Walt Whitman Elementary School located in Pontiac, Michigan. *Id*. at 11. As the deputies passed the school, Deputy Pence observed a vehicle parked in the parking lot of the elementary

[5] Deputy Flaviani's names is erroneously misspelt as "Flatiani" in the lower court transcripts.

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school. *Id*. at 11. The vehicle was lawfully parked in the school parking lot, which was illuminated by parking lot lights. **Appendix C** (EHT, pp 11, 12). No other vehicles were present in the parking lot, and there had been no reports of crime in the area that evening. *Id*. at 12, 20-21. Deputy Pence did not know how long the vehicle had been parked there, and he was not familiar with Mr. Duff or his vehicle. *Id*. at 20-21. The parking lot was open and ungated, and Deputy Pence was unaware if any no trespassing signage was posted for the area. *Id*. at 23. Rather, Deputy Pence felt that the presence of Mr. Duff's vehicle "seemed at the time suspicious *due to the time and day and being that the area is a high drug crime area*." *Id*. at 11. Significantly, Deputy Pence offered no testimonial basis for his conclusion that the area qualified as a so-called high drug crime area. Prior to driving into the parking lot, Deputy Pence reported that there was a "suspicions vehicle" in the parking lot. *Id*. at 26.

Deputy Pence did not take up a position to conduct further investigation; rather he proceeded headlong and positioned his visibly marked patrol vehicle approximately 10 feet behind Mr. Duff's parked vehicle in such a manner as to block Mr. Duff's lawful means of egress.[6] **Appendix C** (EHT, pp 12, 14, 28, 31). Deputy Pence directed both his patrol vehicle's headlights and his patrol vehicle's spotlight on Mr. Duff's parked vehicle. *Id*. As he positioned his marked patrol vehicle, Deputy Pence observed that the interior dome light was illuminated and a person was seated inside the vehicle which was idling. *Id*. at 13-14. Deputy Pence then activate his spotlight on the parked vehicle. *Id*. at 14.

[6] The prosecution elicited from Deputy Pence that Mr. Duff technically may have been able to turn his steering wheel in such a manner as to avoid colliding with Deputy Pence's marked patrol vehicle if Mr. Duff had attempted to back out of the parking space. **Appendix C** (EHT, p 33). However, notwithstanding Deputy Pence's speculation regarding the performance abilities of Mr. Duff's automobile, Deputy Pence made clear that had Mr. Duff attempted to back out of the parking space, Deputy Pence would not have allowed Mr. Duff to leave the scene. *Id*. at 34-35.

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As Deputy Pence approached the driver's side door, Oakland County Sheriff's Department Field Training Officer Flaviani approached the passenger's side door and employed a flashlight to search inside Mr. Duff's vehicle. People's Exhibit 1 (Court of Appeals Appendix E) at 00:35. Deputy Pence then proceeded to question Mr. Duff regarding his presence in the area. *Id*. at 18-19. At no time did Deputy Pence ever inquire regarding Mr. Duff's wellbeing or otherwise ask if Mr. Duff was in need of aid. *Id*. at 30. During the encounter, Deputy Pence observed what he believed to be indicia of intoxication. *Id*. at 19-20. Ultimately, Deputy Pence arrested Mr. Duff for operating a motor vehicle while intoxicated.

C. The Circuit Court's Ruling

On July 18, 2018, Mr. Duff filed a Motion and Brief in Support of Motion to Suppress, challenging the constitutionality of Deputy Pence's actions, and on October 2, 2018, the circuit court conducted an evidentiary hearing. Almost one month after the evidentiary hearing, on November 9, 2018, the circuit court issued an Order Denying Motion to Suppress.

D. The Court of Appeals' First Ruling

On February 11, 2019, Mr. Duff filed a Delayed Application for Leave to Appeal with the Court of Appeals. On March 27, 2019, the Court of Appeals entered an Order denying Mr. Duff's Delayed Application for Leave to Appeal "for failure to persuade the Court of the need for immediate appellate review." **Appendix D** (Order).

E. This Court's First Ruling

On October 29, 2019, this Court, in lieu of granting leave to appeal, remanded this case to the Oakland Circuit Court for reconsideration of the defendant's motion to suppress. *People v Duff*, 504 Mich 995; 934 NW2d 214 (2019). The Court further directed that "[o]n remand, the circuit court shall determine when the defendant was first seized for Fourth Amendment

purposes," noting that "[t]his is the relevant point in time for assessing whether the deputies had probable cause to justify an arrest or a reasonable suspicion of criminal activity to justify a stop under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)." *Id*.

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F. The Circuit court's Ruling on Remand

On March 4, 2020, the circuit court held a status conference hearing. During this status conference, neither party presented additional evidence or testimony. On July 15, 2020, the circuit court entered an order granting defendant's motion to suppress. The gravamen of the circuit court's ruling was as follows:

> Nevertheless, Deputy Pence proceeded to park his patrol car 10 feet away, at a 45-degree angle behind the defendant's vehicle and activated his spotlight pointing at the driver (pg. 16). The Deputy testified that if Mr. Duff were to back his vehicle straight out, he would have hit the officer's car (pg. 28). The defendant's only means to exit is driving over the grass in front of him (status conference 3/4/2020). Under those circumstances, a reasonable person would have believed that he or she was not free to leave; thus constituting a seizure. [**Appendix B** (Order Granting Motion to Suppress, p 2).]

G. The Court of Appeals' Second Ruling

The prosecution appealed, and as noted above, a two-judge majority of the Court of Appeals reversed. The basis of Judge Stephen L. Borrello and Judge Colleen A. O'Brien's decision was that the circuit court clearly erred when it "found that 'defendant's only means to exit [was] driving over the grass in front of him'" because this ruling appeared to be based on representations of counsel on remand rather than evidence adduced at the previous evidentiary hearing. **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 2. Judge Borrello and Judge O'Brien reasoned as follows:

> The circuit court found that Deputy Pence parked his patrol vehicle behind defendant's vehicle, 10 feet away, at a 45-degree angle. This was supported by both Deputy Pence's testimony and the patrol-vehicle recording of the stop played for the circuit court and included in the record. The circuit court also found that, if defendant had reversed his vehicle straight back, he would have hit Deputy Pence's patrol vehicle. This was likewise supported by Deputy Pence's testimony, and arguably the video of the stop. *Then the circuit court found that "defendant's only means to exit [was] driving over the grass in front of him." The circuit court cited this statement to "status conference 3/4/2020," which was the conference that the court held after the case was remanded from our Supreme Court. No evidence was presented at this hearing – only argument by*

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> *the parties. It therefore appears that this finding by the circuit court was based on defense counsel's argument at the hearing in which he asserted that defendant could only exit the parking lot by driving over the grass in front of him. This assertion was unsupported by any evidence, however*. In fact, the evidence in the record only supports a contrary conclusion. Specifically, Deputy Pence testified, "If [defendant] would have turned his wheel as he was backing out, he would have cleared [the patrol] vehicle." Moreover, being that the only vehicles in the parking lot were defendant's vehicle and Deputy Pence's patrol vehicle, and based on the court's finding that the deputy parked behind defendant's vehicle, 10 feet away and at a 45-degree angle, it seems common sense that defendant would have been able to have clear the deputy's vehicle if defendant "turned his wheel as he was backing out." We are therefore left with a definite and firm conviction that the circuit court made a mistake when it found that "defendant's only means to exit [was] driving over the grass in front of him." [**Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 2 (all emphasis added).

Judge Borrello and Judge O'Brien concluded that because Mr. Duff "could exit his parking space, 'albeit with "some maneuvering"'" the position of the Deputy's patrol vehicle alone did not turn this encounter into a seizure. *Id*. at 3. Judge Borrello and Judge O'Brien further found that there was no evidence of other coercive behavior sufficient to turn the Deputy's actions into a seizure of Mr. Duff for Fourth Amendment purposes. *Id*. "As such, defendant's Fourth Amendment rights were not implicated when the deputy parked behind him." *Id*.

As noted above, the remaining judge on the panel, Judge Shapiro, dissented from the two-judge Court of Appeals' Opinion. In his dissent, Judge Shapiro recognized: "The conclusion that defendant should have believed he was free to leave is one that only lawyers and judges could reach given that it can exist only in argument and not in reality." **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 5 (Shapiro, P.J., dissenting). Judge Shapiro further explained:

> No reasonable person, and likely few unreasonable persons, would conclude that they are free to leave when a police car parks behind them so as to block or significantly hinder their ability to drive away and directs the police vehicle's headlights and spotlight at the person's vehicle. [**Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the

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Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 5 (Shapiro, P.J., dissenting).]

Judge Shapiro further noted that, to the extent Court of Appeals precedent can be read for the proposition that the position of a police vehicle is irrelevant as to whether a seizure occurred so long as it does not block every possible path of egress, such precedent was "wrongly decided" and "should be overruled by the Michigan Supreme Court." **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 5 (Shapiro, P.J., dissenting).

Mr. Duff now seeks leave to appeal to this Court or other peremptory relief.

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ARGUMENT

I. LEAVE TO APPEAL OR OTHER PEREMPTORY RELIEF SHOULD BE GRANTED WHERE THE INVESTIGATING DEPUTIES SEIZED APPELLANT WITHOUT THE REQUISITE REASONABLE, ARTICULABLE SUSPICION TO EFFECTUATE AN INVESTIGATORY STOP WHEN THE DEPUTIES POSITIONED THEIR MARKED PATROL VEHICLE BEHIND APPELLANT'S VEHICLE IN SUCH A MANNER AS TO BLOCK APPELLANT'S MEANS OF EGRESS, ILLUMINATED APPELLANT'S VEHICLE WITH THEIR PATROL VEHICLE'S HIGH POWER SPOTLIGHT, EXITED THEIR PATROL VEHICLE, APPROACHED APPELLANT WHILE ARMED AND IN FULL POLICE REGALIA, SHINED A FLASHLIGHT INSIDE APPELLANT'S VEHICLE, AND BEGAN QUESTIONING APPELLANT AS HE SAT IN HIS LAWFULLY PARKED VEHICLE IN A PARKING LOT AT APPROXIMATELY 10:00 P.M.

A. Standard of Review

"This Court reviews a circuit court's findings at a suppression hearing for clear error." *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). "A finding is clearly erroneous when, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Michigan Citizens for Water Conservation v Nestle Waters N Am Inc*, 269 Mich App 25, 40; 709 NW2d 174 (2005), *aff'd in part, rev'd in part on other grds* 479 Mich 280 (2007). "The clear error standard is highly deferential to the trial court and requires that regard be given to the trial court's special opportunity to judge credibility." *Id*. at 40-41. "'This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.'" *Beason v Beason*, 435 Mich 791, 803; 460 NW2d 207 (1990) (quoting *Anderson v City of Bessemer City, NC*, 470 US 564, 573; 105 S Ct 1504; 84 L Ed 2d 518 (1985)). "'The reviewing court oversteps the bounds of its duty … if it undertakes to duplicate the role of the lower court ….'" *Beason*, 435 Mich at 803 (quoting *Anderson*, 470 US at 573). "'If the district court's account of the

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evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* "'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" *Id.* "[T]he application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference; for this reason, we review de novo the circuit court's ultimate ruling on the motion to suppress." *Williams*, 472 Mich at 313.

B. Fourth Amendment Standard

The Fourth Amendment to the United States Constitution guarantees the right of individuals to be secure against unreasonable searches and seizures. US Const, Am IV. "A traffic stop for a suspected violation of law is a 'seizure' of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth Amendment." *Heien v North Carolina*, 574 US 54; 135 S Ct 530, 536; 190 L Ed 2d 475 (2014). Pursuant to the Fourth Amendment, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Arizona v Gant,* 556 US 332, 338; 129 S Ct 1710; 173 L Ed 2d 485 (2009) (citation, internal quotation marks, and emphasis omitted). See also, *People v Davis*, 442 Mich 1, 10; 497 NW2d 910, 914 (1993). "The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'" *Coolidge v New Hampshire*, 403 US 443, 455; 91 S Ct 2022; 29 L Ed 2d 564 (1971) (footnote omitted; citation omitted). See also, *People v Crawl*, 401 Mich 1, 21; 257 NW2d 86 (1977).

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C. Investigatory Stop Exception

The exception to the Fourth Amendment at issue here is the investigatory stop exception recognized in *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).[7] Pursuant to the *Terry* paradigm, when a law enforcement officer observes "unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot," he may briefly detain a person in order to investigate the matter. *Terry*, 392 US at 30. See also, *People v LoCicero (After Rem)*, 453 Mich 496, 501-02; 556 NW2d 498 (1996) (citation omitted). To justify the intrusion, the officer "must have a particularized suspicion, based on 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), *cert diss* 478 US 1017 (1986). An "inchoate or unparticularized suspicion or 'hunch'" is insufficient to justify an investigatory encounter. *United States v Sokolow*, 490 US 1, 7; 109 S Ct 1581; 104 L Ed 2d 1 (1989); *Terry*, 392 US at 27; *LoCicero (After Rem)*, 453 Mich at 502.

D. The Point of the Seizure

The reasonableness of an officer's suspicion must be measured by what the officer knew before conducting the search or seizure. *Florida v JL*, 529 US 266, 271; 120 S Ct 1375; 146 L Ed 2d 254 (2000). "[T]he precise time at which the seizure occurred must be pinpointed" because "[f]acts which become known to the police officer after the seizure cannot be used to justify it." *United States v Robinson*, 625 F2d 1211, 1215 (CA 5, 1980). See also, *United States v Wilson*, 953 F2d 116, 120 (CA 4, 1991); *United States v Gooding*, 695 F2d 78, 81 (CA 5, 1982); *Ramirez v Webb*, 599 F Supp 1278, 1284 (WD Mich, 1984), *aff'd* 787 F2d 592 (CA 6, 1986); and *Shabaz*, 424 Mich at 62.

[7] The *Terry* standard applies to seizures of persons sitting in parked automobiles. *Adams v Williams*, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972); and *People v Freeman*, 413 Mich 492; 320 NW2d 878 (1982).

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"A seizure for Fourth Amendment purposes occurs where the police conduct 'communicated to a reasonable person that the person was not free to decline the officer's requests or otherwise terminate the encounter." *Florida v Bostick*, 501 US 429, 439; 111 S Ct 2382; 115 L Ed 2d 389 (1991). Case law is clear that Mr. Duff was seized for Fourth Amendment purposes when the Officers positioned their marked patrol vehicle behind Mr. Duff's parked vehicle and thereby obstructed Mr. Duff's means of egress.[8] Minimally, Mr. Duff was seized for Fourth Amendment purposes when the Officers, armed and donning full police uniform, used their marked patrol car to block Mr. Duff's vehicle, approached Mr. Duff's vehicle, positioned themselves near the driver's door, and began questioning Mr. Duff.[9]

The two-judge majority of the Court of Appeals paradoxically held that the trial court's finding "that Deputy Pence parked his patrol vehicle behind defendant's vehicle, 10 feet away, at a 45-degree angle" "was supported by both Deputy Pence's testimony and the patrol-vehicle recording of the stop played for the trial court and included in the record." **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 2). The two-judge majority of the Court of Appeals further held that the trial court's finding "that, if defendant had reversed his vehicle straight back, he would have hit Deputy Pence's patrol vehicle" "was likewise supported by Deputy Pence's testimony, and

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[8] See, *e.g.*, *United States v Gale*, 952 F2d 1412, 1415 (DC Cir, 1992); *United States v Quinn*, 815 F2d 153, 154, 156 (CA 1, 1987); *United States v Kerr*, 817 F2d 1384, 1386-1387 (CA 9, 1987); United States v Gross, 662 F3d 393, 399 (CA 6, 2011); *United States v Hardnett*, 804 F2d 353, 357 (CA 6, 1986); *United States v Pavelski*, 789 F2d 485, 488-489 (CA 7, 1986); *United States v Streifel*, 781 F2d 953, 955 (CA 1, 1986); *United States v Patterson*, 648 F2d 625, 628, 633-634 (CA 9, 1981); *United States v Beck*, 602 F2d 726, 728-729 (CA 5, 1979); *United States v Robinson*, 535 F2d 881, 882, 883, *reh den en banc* 540 F2d 1086 (CA 5, 1976); *United States v Nicholas*, 448 F2d 622-624 (CA 8, 1971); *United States v Ross*, 827 F Supp 711, 712 (SD Ala, 1993); and *People v Guy*, 121 Mich App 597, 601; 329 NW2d 435 (1982), *lv den* 417 Mich 1088 (1983).

[9] See, *e.g.*, *United States v Zukas*, 843 F2d 179, 181, 182 (CA 5, 1988); *United States v Clardy*, 819 F2d 670, 671, 672 (CA 6, 1987); *United States v Pena-Canu*, 639 F2d 1228, 1229 (CA 5, Unit A, 1981); *United States v Turner*, 815 F Supp 1332, 1339 n 16 (ND Cal, 1993); *United States v Doe*, 801 F Supp 1562, 1566, 1578 (ED Tex, 1992); *United States v Hayden*, 740 F Supp 650, 653 (SD Iowa, 1989), *aff'd sub nom* 906 F2d 346 (CA 8, 1990); *People v Freeman*, 413 Mich 492, 494-495; 320 NW2d 878 (1982); *People v Armendarez*, 188 Mich App 61, 73; 468 NW2d 893 (1991); and *People v Bryant*, 135 Mich App 206, 210; 333 NW2d 480 (1984).

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arguably the video of the stop." *Id*. Notwithstanding these determinations, the two-judge majority of the Court of Appeals held that the trial court's finding "that 'defendant's only means to exit [was] driving over the grass in front of him'" was unsupported by record evidence because "[t]he trial court cited this statement to 'status conference 3/4/2020,' which was the conference that the court held after the case was remanded from our Supreme Court." *Id*. The Court of Appeals took issue with the fact that on remand "[n]o evidence was presented at this hearing" and the trial court head "only argument by the parties." *Id*. Because of the trial court's citation to "status conference 3/4/2020," the Court of Appeals concluded:

> It therefore *appears that this finding by the trial court was based on defense counsel's argument at the hearing* in which he asserted that defendant could only exit the parking lot by driving over the grass in front of him. *This assertion was unsupported by any evidence, however*. In fact, the evidence in the record only supports a contrary conclusion. Specifically, Deputy Pence testified, "If [defendant] would have turned his wheel as he was backing out, he would have cleared [the patrol] vehicle." Moreover, being that the only vehicles in the parking lot were defendant's vehicle and Deputy Pence's patrol vehicle, and based on the court's finding that the deputy parked behind defendant's vehicle, 10 feet away and at a 45-degree angle, it seems common sense that defendant would have been able to have clear the deputy's vehicle if defendant "turned his wheel as he was backing out." We are therefore left with a definite and firm conviction that the trial court made a mistake when it found that "defendant's only means to exit [was] driving over the grass in front of him." [**Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 2) (all emphasis added).]

There are several problems with the Court of Appeals' ruling.

First, the encounter in this case was captured by Deputy Pence's patrol car video recorder. The lower court reviewed the videotape in addition to receiving testimonial evidence during the October 2, 2018, evidentiary hearing on Mr. Duff's motion to suppress. The Court of Appeals found that Deputy Pence's testimony and the videotaped evidence received by the lower court during the evidentiary hearing established (1) "that Deputy Pence parked his patrol vehicle behind defendant's vehicle, 10 feet away, at a 45-degree angle," and (2) "that, if defendant had

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reversed his vehicle straight back, he would have hit Deputy Pence's patrol vehicle." **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 2.

Conventional motor vehicles lack the ability to move laterally or to attain vertical liftoff, so with the rear of Mr. Duff's vehicle concededly blocked by Deputy Pence's patrol vehicle, the natural corollary to be drawn from the record evidence is "that 'defendant's only means to exit [was] driving over the grass in front of him'" – the selfsame finding that the Court of Appeals found to be clearly erroneous. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). With conventional motor vehicles lacking the ability to move laterally or to embark upon vertical liftoff, it was reasonable for the trial court to infer that once Deputy Pence used his patrol vehicle to block the rear egress of Mr. Duff's vehicle. Indeed, not only is this a reasonable inference but on this record it was the *only* reasonable inference to be drawn. Conspicuously absent from the Court of Appeals' Opinion is any suggestion how Mr. Duff's sole means of egress was not driving over the grass in front of him when the rear of his vehicle was blocked by Deputy Pence's patrol vehicle, and there is no record evidence that Mr. Duff's motor vehicle could had the ability to move laterally or to attain vertical flight.

"This Court reviews a circuit court's findings at a suppression hearing for clear error." *Williams*, 472 Mich at 313. "A finding is clearly erroneous when, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Michigan Citizens for Water Conservation*, 269 Mich App at 40. This standard "is highly deferential to the trial court and requires that regard be given to the trial court's special

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opportunity to judge credibility." *Id*. at 40-41. "'This standard *plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently*.'" *Beason*, 435 Mich at 803 (emphasis added; quoting *Anderson*, 470 US at 573). "'The reviewing court oversteps the bounds of its duty … if it undertakes to duplicate the role of the lower court ….'" *Beason*, 435 Mich at 803 (quoting *Anderson*, 470 US at 573). "*'If the district court's account of the evidence is plausible in light of the record viewed in its entirety*, *the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently*.'" *Id*. (emphasis added). "*'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous*.'" *Id*. (emphasis added).

The trial court's inference was supported by record evidence with which the Court of Appeals expressly agreed, namely (1) "that Deputy Pence parked his patrol vehicle behind defendant's vehicle, 10 feet away, at a 45-degree angle," and (2) "that, if defendant had reversed his vehicle straight back, he would have hit Deputy Pence's patrol vehicle." **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 2). The Court of Appeals nonetheless disregarded the trial court's factual finding and supplanted it with its own finding that because "the only vehicles in the parking lot were defendant's vehicle and Deputy Pence's patrol vehicle, and based on the court's finding that the deputy parked behind defendant's vehicle, 10 feet away and at a 45-degree angle, it seems common sense that defendant would have been able to have clear the deputy's vehicle if defendant 'turned his wheel as he was backing out.'" **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 2). The two-judge majority of the Court of Appeals further found that "upon viewing the patrol-

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vehicle recording of the stop, it appears that defendant would have been able to safely reverse, albeit at an angle, out of the parking spot." *Id*. The fact that the trial court inferred from these facts "that 'defendant's only means to exit [was] driving over the grass in front of him'" while the Court of Appeals preferred the competing inference that "defendant here could exit his parking space, 'albeit with "some maneuvering,"'" id. at 3, was not a basis for reversing the trial court. Again, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Hardiman*, 466 Mich at 428. The trial court's account of the evidence was plausible in light of the record viewed in its entirety, so the Court of Appeals was precluded from reversing even if it was convinced that, had it sat as the trier of fact, it would have weighed the evidence differently. *Beason*, 435 Mich at 803. The Court of Appeals' ruling that the trial court's "assertion was unsupported by *any* evidence" is thus clearly erroneous and an constitutes an unwarranted intrusion into the trial court's exclusive province as factfinder and disregards the limited reviewing function of the clear-erroneous standard.

Second, based upon the trial court's cryptic citation to "status conference 3/4/2020," the two-judge majority of the Court of Appeals wholly extrapolated that because "[n]o evidence was presented at this hearing" "[i]t therefore *appears* that this finding by the trial court was *based on defense counsel's argument at the hearing* in which he asserted that defendant could only exit the parking lot by driving over the grass in front of him." **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 2). There is no transcript of the trial court's March 4, 2020, status conference on remand, so the Court of Appeals' hypothesis "that this finding by the trial court was based on defense counsel's argument at the hearing" is little more than fiction created from whole cloth.

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There is no record evidence of what the trial court meant by "status conference 3/4/2020," and if the Court of Appeals had questions regarding this citation, the appropriate remedy was for the Court to remand this matter back to the trial court for an explanation of the meaning underlying this cryptic notation, not reverse the lower court's findings altogether based upon unwarranted extrapolations from a wholly cryptic citation with no inherent meaning.

Lastly, the two-judge majority of the Court of Appeals held that "the evidence in the record only supports a contrary conclusion" to that drawn by the trial court because "Deputy Pence testified, 'If [defendant] would have turned his wheel as he was backing out, he would have cleared [the patrol] vehicle.'" **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 2). However, when the trial court found "that 'defendant's only means to exit [was] driving over the grass in front of him,'" it thereby rejected Deputy Pence's self-serving testimony to the contrary. Perhaps one of the most fundamental tenets of appellate procedure is that "[q]uestions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011). "'[B]ecause the demeanor of witnesses and credibility are so vitally important to a trial court's determination,' this Court gives deference to the trial court's credibility determination at a [evidentiary] hearing." *People v Kimble*, 252 Mich App 269, 273; 651 NW2d 798 (2002), *aff'd* 470 Mich 305 (2004).

Notwithstanding the almost universal injunction against second-guessing witness credibility on appellate review, the two-judge majority of the Court of Appeals supplanted the trial court's credibility determination regarding Deputy Pence's claim that "'[i]f [defendant] would have turned his wheel as he was backing out, he would have cleared [the patrol] vehicle.'" **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued

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November 23, 2021 (Docket No. 354406), p 2). By doing so, the two-judge majority of the Court of Appeals wholly disregarded the trial court's ability to observe the demeanor of the witnesses to assess their credibility. The fact that the Court of Appeals further believed that the patrol car video corroborated Deputy Pence's testimony does not alter the present analysis where, as noted above, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Hardiman*, 466 Mich at 428. Thus, by second-guessing and supplanting the trial court's credibility determination regarding Deputy Pence based upon competing inferences that the Court of Appeals drew from the patrol car video, the Court of Appeals doubly erred.

For all of these reasons, the Court of Appeals erred when it usurped the trial court's exclusive province as trier of fact, drew its own competing inferences from the facts, and made its own credibility determinations on appeal in order to reverse the trial court's ruling suppressing the evidence against Mr. Duff in this case. Accordingly, leave to appeal or other peremptory relief should be granted so that the Court may address and correct the egregious error of constitutional magnitude that occurred in this case.

E. Defendant was Subject to a Fourth Amendment Seizure

Even assuming *arguendo* the two-judge majority of the Court of Appeals in this case did not err in reversing the trial court's ruling, the Court of Appeals nonetheless erred when it found as a matter of law that "Deputy Pence did not seize defendant for Fourth Amendment purposes when he parked his patrol vehicle behind defendant's vehicle, 10 feet away and at a 45-degree angle," so "defendant's Fourth Amendment rights were not implicated when the deputy parked behind him." **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 3). In reaching this conclusion, the

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two-judge majority of the Court of Appeals found "instructive a portion of *United States v Carr*, 674 F3d 570 (CA 6, 2012), that this Court cited approving in *People v Anthony*, 327 Mich App 24, 39-40; 932 NW2d 202 (2019)." **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 3).

> As a threshold matter, the stop was consensual at the point where the officers parked their unmarked police car near Carr's Tahoe. A "consensual encounter" occurs when "a reasonable person would feel free to terminate the encounter." *United States v. Drayton*, 536 US 194, 201; 122 S Ct 2105; 153 L Ed 2d 242 (2002). This court has analyzed similar civilian-police encounters by determining whether the police vehicle blocked the defendant's egress. See, e.g., *United States v. See*, 574 F3d 309, 313 (6th Cir. 2009); United States v. Gross, 662 F3d 393, 399-400 (6th Cir. 2011). As the concurrence in See suggested, *unless there is other coercive behavior, a police officer can initiate a consensual encounter by parking his police vehicle in a manner that allows the defendant to leave*. *See*, 574 F3d at 315 (Gilman, J., concurring). Here, the police officers parked their unmarked, black Ford Explorer at an angle in front of Carr's Tahoe. *The angle of the police vehicle gave Carr sufficient room to drive either forward or backward out of the carwash bay. Although pulling forward would have required "some maneuvering" for Carr to get around the Explorer, "there was enough room that [Carr] could have just merely steered around [the Explorer]."* 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."* [**Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 3 (quoting *Carr*, 674 F3d at 572-573) (emphasis added).]

Based upon this excerpt from the Sixth Circuit Federal Court of Appeals' *Carr* decision, the Court of Appeals panel here proceeded to conclude:

> Like the defendant in *Carr*, defendant here could exit his parking space, "albeit with 'some maneuvering.'" Thus, the position of Deputy Pence's patrol vehicle alone did not turn this encounter into a seizure, and we must determine whether there was "other coercive behavior" by Deputy Pence that turned the encounter into a seizure for Fourth Amendment purposes. *Id*. at 573. *On the record before us, there was no such coercive behavior.* Accordingly, Deputy Pence did not seize defendant for Fourth Amendment purposes when he parked his patrol vehicle behind defendant's vehicle, 10 feet away and at a 45-degree angle. As such, defendant's Fourth Amendment rights were not implicated when the deputy parked behind him. See *Anthony*, 327 Mich App at 33 ("If there is no detention – no seizure within the meaning of the Fourth Amendment – then no

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constitutional rights have been infringed.") (Quotation marks and citation omitted.) [**Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 3).]

The problem with the Court of Appeals' ruling is that it cherry-picked precedent from the Sixth Circuit Federal Court of Appeals to reverse the trial court while wholly ignoring more recent precedent from the Sixth Circuit Federal Court of Appeals squarely on point with this case which distinguishes *Carr*, deems conduct such as that here other coercive behavior, and holds that the stop here did implicate the Fourth Amendment.

Specifically, in *United States v Williams*, 525 Fed Appx 330 (CA 6, 2013), a Sergeant with the Memphis Police Department was patrolling the parking lot of a nightclub in his squad car during the early morning hours in response to a number of recently reported vehicle break-ins. *Id*. at 331. He was accompanied by another Officer driving a separate squad car. *Id*. The Sergeant observed a vehicle backed into a parking space approximately 100 years from the nightclub's entrance with its headlights on and the engine running. *Id*. Two males were seated in the front driver's seat and front passenger's seat. *Id*. Interest piqued, the Sergeant "approached perpendicular to the parked vehicle, which was hemmed in by a dumpster on one side, an unoccupied vehicle on the other, and a chain-link fence in the rear." *Id*. The Sergeant "pulled his squad car just past the front of the parked vehicle before coming to a stop." *Id*. The government maintained, and the district court found, that the two vehicles formed an L-shape which left the parked vehicle a possible means of egress. *Id*. However, according to the Defendant, the vehicles formed a T-shape that blocked the egress of his parked vehicle. *Id*.

The Sergeant kept his patrol vehicle spotlight shining in the direction of the parked vehicle as he exited his own. *Id*. He then walked around the back of his squad car, in front of the defendant's parked vehicle, and proceeded to the driver's side door with his flashlight drawn.

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Id. The Sergeant at this point noticed both occupants "shuffling around" and apparently "moving stuff" on the front floorboard. *Id*. He also noticed that both occupants of the vehicle appeared to be "unkempt" in contrast to average club patrons. *Id*. Once at the driver's side door, the Sergeant Johnson inquired what the two men were doing and simultaneously used his flashlight to probe the vehicle's interior. *Id*. The Sergeant immediately caught sight of DVD monitors and stereo equipment at the defendant's feet. *Id*. The encounter escalated from there and subsequent questioning revealed that the male in the driver's seat had a suspended driver's license, expired plates taken from another vehicle, and a number of common automobile "burglary tools" – gloves, a flashlight, and a screwdriver – in plain view near his seat. *Id*.

The Sergeant called for back-up, and once another Officer arrived, the two men in seated in the parked vehicle were removed from the vehicle and detained in separate squad cars while the officers searched the lot for evidence of fresh break-ins. *Id*. Upon returning to his patrol vehicle, the backup Officer observed the defendant "making a large amount of movement in the back seat" of his squad car. *Id*. The Officer opened the door and discovered a handgun lying on the floorboard beneath the defendant. *Id*. A search of defendant's person revealed several rounds of ammunition. *Id*.

The defendant was indicted for being a convicted felon in possession of a firearm and later added a count for willfully failing to appear after defendant skipped a court date and fled the district for six months. *Id*. at 332. The defendant filed a motion to suppress the handgun and associated contraband, arguing that the officers initially seized him in violation of the Fourth Amendment. *Id*. The district court denied the motion after concluding that the encounter had been consensual based on the government's version of the events (*i.e.,* that the two vehicles formed an L-shape which left the parked vehicle a possible means of egress).

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The Sixth Circuit Federal Court of Appeals reversed, finding that the encounter violated the Fourth Amendment. The Court first analyzed a trio of recent cases – *United States v See*, 574 F3d 309 (CA 6, 2009), *United States v Gross*, 662 F3d 393 (CA 6, 2011), and *United States v Carr*, 674 F3d 570 (CA 6, 2012) – all of which involved police officers positioning their squad cars to curtail a suspect's ability to leave the scene. *Id*. at 332. The Court accepted the district court's factual finding that the Sergeant had pulled his squad car far enough past the defendant's parked vehicle to allow it to maneuver out of the space yet acknowledged that maneuvering around the Sergeant's close-in squad car was the only way to leave the scene. *Id*. at 333. The Court specifically noted that "*[u]nlike the defendant in Carr*, [the occupants] did not have the option of simply backing away or taking some other less confrontational route." *Id*. Noting that "[t]hese facts do not lend themselves to an easy resolution," the Court acknowledged that "if the relative position of the squad car was the only relevant factor; the availability of a hypothetical egress would doom his case." *Id*. The Court held that the availability of a hypothetical egress "is not dispositive" and "decline[d] to announce a rule … that would seem to reduce our Fourth Amendment analysis to counting inches on a yardstick." *Id*. Rather, the Court acknowledged that "'[t]he ultimate question remains whether the defendant 'believed he was ... free to leave,' … not whether it was merely physically possible."

Weighing the totality of the circumstances, the Court found several factors that convinced it "that the encounter was more akin to an investigative detention than a run-of-the-mill conversation on a public street." *Id*. at 333.

> First, *Sergeant Johnson did not switch off the alley lights on his squad car when he stopped and got out, instead leaving them pointing in the general direction of Chalmers and Williams throughout the episode*. In addition, Sergeant Johnson *approached the driver's side door by walking directly in front of the parked vehicle, effectively blocking the only available egress in the process*. Finally, once Sergeant Johnson arrived at the driver's side door, *he used his flashlight to probe the vehicle's interior and began*

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> *conversing with Chalmers*. ***These details taken together indicate that Sergeant Johnson was no longer simply "putting questions to" Chalmers and Williams.*** See *United States v. Williams*, 615 F.3d 657, 663 (6th Cir.2010). Although no one detail is sufficient on its own here to transform the initial encounter into a compulsory stop, see Carr, 674 F.3d at 572–74, ***it is unlikely that a reasonable person facing a panoply of probing lights and aware that the inquiring officer has further interest in the interior of his vehicle would believe that he is free to maneuver out of his parking space past the squad car that had blocked the egress a moment earlier***.
>
> *Thus, at this point, we think a reasonable person in the defendant's shoes, already hemmed into a parking space with a single narrow egress, would no longer feel free to terminate such an encounter*. The aggregate effect of Sergeant Johnson's "objective behavior" created a coercive situation in which he clearly communicated to the vehicle's occupants that they were under investigation. See *Waldon*, 206 F.3d at 603. *The district court was wrong to conclude otherwise*. [*Williams*, 525 Fed Appx at 333-34 (all emphasis added).]

The *Williams* case is significant because here, after Deputy Pence hemmed Mr. Duff in his parking space, Deputy Pence also shined his spotlight into Mr. Duff's vehicle. As Field Training Officer Flaviani approached the passenger's side door of Mr. Duff's vehicle, he momentarily blocked Mr. Duff's means of egress just like the Sergeant did in the *Williams* case. And once he arrived at the passenger seat window, Field Training Officer Flaviani used a flashlight to search inside Mr. Duff's vehicle just like the Sergeant did in the *Williams* case. People's Exhibit 1 (Court of Appeals Appendix E) at 00:35. In short, these same factors were deemed by the Sixth Circuit Federal Court of Appeals in *Williams* to constituted "other coercive behavior" in addition to merely positioning a patrol vehicle that gives rise to a seizure for Fourth Amendment purposes.

While the two-judge majority of the Court of Appeals panel here expressly relied upon the *Carr* decision, they wholly ignored *Carr*'s progeny – *United States v Williams* – in which the Sixth Circuit Federal Court of Appeals expressly distinguished *Carr* based upon three factors indisputably present in this case. Rather, the two-judge majority of the Court of Appeals panel here simply concluded, *ipse dixit*, that "[o]n the record before us, there was no such coercive

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behavior," wholly ignoring the selfsame factors relief upon by the *Williams* Court to distinguish *Carr* and reach an opposite holding. **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 3).

Significantly, although Judge Shapiro did not cite *Williams* in his dissenting opinion, he presciently distinguished this case from *Carr* based upon the same distinguishing factors articulated by the Sixth Circuit Federal Court of Appeals in *Williams*. As with *Carr*, Judge Shapiro noted that "[w]hether defendant's car could actually have been maneuvered past the police vehicle is a factor relevant to that inquiry, *but it is not the inquiry itself*." **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 4 (Shapiro, P.J, dissenting)). Judge Shapiro continued:

> Viewing the totality of the circumstances, *the evidence was **overwhelming** that a reasonable person in defendant's shoes would conclude that they were not free to leave* and I see no basis to find clear error by the trial court. *The police car was parked behind defendant's car at night, obstructing his only **straight** path of egress*. Further, it was dark *and the police car's headlights and spotlight were shining on defendant's vehicle, undoubtedly affecting defendant's vision were he to drive in reverse* and strongly suggesting that the police were not merely initiating a casual, consensual encounter. Under these circumstances, the defendant could not leave the scene without risking striking a police car or a police officer, or at least finding himself arrested for fleeing and eluding or resisting and obstructing. *The conclusion that defendant should have believed he was free to leave is one that only lawyers and judges could reach given that it can exist only in argument and not in reality*. No reasonable person, and likely few unreasonable persons, would conclude that they are free to leave when a police car parks behind them so as to block or significantly hinder their ability to drive away and directs the police vehicle's headlights and spotlight at the person's vehicle. [**Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 5) (Shapiro, P.J, dissenting; all emphasis added; footnotes omitted).]

Judge Shapiro expressly acknowledged the two-judge majority's refusal to consider pertinent factors, noting that "[a]lthough the spotlight shining on defendant was relied on by the trial court as a pertinent factor in this case, the majority declines to consider it in reversing the

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court." **Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 5) (Shapiro, P.J, dissenting).

Noting that *Carr* was a 2-1 decision, Judge Shapiro distinguished *Carr* and *People v Anthony*:

> In reversing the trial court, the majority relies heavily on *United States v Carr*, 674 F3d 570 (C.A. 6, 2012), a nonbinding federal decision that was quoted with approval in *People v Anthony*, 327 Mich App 24; 932 NW2d 202 (2019). Both cases are readily distinguishable on the facts. In *Carr*, *the defendant's vehicle could have left either through the front of the carwash bay, where a police vehicle was parked at angle in front of the defendant's vehicle,* ***or the rear of the bay where there was no police vehicle***. See *Carr*, 674 F3d at 572-573. In contrast*, defendant in this case could not drive forward and his only option would have been to maneuver past the police vehicle in reverse while looking back into headlights and a spotlight pointed toward him*. And in *Anthony*, there was no question about the availability of egress as the officers parked parallel to the defendant's vehicle on the street. See *Anthony*, 327 Mich App at 39.
>
> Moreover, to the extent that *Anthony*'s reliance on *Carr* can be read for the proposition that the position of the police vehicle is irrelevant as to whether a seizure occurred so long as it does not block every possible path of egress, *I would conclude that it was wrongly decided* ***and its holding should be overruled by the Michigan Supreme Court***. *Anthony* is plainly at odds with the well-established standard that a seizure occurs if, "in view of all the circumstances, a reasonable person would have believed that he was not free to leave." *Jenkins*, 472 Mich at 32 (emphasis added). See also *United States v Drayton*, 536 US 194, 201; 122 S Ct 2105; 153 LEd2d 242 (2002) ("[F]or the most part per se rules are inappropriate in the Fourth Amendment context."). Each case must be decided on its own facts, *and defendant's theoretical ability to maneuver past the police vehicle is not dispositive*.
>
> The trial court properly considered the totality of the circumstances and found that a reasonable person would not have believed he was free to leave. Because there was ample evidentiary support for this conclusion, I would affirm the trial court's ruling. [**Appendix A** (*People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406), p 5) (Shapiro, P.J, dissenting; all emphasis added; footnotes omitted).]

Significantly, neither *People v Anthony* nor any other Court of Appeals opinion has addressed the Sixth Circuit Federal Court of Appeals in *Williams* and its impact upon *People v Anthony* and other similar cases. For this reason alone, leave to appeal or other peremptory should be granted so that this important and timely constitutional question may be addressed.

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F. The Reasonableness of the Seizure

Once the seizure that occurred for purposes of the Fourth Amendment is acknowledged, its unreasonableness becomes readily apparent. The only reason Deputy Pence articulated in support of his decision to seize Mr. Duff was (1) Mr. Duff's presence in an alleged high crime area, and (2) Mr. Duff sitting in a lawfully parked vehicle in a school parking lot at approximately 10:00 p.m. Precedent is clear that these factors rise alone do not give rise to a reasonable suspicion that criminal activity is afoot so as to justify governmental intrusion upon an individual's liberty.

1. Presence in High Crime Area

The threshold problem with Deputy Pence's claim that the Walt Whitman Elementary School parking lot is a "high drug crime area" is that such a claim is conclusory and devoid of any factual basis. "The term high crime area is itself a general and conclusory term that should not be used to justify a stop or a frisk, or both, without requiring the articulation of specific facts demonstrating the reasonableness of the intrusion." *Commonwealth v Barreto*, 94 Mass App Ct 337, 344 n 12; 113 NE3d 429 (2018) (internal quotations omitted). There simply is not one scintilla of record evidence to support Deputy Pence's *ipse dixit* claim that the Walt Whitman Elementary School parking lot is a "high drug crime area." Because the prosecution bears the burden of showing that a search or seizure was justified by a recognized exception to the warrant requirement, *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003), any failure of proof in the record evidence inures to the prosecution's detriment.

Even assuming *arguendo* that Deputy Pence's "high drug crime area" claim was supported by specific, articulable facts – which it is not – Mr. Duff's presence in such an area would still not *ipso facto* justify a governmental seizure. "An individual's presence in an area of

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expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d 570 (2000). See also, *Family Serv Ass'n ex rel Coil v Wells Tp*, 783 F3d 600, 604 (CA 6, 2015) ("[A]n individual's late-night presence in a high-crime area by itself does not establish reasonable suspicion of anything other than the probability that the individual lives in a high-crime area."); *United States v Jame*s, 62 F Supp 3d 605, 610 (ED Mich, 2014) ("[J]ust because the police are patrolling a 'high crime' area does not give them free license to stop just anyone. The police must have more."); *People v Shabaz*, 424 Mich 42, 60; 378 NW2d 451 (1985) ("[T]he crime rate in a neighborhood ... alone would not establish the grounds for an investigatory stop."), *cert diss* 478 US 1017 (1986). As our Supreme Court explained in *Shabaz*:

> Defendant's presence in a high-crime neighborhood does nothing to distinguish him from any number of other pedestrians in the area. It provides no particular reasonable basis for suspicion as to the activity of the defendant. The same must be said for his emergence from an apartment building known to the police to be the site of previous criminal activity. It cannot reasonably be concluded that everyone seen carrying a small paper bag, entering or leaving an apartment building where previous concealed weapons and narcotics arrests have been made, is likely to be involved in such activity. *A high neighborhood crime rate ordinarily requires the presence of both innocent victims and criminal perpetration in the same neighborhood*. [*Shabaz*, 424 Mich at 60-61 (emphasis added).]

See similarly, *Commonwealth v Johnson*, 454 Mass 159, 163; 908 NE2d 729 (2009) ("[W]e recognize that so-called high crime areas are inhabited and frequented by many law-abiding citizens who are entitled to be protected against being stopped and frisked just because of the neighborhood where they live, work, or visit.")

Thus, Deputy Pence's claim that Mr. Duff was present in a "high drug crime area" – even if supported by specific, articulable facts –fails to justify Deputy Pence's seizure of Mr. Duff.

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2. Sitting in Lawfully Parked Vehicle at Night

The only other fact offered by Deputy Pence to justify his seizure of Mr. Duff is the fact that Mr. Duff was sitting in a vehicle lawfully parked in the Walt Whitman Elementary School parking lot at 10:00 p.m. on a Sunday. However, this basis is also insufficient to justify an investigatory stop.

In *People v Freeman*, 413 Mich 492; 320 NW2d 878 (1982) (copy attached as **Appendix E**), two Hazel Park police officers on routine patrol observed the defendant sitting in a parked automobile at 12:30 a.m. *Id*. at 493. The vehicle was parked in an unlit parking lot next to an unlit house adjacent to the Hazel Park race track with its parking lights on and motor running. *Id*. The officers approached, asked the defendant to exit his vehicle, and requested to see his automobile registration and personal identification. *Id*. at 493-44. During the investigatory stop the officers searched the vehicle, discovered a gun, and arrested the defendant. *Id*. at 494. The defendant was convicted of possessing a weapon in the circuit court, and a panel of the Court of Appeals affirmed the conviction because "'[c]onsidering the time of night and the presence of a vehicle with its motor running in a parking lot where it apparently did not belong, the police had a reasonable basis for investigating the situation.'" *Freeman*, 413 Mich at 494.

This Court, however, in lieu of granting leave to appeal, reversed the conviction, holding: "A lone automobile idling in a darkened parking lot late at night does not, without more, support a reasonable suspicion of criminal activity. People may temporarily stop their automobiles in such locations for a variety of reasons: to rest, to check directions, to rendezvous with others, to converse, etc." *Freeman*, 413 Mich at 496. See similarly, *People v Burrell*, 417 Mich 439, 450; 339 NW2d 403 (1983) ("[A] stop cannot be justified by individualized, articulable suspicion when a police officer merely observes two black men in a dark automobile driving slowly

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through a white or predominantly white community and recalls that armed robberies occurred the month before which were allegedly committed by two black males in a dark vehicle.")

Both before and after our Supreme Court's decision in *Freeman*, almost every federal jurisdiction to address similar factual scenarios invariably found such stops unreasonable. For example, the Fifth Circuit, in *United States v Hill*, 752 F3d 1029 (CA 5, 2014), vacated the defendant's conviction where police observed the defendant, "without a driver's license, at 11:00 p.m. on a Saturday night, in an apartment complex that has a drug reputation and is in a high-crime county, ... sitting in the driver's seat of a car that was backed into a parking spot, and, when the police arrived, [the] passenger exited from the car and took a few steps away." *Id*. at 1034. See also *United States v Beck*, 602 F2d 726 (CA 5, 1979) ("There is nothing inherently suspicious about two black men sitting in a parked car, with or without the engine running, on a street in a black neighborhood on a midsummer afternoon. They were not offending any traffic ordinance; there was no evidence of recent crimes in the neighborhood; no reasons to suspect that [the defendant] or his passenger were wanted by the police; and no other reasons to believe that anything unusual was taking place. [The officer's] mere unfounded feeling that something might be afoot did not warrant his stop of the Chevrolet.")

The Seventh Circuit similarly struck down an investigatory stop and reversed the defendant's conviction in *United States v Packer*, 15 F3d 654 (CA 7, 1994), where police, upon responding to a suspicious vehicle report, observed four black males sitting in a parked car with fogged windows at 1:00 a.m. *Id*. at 655. The district court had found the stop reasonable due to 1) the suspicious vehicle report, 2) the lateness of the hour, 3) the fogged car windows, and 4) the officers' reasonable belief that the car was in fact the one that had been reported in the dispatch. *Id*. at 656. However, the Seventh Circuit disagreed and reversed:

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> In cases where *Terry* stops were found to be justified by reasonable suspicion, the law enforcement officer generally has observed or has received a report of more suspicious activities than four men sitting together in a parked car at the wee hours of the morning. [*Id.* at 658].

See similarly *Catledge v City of Chicago*, 428 Fed Appx 646, 649 (CA 7, 2011) ("Observing someone sitting in a legally parked car, without more, cannot justify a *Terry* stop.")

The Eighth Circuit, in *United States v Nicholas*, 448 F2d 622 (CA 8, 1971), reversed the defendant's conviction due to an unreasonable investigatory stop where police on routine patrol at 11:15 p.m. in an area known for its high incidence of narcotics traffic observed a black male sitting in the front passenger seat of a vehicle. *Id*. at 623. The automobile was parked in a pool hall parking lot and bore out-of-state license plates. *Id*. When a second black male exited the pool hall several minutes later and entered the driver's seat of the vehicle, the officers approached and conducted an investigatory stop. *Id*. The Eighth Circuit struck down the stop, finding that such facts supported only a generalized suspicion of criminal activity. *Id*. at 625.

The Eleventh Circuit, in *United States v Thompson*, 712 F2d 1356 (CA 11, 1983), found a *Terry* stop unconstitutional where a Port Authority officer observed the defendant sitting in an automobile parked in an airport parking lot with its interior dome light lit. *Id*. at 1358. Although the vehicle had been parked in the parking lot for almost two weeks, this was the first time the officer had observed anyone occupy the automobile. *Id*. As he approached the vehicle, the officer observed the defendant hold an object to his nose, screw a lid on the object, and then quickly move the object to his side when confronted with the officer's presence. *Id*. During the stop the defendant consented to a search of his vehicle which "uncovered various weapons, ammunition, hashish, and a large sum of cash. *Id*. On these facts, the Eleventh Circuit found the stop unreasonable and reversed the defendant's weapons conviction. *Id*. at 1361. See similarly, *United States v Cooley*, 552 F Supp 2d 1284, 1293 (ND Ala, 2008) ("Here, the only reason for

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the entry of the police officers into the parking lot was a desire to investigate for any suspicious activities. But there were no suspicious activities in the parking lot. All that they saw on that Friday afternoon was two black men sitting in a car parked behind a beauty salon. There was no improper tag on the vehicle, no loud noise coming from the car, no traffic violations, no evidence that either of the defendants was wanted by law enforcement, no evidence of any crimes in the parking lot – in short, there was 'no ... reason to believe that anything unusual was taking place.' .... [The officer's] hunch that 'suspicious activities' might be taking place was unfounded, and certainly did not amount to a 'reasonable suspicion' of criminal activity.")

The district court, in *United States v Turner*, 815 F Supp 1332 (ND Cal, 1993), struck down a stop and dismissed the charges against the defendant where a park ranger had observed the defendant and another man sitting in an automobile parked in a remote section of a national park behind a building where unlawful activity and a suicide had occurred in the past. *Id*. at 1333-34. The defendant saw the ranger approaching and began driving away while the ranger ordered him to stop. *Id*. at 1334. He drove around the building and was then stopped by the ranger. *Id*. The Court there suppressed the evidence found during a subsequent search of the vehicle, holding:

> This is not enough. Vaguely "suspicious" activity in a remote area where some unlawful conduct has previously taken place will not justify an investigatory stop. The factors articulated by the government describe "too many individuals," especially in a public outdoor recreation area. [*Id*. at 1340].

The district court, in *United States v Hayden*, 740 F Supp 650 (SD Iowa, 1989), *aff'd sub nom United States v Jefferson*, 906 F2d 346 (CA 8, 1990), suppressed evidence found during an investigatory stop where an officer stopped the defendants who were sitting in the front seats of an idling out-of-state rental car parked at an interstate rest area at 6: 30 a.m. on a foggy morning.

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Id. at 347-48. That Court held that such facts could not give rise to a reasonable suspicion of criminal activity. *Id*. at 349-50.

The district court, in *United States v Roy*, 568 F Supp 1127 (D Conn, 1983), *vacated and remanded on other grds* 734 F2d 108 (CA 2, 1984), held an investigatory stop unconstitutional where detectives observed the defendant and another man wearing hats low over their brows and slouching in a "beat up" automobile. *Id*. at 1128. The vehicle bore out-of-state license plates and was backed into a parking space at a shopping center where there had been "a recent rash of auto thefts, purse snatches, and robberies. *Id*. The men were watching stores at the shopping center. *Id*. After the detectives called for police assistance, the passenger exited the vehicle and proceeded toward the stores while "nervously looking over his shoulder as if to see if someone were following him." *Id*. at 1129. The defendant then drove away, and the detectives stopped him. During the stop the defendant's vehicle was searched and three guns found. *Id*. at 1130-31. Despite the presence of all of these facts, the Court found the stop unreasonable and suppressed the evidence discovered during the investigatory encounter.[10]

[10] Decisions from state courts involving similar facts have also found such stops to be constitutionally impermissible. See, *e.g*. *Hemsley v United States*, 547 A2d 132, 143 (DC 1988) ("Appellant's sitting with two others in a parked car with the windows rolled up and a lot of smoke inside 'is not sufficiently suspicious – even in a "high crime" area – to warrant an investigative seizure of the person."); *Baker v State*, 754 So2d 154, 155 (Fla App, 2000) ("There is no indication in this record as to what [the defendant] was doing, other than merely sitting in his van at 3:00 in the morning near a closed business, which would warrant a 'justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.' .... If [the defendant's] actions are sufficient to warrant a *Terry* stop, then anyone who parks in a business area late at night would be subject to a *Terry* stop. Both the loitering statute and common sense require more than this."); *In re MJH*, 239 Ga App 894, 895; 522 SE2d 491 (Ga App 1999) ("Construing the evidence, as we must, to uphold the findings and judgment of the trial court, we agree that the record shows no objective manifestation that M.J.H. was, or was about to be, engaged in criminal conduct. The officer acknowledged he did not observe the occupants of the truck doing anything wrong. The only arguably suspicious behavior observed by the officer was parking a vehicle outside the white lines in the parking lot of a public park at 10:00 at night."); *People v Mills*, 115 Ill App 3d 809, 814-15; 450 NE2d 935 (Ill App 1983) (holding that officer lacked requisite reasonable suspicion where he observed defendant, looking nervous and sitting in parked car in parking lot, make fast movements and lean forward when officer approached); *State v Costa*, 327 NJ Super 22, 29; 742 A2d 599 (1999) (holding that investigatory stop was unjustified merely because defendant and his friend were sitting in parked vehicle in tavern parking lot listening to song on radio before entering tavern); *State v Crosby*, 72 Ohio App 3d 148; 594 NE2d 110 (1991) (holding stop of suspected drug dealer unlawful where police observed defendant sitting in vehicle at 10:15 p.m. while parked in area known for drug activity with man leaning inside car window), *app diss* 573 NE2d 667 (Ohio 1991).

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G. Analysis

In light of this abundance of precedent from both Michigan and other federal and state jurisdictions throughout the nation, it is salient that the predicate facts in support of the investigatory stop here fall short of establishing the requisite factual basis to sustain an investigatory stop. First, as all the foregoing case law indicates, sitting in a lawfully parked automobile is not indicative of criminal activity. See also *People v Chambers*, 195 Mich App 118, 121-22; 489 NW2d 168, 170 (1992); *People v Cabello*, 74 Mich App 78, 79; 253 NW2d 363 (1977).

Second, the fact that it was approximately at 10:00 p.m. does not justify the deputies' actions. *Cf. Packer*, 15 F3d at 658 (holding stop of suspects sitting in parked car at 1:00 a.m. unlawful); *Hayden*, 740 F Supp at 653 (holding stop of suspects sitting in parked car at 6:30 a.m. unlawful); and *Freeman*, 413 Mich at 496 (stop of suspect sitting in parked car at 12:30 a.m. unlawful).

Third, at best, the deputies could only speculate as to what Mr. Duff was doing inside of his automobile. *People v Coscarelli*, 196 Mich App 724, 728; 493 NW2d 525 (1992).

Lastly, perhaps the most important aspect of this case is what did not occur. There had been no recent reports of suspicious persons or criminal activity in the parking lot. *Cf. Beck*, 602 F2d at 729; *Nicholas*, 448 F2d at 625; and *Freeman*, 413 Mich at 497; *People v Bloyd*, 416 Mich 538, 550; 331 NW2d 447 (1982) ("Our law must be more protective of liberty if there has not been any report of a crime"). The deputies had no information linking Mr. Duff or his vehicle to criminal activity. *Cf. Shabaz*, 424 Mich at 64-65; *People v Falconer*, 76 Mich App 367, 369; 256 NW2d 597, *lv den* 402 Mich 816 (1977). Mr. Duff was not otherwise known to the deputies as a suspect in a crime. *Cf. Shabaz*, 424 Mich at 64-65. The deputies never took up a post for

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further observation but immediately proceeded to approach as soon as they observed Mr. Duff; thus, they had no way of knowing whether the occupants of the vehicle had been present in the vehicle for two minutes or two hours. *Cf. Packer*, 15 F3d at 658; and *United States v Bueno-Ariza*, 615 F2d 29, 36 (CA 2, 1980). The absence of such factors has been emphasized by courts when they found stops similar to the one at bar to be unconstitutional.

H. Conclusion

The case *sub judice* has wide constitutional implications for every citizen of this State. Mr. Duff was merely observed inside his lawfully parked car at approximately 10:00 p.m. in a public-school parking lot. If this Deputy Pence's conduct remains unreviewed, it will effectively vest police with authority to seize anyone siting inside their lawfully parked vehicle even momentarily. The problem with such a ruling was best articulated in *Papachristou v City of Jacksonville*, 405 US 156, 164; 92 S Ct 839; 31 L Ed 2d 110 (1972): "Walkers and strollers and wanderers may be going to or coming from a burglary. Loafers or loiterers may be 'casing' a holdup. The difficulty is that these activities are historically part of the amenities of life as we have known them."

More importantly, this Court has never addressed what measures a citizen must take during a police-citizen encounter initiated by police while the citizen is stationary in order to determine whether the citizen is free to leave. Because the encounter is initiated while the citizen is stationary, the point in time when the citizen is seized for Fourth Amendment purposes remains unknown unless and until the citizen engages in resistive behavior to ascertain his Fourth Amendment status. However, as noted above, such conduct places the police, the citizen, and innocent bystanders at undue risk of death or great bodily harm and has already resulted in the deaths of way too many citizens merely seeking to ascertain their Fourth Amendment status

during police-citizen encounters. Accordingly, leave to appeal or other peremptory should be granted so that this important and timely constitutional question may be addressed.

RELIEF

WHEREFORE, Appellant respectfully request this Honorable Court to grant leave to appeal and/or peremptorily reverse the circuit court's Order Denying Motion to Suppress, to award all fees and costs incurred as a result of brining and maintaining the present appeal, and to grant any other relief to which it may appear that Appellant is entitled.

Respectfully submitted,

/s/ Issa G. Haddad

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Dated: January 18, 2022

Haddad Law Firm. PLC.

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

MATTHEW SCOTT DUFF,

Defendant-Appellee.

COA Case No.
Cir Ct Case No. 2018-267140-FH
Dist Ct Case Nos. 1873027FD

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PROOF OF SERVICE

The undersigned certifies that s/he served a copy of Appellant's Application for Leave to Appeal and this Proof of Service upon all parties of record, or their counsel if represented, by uploading said papers to the TrueFiling server for electronic transmission to the Court of Appeals and all parties of record, or their counsel if represented on the date set forth below.

Dated: January 18, 2022

/s/ Issa G. Haddad
Affiant

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STATE OF MICHIGAN

IN THE SUPREME COURT

STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

MATTHEW SCOTT DUFF,

Defendant-Appellee.

S Ct Case No.
COA Case No. 347603
Cir Ct Case No. 2018-267140-FH
Dist Ct Case No. 1873027FD

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EXHIBIT A

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2021 WL 5504189
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellant,
v.
Matthew Scott DUFF, Defendant-Appellee.

No. 354406
|
November 23, 2021

Oakland Circuit Court, LC No. 2018-267140-FH

Before: Shapiro, P.J., and Borrello and O'Brien, JJ.

Opinion

Per Curiam.

***1** The prosecution appeals as of right an order granting defendant's motion to dismiss the charges against defendant for operating a motor vehicle while intoxicated, third offense, MCL 257.625, following the court's order granting defendant's motion to suppress. On appeal, the prosecution argues that the trial court erred when ruling on defendant's motion to suppress by concluding that the deputy seized defendant for purposes of the Fourth Amendment when the deputy parked his patrol car 10 feet away from defendant's car at a 45-degree angle. Under the facts of this case, we agree with the prosecution, and therefore reverse.

On the evening of March 4, 2018, Oakland County Sheriff's Deputy Jason Pence was out on patrol in Pontiac, Michigan, when he saw a white Kia Forte vehicle parked in the parking lot of a closed elementary school. It was the only vehicle in the parking lot. The engine of the vehicle was running, and the interior overhead lights were on. Deputy Pence observed a single person sitting in the driver's seat of the vehicle. Deputy Pence proceeded to park his patrol car 10 feet away, at a 45-degree angle, behind the vehicle. For his safety, the deputy pointed his spotlight at the driver's side of the vehicle and turned it on. Deputy Pence did not activate his overhead lights or emergency siren. He proceeded to walk up to the driver's side of the vehicle to speak with the occupant of the vehicle—defendant. Upon initiating contact with defendant, Deputy Pence noticed that defendant's eyes were bloodshot and glossy, and that he was slurring his speech. Deputy Pence also detected the odor of alcohol. Later during the investigation, defendant said that he had been drinking that night.

On July 18, 2018, defendant filed a motion to suppress the result of his blood alcohol test, arguing that it must be suppressed because Deputy Pence lacked a reasonable, articulable suspicion, based on objective facts, that criminal activity was afoot when he seized defendant. On August 16, 2018, the prosecution responded, arguing that Deputy Pence was lawfully performing his duty when he approached defendant's vehicle and asked defendant to produce identification. The prosecution argued that initiating an encounter for the purpose of an inquiry does not constitute a seizure. An evidentiary hearing on defendant's motion to suppress was held on October 2, 2018. On November 9, 2018, the trial court entered an order denying defendant's motion to suppress, reasoning that Deputy Pence had a reasonable, articulable suspicion to seize defendant.

On February 13, 2019, defendant filed a delayed application for leave to appeal with this Court, arguing that all evidence obtained directly or indirectly as a result of Deputy Pence's encounter with defendant must be suppressed because Deputy Pence's act of parking his patrol vehicle behind defendant's vehicle and approaching defendant constituted a stop without reasonable suspicion of criminal activity in violation of defendant's Fourth Amendment rights. This Court denied defendant's delayed application for leave to appeal. [1] Defendant then filed an application for leave to appeal with our Supreme Court, and that Court entered an order remanding the case to the trial court to reconsider defendant's motion to suppress with instructions to "determine when the defendant was first seized for Fourth Amendment purposes." *People v Duff*, 504 Mich 995, 995 (2019). On March 4, 2020, the trial court held a status conference hearing. At the hearing, neither party presented additional evidence or testimony.

***2** On July 15, 2020, the trial court entered an order granting defendant's motion to suppress. The trial court concluded that Deputy Pence seized defendant when the deputy parked behind him, reasoning:

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> Deputy Pence proceeded to park his patrol car 10 feet away, at a 45-degree angle behind the defendant's vehicle and activated his spotlight pointing at the driver. The Deputy testified that if Mr. Duff were to back his vehicle straight out, he would have hit the officer's car. The defendant's only means to exit [was] driving over the grass in front of him. Under those circumstances, a reasonable person would have believed that he or she was not free to leave, thus constituting a seizure. [Citations omitted.]

The trial court explained that Deputy Pence did not have reasonable suspicion at the time of this seizure, so the seizure violated defendant's constitutional rights. On July 23, 2020, the trial court entered an order dismissing the case.

On appeal, the prosecution argues that the trial court erred by granting defendant's motion to suppress. We agree.

Constitutional questions are questions of law that are reviewed de novo. *People v Steele*, 283 Mich App 472, 487; 769 NW2d 256 (2009). This Court reviews "for clear error a trial court's findings of fact in a suppression hearing," but reviews "de novo whether the Fourth Amendment was violated and whether an exclusionary rule applies." *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002).

For Fourth Amendment purposes, warrantless seizures are presumed unreasonable unless they fall under one of the exceptions to the warrant requirement. *Coolidge v New Hampshire*, 403 US 443, 454-455; 91 S Ct 2022; 29 L Ed 2d 564 (1971). However, not every interaction with law enforcement constitutes a seizure triggering the Fourth Amendment. An officer may approach a citizen "on the street or in other public places" and ask the citizen to voluntarily answer questions without violating the Fourth Amendment. *United States v Drayton*, 536 US 194, 200-201; 122 S Ct 2105; 153 L Ed 2d 242 (2002). "[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v Bostick*, 501 US 429, 439; 111 S Ct 2382, 2389; 115 L Ed 2d 389 (1991).

The trial court found that Deputy Pence parked his patrol vehicle behind defendant's vehicle, 10 feet away, at a 45-degree angle. This was supported by both Deputy Pence's testimony and the patrol-vehicle recording of the stop played for the trial court and included in the record. The trial court also found that, if defendant had reversed his vehicle straight back, he would have hit Deputy Pence's patrol vehicle. This was likewise supported by Deputy Pence's testimony, and arguably the video of the stop. Then the trial court found that "defendant's only means to exit [was] driving over the grass in front of him." The trial court cited this statement to "status conference 3/4/2020," which was the conference that the court held after the case was remanded from our Supreme Court. No evidence was presented at this hearing —only argument by the parties. It therefore appears that this finding by the trial court was based on defense counsel's argument at the hearing in which he asserted that defendant could only exit the parking lot by driving over the grass in front of him. This assertion was unsupported by any evidence, however. In fact, the evidence in the record only supports a contrary conclusion. Specifically, Deputy Pence testified, "If [defendant] would have turned his wheel as he was backing out, he would have cleared my vehicle." Moreover, being that the only vehicles in the parking lot were defendant's vehicle and Deputy Pence's patrol vehicle, and based on the court's finding that the deputy parked behind defendant's vehicle, 10 feet away and at a 45-degree angle, it seems common sense that defendant would have been able to have clear the deputy's vehicle if defendant "turned his wheel as he was backing out."[2] We are therefore left with a definite and firm conviction that the trial court made a mistake when it found that "defendant's only means to exit [was] driving over the grass in front of him."

***3** The question then becomes whether Deputy Pence's conduct of partially obstructing 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." *Bostick*, 501 US at

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439. In answering this question, we find instructive a portion of *United States v Carr*, 674 F3d 570 (C.A. 6, 2012), that this Court cited approving in *People v Anthony*, 327 Mich App 24, 39-40; 932 NW2d 202 (2019). In *Carr*, the Sixth Circuit Court of Appeals explained:

> As a threshold matter, the stop was consensual at the point where the officers parked their unmarked police car near Carr's Tahoe. A "consensual encounter" occurs when "a reasonable person would feel free to terminate the encounter." *United States v. Drayton*, 536 US 194, 201; 122 S Ct 2105; 153 L Ed 2d 242 (2002). This court has analyzed similar civilian-police encounters by determining whether the police vehicle blocked the defendant's egress. See, e.g., *United States v. See*, 574 F3d 309, 313 (6th Cir. 2009); *United States v. Gross*, 662 F3d 393, 399-400 (6th Cir. 2011). As the concurrence in *See* suggested, unless there is other coercive behavior, a police officer can initiate a consensual encounter by parking his police vehicle in a manner that allows the defendant to leave. *See*, 574 F3d at 315 (Gilman, J., concurring). Here, the police officers parked their unmarked, black Ford Explorer at an angle in front of Carr's Tahoe. The angle of the police vehicle gave Carr sufficient room to drive either forward or backward out of the carwash bay. Although pulling forward would have required "some maneuvering" for Carr to get around the Explorer, "there was enough room that [Carr] could have just merely steered around [the Explorer]." 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." [*Carr*, 674 F3d at 572-573.]

Like the defendant in *Carr*, defendant here could exit his parking space, "albeit with 'some maneuvering.' " Thus, the position of Deputy Pence's patrol vehicle alone did not turn this encounter into a seizure, and we must determine whether there was "other coercive behavior" by Deputy Pence that turned the encounter into a seizure for Fourth Amendment purposes. *Id.* at 573. On the record before us, there was no such coercive behavior. Accordingly, Deputy Pence did not seize defendant for Fourth Amendment purposes when he parked his patrol vehicle behind defendant's vehicle, 10 feet away and at a 45-degree angle. As such, defendant's Fourth Amendment rights were not implicated when the deputy parked behind him. See *Anthony*, 327 Mich App at 33 ("If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.") (Quotation marks and citation omitted.)

According to Deputy Pence, when he reached the vehicle, which was running, the window was already down, and he saw that defendant's eyes were bloodshot and glossy, which the deputy explained was consistent with someone who had been consuming alcohol. When the deputy spoke to defendant, he noticed that defendant's speech was slurred, which was also consistent with someone who had been consuming alcohol. The deputy could also smell alcohol coming out of the vehicle. On these facts, Deputy Pence had reasonable suspicion that defendant had operated a vehicle while intoxicated, and could briefly detain defendant for further investigation. See *People v Oliver*, 464 Mich 184, 193; 627 NW2d 297 (2001) (explaining that an officer may "detain a person consistently with the Fourth Amendment on the basis of reasonable suspicion that criminal activity may be afoot"). [3]

***4** Reversed and remanded for further proceedings. We do not retain jurisdiction.

Shapiro, P.J. (dissenting).

I respectfully dissent. The trial court did not err by determining that defendant was seized for purposes of the Fourth Amendment because under the circumstances of this case a reasonable person would not have believed he was free to leave.

It is well-settled that "[a] lone automobile idling in a darkened parking lot late at night does not, without more, support a reasonable suspicion of criminal activity." *People v Freeman*, 413 Mich 492, 496; 320 NW2d 878 (1982). Where reasonable suspicion cannot be demonstrated, the officers may not act in a fashion to significantly hinder the ability of the person stopped to leave the scene. If a reasonable person would believe that they were not free to leave, then the police

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action is a *Terry* stop, i.e., a seizure. See *People v Shankle*, 227 Mich App 690, 659-696; 577 NW2d 471 (1998).

In this case, defendant was parked at the edge of a parking lot such that he could not drive forward without leaving the paved parking area and driving over grass. The approaching officer parked his patrol car 10 feet behind defendant's vehicle with the headlights pointed at defendant's car. The officer also activated the patrol car's spotlight, and pointed it at the driver's side of defendant's car. The officer testified that he purposely positioned his patrol car behind defendant's vehicle so that if defendant attempted to back straight out of the parking spot he would strike the police car. And the officer testified that if defendant had attempted to drive away he would have activated his sirens and lights and forced defendant to stop his vehicle.

At the outset of this case, the prosecution argued that the officer had reasonable suspicion of criminal activity or that he was making a health and safety check of the driver. However, at the evidentiary hearing the deputy testified that his only basis for suspecting criminal activity was that the parking lot was in a high crime area and he conceded that he made no inquiry as to whether defendant needed assistance or medical treatment. Because there was no basis for a *Terry* stop and the stop was not for health and safety purposes, the prosecution was left only with the argument that what occurred was merely a "consensual encounter." The trial court conducted an evidentiary hearing and thereafter granted defendant's motion to suppress, finding that under the circumstances, "a reasonable person would have believed that he or she was not free to leave; thus constituting a seizure."

The majority concludes that this trial court finding was clearly erroneous because there was enough room behind defendant's vehicle for him to leave the scene by carefully maneuvering his vehicle in reverse around the police car. This reasoning, however, misconstrues the test for whether a seizure occurs within the meaning of the Fourth Amendment. The Fourth Amendment does not turn on a measuring tape or the existence of some demanding but conceivable means of departure; the question is not whether leaving was physically possible but whether a reasonable person would believe he was free to leave. The standard was clearly enunciated by the Supreme Court in *People v Jenkins*, 472 Mich 26, 32, 691 NW2d 759 (2005): "A 'seizure' within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave." Whether defendant's car could actually have been maneuvered past the police vehicle is a factor relevant to that inquiry, but it is not the inquiry itself.

***5** Viewing the totality of the circumstances, the evidence was overwhelming that a reasonable person in defendant's shoes would conclude that they were not free to leave and I see no basis to find clear error by the trial court. The police car was parked behind defendant's car at night, obstructing his only straight path of egress. Further, it was dark and the police car's headlights and spotlight were shining on defendant's vehicle, undoubtedly affecting defendant's vision were he to drive in reverse and strongly suggesting that the police were not merely initiating a casual, consensual encounter. [1] Under these circumstances, the defendant could not leave the scene without risking striking a police car or a police officer, or at least finding himself arrested for fleeing and eluding or resisting and obstructing. [2] The conclusion that defendant should have believed he was free to leave is one that only lawyers and judges could reach given that it can exist only in argument and not in reality. No reasonable person, and likely few unreasonable persons, would conclude that they are free to leave when a police car parks behind them so as to block or significantly hinder their ability to drive away and directs the police vehicle's headlights and spotlight at the person's vehicle.

In reversing the trial court, the majority relies heavily on *United States v Carr*, 674 F3d 570 (C.A. 6, 2012), a nonbinding federal decision [3] that was quoted with approval in *People v Anthony*, 327 Mich App 24; 932 NW2d 202 (2019). Both cases are readily distinguishable on the facts. In *Carr*, the defendant's vehicle could have left either through the front of the carwash bay, where a police vehicle was parked at angle in front of the defendant's vehicle, or the rear of the bay where there was no police vehicle. See *Carr*, 674 F3d at 572-573. In contrast, defendant in this case could not drive forward and his only option would have been to maneuver past the police vehicle in reverse while looking back into headlights and a spotlight pointed toward him. And in *Anthony*, there was no question about the availability of egress as the officers parked parallel to the defendant's vehicle on the street. See *Anthony*, 327 Mich App at 39.

Moreover, to the extent that *Anthony*'s reliance on *Carr* can be read for the proposition that the position of the police vehicle is irrelevant as to whether a seizure occurred so long as it does

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not block every possible path of egress, I would conclude that it was wrongly decided and its holding should be overruled by the Michigan Supreme Court. *Anthony* is plainly at odds with the well-established standard that a seizure occurs if, "*in view of all the circumstances*, a reasonable person would have believed that he was not free to leave." *Jenkins*, 472 Mich at 32 (emphasis added). See also *United States v Drayton*, 536 US 194, 201; 122 S Ct 2105; 153 LEd2d 242 (2002) ("[F]or the most part *per se* rules are inappropriate in the Fourth Amendment context."). Each case must be decided on its own facts, and defendant's theoretical ability to maneuver past the police vehicle is not dispositive.

The trial court properly considered the totality of the circumstances and found that a reasonable person would not have believed he was free to leave. Because there was ample evidentiary support for this conclusion, I would affirm the trial court's ruling.

All Citations

Not Reported in N.W. Rptr., 2021 WL 5504189

Footnotes

1 *People v Duff*, unpublished order of the Court of Appeals, entered March 27, 2019 (Docket No. 347603).

2 Also, upon viewing the patrol-vehicle recording of the stop, it appears that defendant would have been able to safely reverse, albeit at an angle, out of the parking spot.

3 In light of our conclusion that the trial court erred by granting defendant's motion to suppress, we decline to address the prosecution's argument that the exclusionary rule should not apply under the facts of this case.

1 Although the spotlight shining on defendant was relied on by the trial court as a pertinent factor in this case, the majority declines to consider it in reversing the court.

2 An officer's subjective intent not to let someone leave is not dispositive as to whether a seizure occurred, but it is relevant, particularly when the manner in which the officer behaves is consistent with that intent, e.g., physically hindering a person's ability to leave.

3 *Carr* was a 2-1 decision.

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EXHIBIT B

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUTY OF OAKLAND

PEOPLE OF THE STATE
OF MICHIGAN,
Plaintiff,

v

Case No: 18-267140-FH
Hon, Denise Langford Morris

MATHEW SCOTT DUFF,
Defendant.
_____/

ORDER GRANTING MOTION TO SUPPRESS

The Defendant Mathew Duff, through counsel, appealed a March 27, 2019 Court of Appeal's ruling to the Supreme Court for which it ordered this case REMANDED to the Oakland Circuit Court to determine when the defendant was first seized for Fourth Amendment Purposes.

[A] "seizure" occurs for Fourth Amendment purposes when a reasonable person would have believed that he or she was not free to leave. People v. Anthony, 327 Mich. App. 24, 932 N.W.2d 202 (2019). (See United States v. Mendenhall, 446 U.S. at 554, 100 S.Ct. 1870. (1980)). (alteration in quotation). In other words, "whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street ... ." Florida. v. Bostick, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991).

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FACTS

On Sunday, March 4, 2018, at approximately 10:09 pm Oakland County Sheriff Deputy Jason Pence was on routine patrol in the city of Pontiac, Michigan, near the intersection of W. Montcalm Street and Summit Avenue. He was in a fully-marked patrol vehicle and was in full uniform at that time. He observed a white Kia Forte vehicle parked, facing "northbound on Montcalm," and running in the parking lot of Whitman Elementary School (pg. 15) in a "high crime" area (pg. 18). The only vehicle on the lot that was "two or three parking spots in from the entrance off summit." *Id*. Yet, he is unable to articulate an "unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry v Ohio*, 392 US 1 (1968). (pg. 17, 26 - 27). Nor did he intended to conduct a welfare check on the defendant. Florida. v. Bostick, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991).

Nevertheless, Deputy Pence proceeded to park his patrol car 10 feet away, at a 45-degree angle behind the defendant's vehicle and activated his spotlight pointing at the driver (pg. 16). The Deputy testified that if Mr. Duff were to back his vehicle straight out, he would have hit the officer's car (pg. 28). The defendant's only means to exit is driving over the grass in front of him (status conference 3/4/2020). Under those circumstances, a reasonable person would have believed that he or she was not free to leave; thus constituting a seizure.

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Deputy Pence, then, proceeded to approached Mr. Duff's side of his vehicle on foot and conducted his investigation. Deputy Pence observed Defendant seated in the driver's seat and sought identification from him. Upon initiating contact with the defendant, he detected the odor of alcohol on the defendant's breath, observed slurred speech, bloodshot and watery eyes. Deputy Pence also observed defendant having difficulty removing his driver's license from his wallet. Lastly, Defendant admitted to drinking and blew two PBTs and was over the legal limit.

CONCLUSION

After careful review of the testimony, exhibits, supporting briefs, and applicable law, the Court finds that Deputy Pence's encounter with Mr. Matthew Duff constitutes a seizure. Furthermore, based on the totality of the circumstances, the Defendant's assertions are substantiated for the reasons set forth.

Accordingly,

IT IS HEREBY ORDERED that the Defendant's Motion to Suppress Evidence is GRANTED.

IT IS SO ORDERED.

DATED: 7/14/2020

DENISE LANGFORD MORRIS JN
Circuit Court Judge

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EXHIBIT C

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

THE PEOPLE OF THE
STATE OF MICHIGAN,

v Case No. 2018-267140-FH

MATTHEW SCOTT DUFF,

Defendant./

EVIDENTIARY HEARING

BEFORE THE HONORABLE DENISE LANGFORD MORRIS, CIRCUIT JUDGE

Pontiac, Michigan - Tuesday, October 2, 2018

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Pontiac, Michigan

Tuesday, October 2, 2018 - 10:02 a.m.

* * * * * *

THE CLERK: Your Honor, now calling the matter of People versus Duff, case number 18-267140-FH.

MR. ZEMAN: Jeff Zeman appearing on behalf of the People.

MR. HADDAD: Good morning, your Honor, Issa Haddad on behalf of Mr. Duff, present and standing to my left, date and time for the evidentiary hearing. We are ready to proceed.

THE COURT: All right. As I indicated, I have an emergency that arose -- a death of a dear friend, Judge Ben Logan, in the Grand Rapids District Court. He died, and so anyway, I've got to get up there. I need to be in Grand Rapids at one o'clock and I don't want to be arrested for speeding on the way. So, I'm going to be leaving shortly.

MR. ZEMAN: Your Honor, the People have --

THE COURT: So, let's get started.

MR. ZEMAN: Your Honor, the People have only one witness, Deputy Pence, who's in the courtroom right now. There's nobody else in the courtroom besides counsel, defendant, court staff and the Judge --

THE COURT: Okay, I'd like to get --

MR. ZEMAN: -- the People would ask for a mutual sequestration order, nevertheless.

THE COURT: So ordered.

MR. ZEMAN: Thank you.

MR. HADDAD: No objection.

MR. ZEMAN: Just --

THE COURT: Any opening statement?

MR. ZEMAN: Just briefly opening, your Honor. Def -- it's defendant's motion with regard to the stop, the initial seizure of the defendant at the time of the offense. Obviously, it's the -- the People's burden to admit any and all evidence at trial. It's the People's position that all evidence (indiscernible) from that stop should be admissible at trial.

The People's position is that the -- that Deputy Pence was either performing a -- a wel -- a welfare check or had reasonable suspicion at the time that he first approached the defendant's vehicle to investigate for possible criminal activity and we intend to put on evidence to support that.

THE COURT: So noted.

MR. ZEMAN: Thank you, your Honor.

MR. HADDAD: Your Honor, in response to that, all the evidence elicited at the preliminary exam was that this was an investigatory stop. He approached, he parked

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behind the vehicle. The vehicle was seized at that moment. Even though the overhead lights were not on, it was considered a seizure for the purpose of the 4th Amendment because the defendant, Mr. Duff, was not free to leave.

If he were to put the car in drive, he'd have to drive on the grass and the snow in front of him, which isn't part of the -- part of the paved parking lot. To put it in reverse, he would have to either hit the patrol car or try to maneuver in a position where it would be -- it would be unreasonable to back up the way the officer positioned his car.

It's our position that once he parked his patrol vehicle behind the defendant without any reasonable suspicion of criminal activity being afoot, that was a seizure for all 4th Amendment purposes. Once he got out, the first thing he asked the defendant was for his papers, his identification, which isn't for a welfare check, it's not "how are you doing, you know, is something wrong? Why are you here;" it was identification, license, insurance and registration.

(Indiscernible) from the -- from the preliminary exam and this was a 4th Amendment stop. He was seized without any reasonable suspicion or probable cause for that matter and at the end, we're going to ask to suppress

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any evidence after the vehicle was stopped -- I'm sorry, after the police car was stopped, parked, positioned behind my defen -- my client's car. Thank you.

THE COURT: Okay. For the purposes of the record, you stipulate that it was March 4, 2018, 10:09 at the time of the stop, correct?

MR. ZEMAN: Yes, your Honor.

MR. HADDAD: Yes, your Honor.

THE COURT: Call your first witness.

MR. ZEMAN: Your Honor, actually I would, prior to calling the first witness, I believe there's also a stipulation from both of the parties to the admission of People's Exhibits One and Two. They are copies of -- they are CDs containing in-car video that were also admitted at the preliminary examination; is that correct, counsel?

MR. HADDAD: That's correct.

THE COURT: What's the difference between the two of them?

MR. ZEMAN: It's continued. I think the files were just too big to fit on a single disk.

THE COURT: One is part one and one is part two?

MR. ZEMAN: That's right, your Honor.

THE COURT: Okay.

MR. ZEMAN: Actually, I think they're labeled parts two and three, but they're relevant portions.

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THE COURT: Parts two and three? Is there another part missing?

MR. ZEMAN: There are -- there's also part -- well -- well, there are four disks, but just for the Court's -- just so the Court is aware --

THE COURT: All involving this --

MR. ZEMAN: -- when you see the disks --

THE COURT: All involving this case?

MR. ZEMAN: All involving this case, your Honor. That's right.

THE COURT: So, why ar -- are we putting them all in or --

MR. ZEMAN: No, just -- just two and three. These are the ones that were admitted, unless you -- I mean, would you -- I know, I guess I (indiscernible) with them all. It doesn't matter to me.

MR. HADDAD: Right. The -- those are the two that's pertinent, that shows -- there's not one of them actually pulling in where they -- where they stop, so --

THE COURT: Okay. So, you stipulate that you only want the Court to review parts two and three, that parts one and four are irrelevant?

MR. HADDAD: For the purposes of this motion, your Honor.

THE COURT: For purposes of this evidentiary

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hearing?

MR. HADDAD: At this time, I'm stipulating to two and three.

THE COURT: So noted.

MR. HADDAD: Thank you.

THE COURT: All right?

MR. ZEMAN: Thank you, your Honor, and they are labeled somewhat confusingly, one and two.

THE COURT: Well, they're Exhibits One and Two, but --

MR. ZEMAN: That's right, your Honor.

THE COURT: -- they're parts two and three.

MR. ZEMAN: Yes, your Honor. If I may approach?

THE COURT: Got it, mm-hmm.

(At 10:07 a.m., People's Exhibits One and Two were admitted.)

THE COURT: All right, you may call your first witness.

MR. ZEMAN: Thank you, your Honor. The People call Deputy Pence.

THE COURT: Raise your right hand. Do you swear to tell the truth, the whole truth, so help you God?

MR. PENCE: I do, your Honor.

THE COURT: All right, please be seated. State your full name for the record.

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THE WITNESS: Deputy Jason Pence, P as in Paul, e-n-c-e, is my last name.

THE COURT: P?

THE WITNESS: -- e-n-c-e.

THE COURT: Oh, like Vice President Pence?

THE WITNESS: Yes, ma'am.

THE COURT: Okay, any relation?

THE WITNESS: No.

THE COURT: You never know. You never know.

THE WITNESS: You're right.

THE COURT: Okay, go ahead.

MR. ZEMAN: Thank you, your Honor.

DEPUTY JASON PENCE

(At 10:07 a.m., sworn as witness, testified as follows)

DIRECT EXAMINATION

BY MR. ZEMAN:

Q Deputy Pence, how are you currently employed?

A With the Cou -- with the Oakland County Sheriff's Office.

Q Okay. Are you a patrol deputy for the Oakland County Sheriff's Office?

A Yes, sir.

Q Where are you currently assigned?

A I am currently assigned in Independence Township, but I -- at the time of the incident, I was assigned as a -- as a field training office -- or as a training -- a training

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deputy, I had just -- just started with the Oakland County Sheriff's Office.

Q Okay. So, on March 4th --

A And I was in -- I was in Pontiac.

Q On March 4th of this year, you were assigned to Pontiac patrol; is that correct?

A Yes.

Q Okay. Now, what experience do you have as a law enforcement officer prior to your training with the Oakland County Sheriff's Office back in March on the Pontiac patrol?

A One year with Milford Police Department, twenty-two years with Hazel Park Police Department in which, out of those nine -- or out of those twenty-two years, nine years was a -- as detective and school liaison.

Q Okay. And prior to your being hired by the Oakland County Sheriff's Office; how long was it between your working for Hazel Park and coming to work for the Sheriff's Office?

A I retired and then, I gained employment -- full-time employment in February of 2018.

Q Okay. I guess, at -- at what point did you retire? I'm just kind of wondering how --

A Oh, February of 2017 -- end of February 2017.

Q Okay. So, directing your attention now to March the 4th, approximately 10:09 p.m.; where were you on that date and

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time?

A I was driving a patrol vehicle on Montcalm in the city of Pontiac.

Q Okay. Were you -- were -- you say patrol vehicle; was it a fully-marked patrol vehicle?

A Yes, it was.

Q Was it equipped with overhead lights?

A Yes, it was.

Q Was it equipped with a siren?

A Yes.

Q Were there any other deputies in your patrol vehicle with you at that time?

A Yes, there was. It was a field training officer; his name was Paul Flatiani (ph).

Q Deputy Flatiani?

A Yes.

Q Okay. Anyone else besides the two of you in the patrol vehicle?

A No.

Q Okay. What, if anything, did you observe at that time?

A As I was traveling westbound on Montcalm, I observed up at the elementary school, which is Whitman Elementary off of Summit, a vehicle parked in the parking lot, which seemed at the time suspicious due to the time and day and being that the area is a high drug crime area.

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Q Okay. Deputy Pence, so with regard to the day of the week, what day of the week was March 4th of 2000 -- hold on, let me just make sure this is right, 2018?

A It was a Sunday.

Q Was it a Sunday? So, this is a Sunday night at approximately 10:00 p.m. that we're talking about now; is that correct?

A Yes.

Q Was it dark? Sorry, that's kind of a dumb question.

A Yes.

Q Was the school itself illuminated in any way at that time?

A The parking lot was illuminated.

Q Okay. Illuminated in what way?

A With parking lot lights.

Q Okay. Now, you described seeing a vehicle in the parking lot at that time; is that correct?

A Yes.

Q Were there any other vehicles besides the one that you described in the parking lot at the same time?

A Only -- only vehicle in the parking lot.

Q To your knowledge, was the school open at that time?

A It was closed.

Q Okay. What do -- what -- upon observing that vehicle, what did you do?

A I pulled up. I observed it. At that time, I observed

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that it was occupied. The driver had his in-car lights illuminated. I could see that it was occupied just by one light in there.

Q By one light? Okay, when you say the in-car lights; you mean interior lights?

A Interior lights, yes.

Q Okay. Was the car running?

A I don't recall.

Q You don't recall, okay. Would it be in your report if it was?

A It may -- it may be, I'm not sure if it was.

Q Okay. Would it help you to review your report if that would refresh your recollection?

A Yes.

MR. ZEMAN: Your Honor, may the record reflect I'm showing defense counsel, it's page six of People's discovery, page four of six of the police report.

MR. HADDAD: Yes.

THE COURT: So noted.

MR. ZEMAN: May I approach the witness, your Honor?

THE COURT: Yes.

BY MR. ZEMAN:

Q Deputy Pence, I'm handing you a copy of your police report. If you'll take a look at it, try to refresh your

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recollection. If your recollection is refreshed, look up at me, I'll take it back from you.

A Yes, sir.

Q Is your recollection refreshed?

A Yes.

Q Do you recall whether the vehicle was running when you first saw it?

A Yes, it was.

Q The vehicle was running?

A Yes, it was running.

Q Did you, yourself, pull into the parking lot upon observing that vehicle?

A Yes.

Q Okay. And you were -- were you driving or Deputy Flaviani?

A I was.

Q Where did you pull in the parking lot?

THE COURT: I'm sorry, Deputy who?

MR. ZEMAN: Flaviani, the field training officer.

THE COURT: How do you spell that?

MR. ZEMAN: How do you spell Flaviani?

THE WITNESS: F-l-a-v-i-a-n-i.

THE COURT: Thank you, go ahead.

BY MR. ZEMAN:

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Q Where in the parking lot did you pull the patrol vehicle?
A The vehicle was facing northbound towards Montcalm.
Q Safe to say the suspect's vehicle?
A Yes, the suspect vehicle was facing northbound. I then pulled around and, I believe, at about a -- at about a 45-degree angle to the vehicle.
Q Okay. So, I'm going to ask you for a little more detail on that. Was the suspect vehicle parked in the parking spot?
A Yes, it was.
Q Was the parking spot in the middle of the parking lot, at the edge of the parking lot; do you recall?
A Probably two or three parking spots in from the entrance off of -- off of Summit.
Q Okay. Was it pulled into a parking spot facing forward or facing backward?
A Facing forward.
Q Okay. And in front of the vehicle, was there -- was there more asphalt or was it -- or was it lawn or grass or was it --
A It was lawn or grass.
Q It's grass. Okay. Now, then, when you pulled -- you described pulling your vehicle in at a 45-degree angle. I guess, what part of -- I guess, where was the -- the nose of your vehicle pointing toward?

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A My nose was pointing towards his left rear bumper of his vehicle.
Q Okay. How close to the suspect vehicle were you?
A Approximately ten feet.
Q Okay. So, ten feet behind the suspect vehicle facing towards his rear left bumper; is that correct?
A And the middle of my vehicle was facing directly at his left rear bumper.
Q Okay. Is it driver's side rear bumper?
A Yes, driver's side.
Q Did you activate your lights at that time? Your -- I'm sorry, your emergency overhead lights at that time?
A No, I don't believe I did.
Q Okay. Did you activate your emergency siren at that time?
A No.
Q Okay. Did -- were your headlights operational?
A Yes.
Q Were they aiming at the vehicle?
A Yes.
Q Did you activate any spotlight or anything like that?
A Yes, I did.
Q Okay. And where did you point that?
A At the driver.
Q Okay. Why did you do that?
A For my safety and Deputy Flaviani's safety.

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Q Okay. So, let me ask you this. Prior to pulling into the parking lot as you des -- sorry. Let me ask you this first, and did you park your vehicle in that position?

A Yes.

Q Okay. Prior to your even entering the parking lot, are you -- why did you do that?

A Being that it was a lone vehicle in a parking lot and that I know there was no activity going on at the school, I see it was occupied, the school was closed, it was -- it was late. We didn't -- I didn't know if he was having some sort of medical emergency or possibly, since it is a high crime area where -- where that school is located or that the person was possibly having any sort of criminal activity going on at that time.

Q Okay. Is Whitman Elementary -- is that located in the city of Pontiac?

A Yes, it is.

Q Okay. So, what kind of criminal activity do you think might have been happening in --

MR. HADDAD: Objection, irrelevant.

THE COURT: Sustained.

MR. HADDAD: Thank you.

MR. ZEMAN: Your Honor, the -- the question here reasonable suspicion. This was with -- I can -- I can rephrase, if the Court would prefer.

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THE COURT: You've -- you've got to have facts. He said there's no -- he said it's a high crime area. We're not going to speculate on what could have happened as a crime in the area.

MR. ZEMAN: Your Honor, re -- respectfully, the operative question here is whether or not there's reasonable suspicion to suspect -- to suspect that a crime was occurring.

THE COURT: Yeah, based on what he's seen.

MR. ZEMAN: Based on what he's seen now, so based on his training and experience. Okay.

THE COURT: It's -- it's an over broad question. We know that anywhere in the world, murders, robberies, rapes, child molestation, anything is possible. We're not trying to get on what's possible. We're dealing with reasonable suspicion based on what you observe and what you see and we know he's an experienced officer. He's already told us that.

MR. ZEMAN: Yes, your Honor.

THE COURT: Let's go -- let's move on.

MR. ZEMAN: Okay. Thank you, your Honor.

BY MR. ZEMAN:

Q Okay. Upon positioning your vehicle behind the suspect vehicle, what did you do next?

A I approached the driver on -- on his side of the vehicle.

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Q Okay. Is that to say you walked up to the driver's -- driver's window?
A Driver's -- driver's door. Driver's door.
Q Driver's door? Okay. And what happened next?
A He had his window down already.
Q Okay. Did you speak to the oc -- the -- to the driver of the vehicle?
A Yes, I did.
Q Is that person in the courtroom right now?
A Yes, he is.
Q Could you please point to that person and describe something they're wearing?
A He's wearing a gray -- gray suit, gray -- green undershirt.

MR. ZEMAN: Your Honor, may the record reflect an in-court identification of the defendant.

THE COURT: So ordered.

BY MR. ZEMAN:
Q What, if anything, did you observe upon first speaking to the driver of the vehicle -- or to the defendant that night?
A I could see that his eyes were bloodshot and glossy which, with my experience, tends to lean towards someone that had been drinking that night.
Q Okay. Did you speak to the defendant?

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A Yes, I did.
Q What was his manner of speaking; if you recall?
A It was -- he had slurred speech.
Q Okay. Could you -- could you smell anything? Did you observe anything else that would indicate alcohol?
A Yes, then I could smell an odor of alcohol intoxicants coming out of -- of the vehicle and out of him.
Q Did you -- did he tell you anything to indicate whether or not he had been drinking?
A Yes, later during the investigation, he did say that he had -- he had been drinking.
Q But not until -- not until after -- sometime after your initial encounter with him?
A Yes.

MR. ZEMAN: Okay. I have no further questions at this time, your Honor.

THE COURT: You may cross-examine.

MR. HADDAD: Thank you.

CROSS-EXAMINATION

BY MR. HADDAD:

Q Now, it's true that there was no report of any crimes at the parking lot of the elementary school, correct?
A Correct.
Q And you don't know how long this vehicle was parked before you approached this vehicle, correct?

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A Correct.

THE COURT: You mean no reports of a crime that night?

MR. HADDAD: Yes, your Honor. That's -- that -- that was my --

THE COURT: So noted.

BY MR. HADDAD:

Q Thank you. Now, you have never met Mr. Duff prior to this day, correct?

A Correct.

Q You have never seen his vehicle before?

A No, not his vehicle.

Q Okay. And you have -- and your partner, are you aware if he had any encounters with Mr. Duff prior to this date?

A Not that I'm aware of.

Q Okay. So, this is the first time you've encountered Mr. Duff, correct?

A Yes.

Q All right. Now, when you first approached -- when you first -- you were driving from east to west in front of the school?

A Yes.

Q And you saw a vehicle parked in the parking lot, correct?

A Yes.

Q You decided to investigate, correct?

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A Yes.
Q And so, at that point in time when you made the decision to investigate, all you had was, there was a parked car in the parking lot, correct?
A I could see it was occupied.
Q It was occupied. An occupied car in the parking lot at night time?
A Yes.
Q Okay. So, you made a left onto the road where the school driveway entrance was, then you made a left in the parking lot, correct?
A I believe so.
Q Okay. Now, when you first pulled in -- I'm sorry. At that point in time, that's all you had, just a lone vehicle in a parking lot with -- and do you recall if it was running or not?
A It was running.
Q Do you recall if the front headlights were on?
A I don't recall if it was on or not.
Q Okay. Whether the headlights were on or not, would that make a difference?
A No.
Q Okay. So, there's a car running, occupied in the lone parking lot, correct?
A Of an elementary school.

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Q Of -- of an elementary school. Now, is there any posted signs that says do not enter this parking lot?
A Like, as in trespassing signs?
Q Yes.
A I don't recall.
Q You don't recall, okay. You didn't note that in your police report in any way or if there was though, did you?
A No.
Q And you're familiar with this area, correct?
A Yes.
Q As you sit here today, you don't know if there's any known trespassing signs or not?
A No, I don't think so.
Q Okay. Now, this is a public-owned elementary school, correct?
A Yes.
Q Okay. And there's gates on this entrance?
A No.
Q Okay. So, this is just an open driveway like, open to a 24-hour gas station, correct?
A Yes.
Q Okay. Someone could pull in, turn around and pull out and they wouldn't have any problems, correct?
A Correct.
Q Okay. Now, when you first approached the vehicle, the

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vehicle was parked in between two lines, correct?

A I don't know if he was between -- in -- in a parking spot or in between the lines, he was parked.

Q Okay. All right. It's not notated in your police report whether he was straddling a line or not, correct?

A I don't believe I put that in there.

Q Okay. If -- that would have been important how the person would have parked before you got out of your vehicle to determine if a crime was afoot though, correct?

A Not necessarily.

Q Not necessarily. Okay, fair enough. Now, you said you pulled in and you had a 45-degree angle in position to where the car was parked, correct?

A Yes.

Q Okay. So -- so, was the center of your vehicle the -- your dash-mount camera is located in the center of your windshield, correct?

A It's off to the right of the -- of the rearview mirror.

Q More or less, it's in the one-third in the middle of your windshield though, correct?

A Yes.

Q Okay. And that points forward, correct.

A Yes.

Q And so, where yours is positioned, you would have -- your camera was your center of your bumper directly toward the

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left corner bumper of the white Kia?
A I believe so.
Q Okay. And so, your -- your camera would able to encompass the driver exiting his vehicle, correct?
A Yes.
Q Okay. Have you seen the vehicle?
A What'd you say?
Q I'm sorry, have you seen the video?
A Yes, it's been some -- some time since we had the exam.
Q Okay. So, the -- is that the first time you saw it was at the exam?
A Yes.
Q Sometime in May of this year?
A Yes.
Q Okay. And have you seen it since then?
A No.
Q Okay. Now, when you first parked your vehicle, you said you were ten feet away from the defendant's bumper, correct?
A Approximately. That's usually how I -- how I park my vehicles during a stop.
Q Okay. And so, for this traffic stop, you didn't activate your overhead lights, did you?
A No.
Q No, okay. And you manually turned on your recorder,

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correct?
A Yes.
Q All right. And that was to capture the discussion you were going to have with this investigation, correct?
A Yes. Anytime we have any sort of conversation with -- with the public, I turn on my -- I turn on my microphone which activates our recorder.
Q Now, did you call anything in prior to pulling into this parking lot?
A I believe I did.
Q What did you call in?
A I believe I called out a suspicious vehicle.
Q Suspicious vehicle, okay. When you parked your vehicle before you exited, did you try to run the plate?
A I believe I did.
Q Okay. And that's all consistent with a criminal investigation, correct?
A Yes.
Q Okay. Now, you didn't call to see if any ambulances were in the area, correct?
A No.
Q You didn't verify with dispatch if anybody reported any emergencies with any white cars in the area, did you?
A No.
Q You weren't aware of any ongoing emergencies in the area,

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were you?
A Not that I know of.
Q Okay. All right. So, this was a criminal investigation when you first pulled in the parking lot, correct?
A Not necessarily.
Q Okay. What was it, then?
A It was just to investigate why someone was parked there --
Q Okay.
A -- at that time of night.
Q Okay. Now, you said there was ten feet between your car and the defendant's car, and I need to clarify this because car's have different lengths and different widths. Would you say your front bumper, the closest part of your car was ten feet away from the closest part of Mr. Duff's vehicle?
A Yes.
Q Okay. And so, that would roughly be the center of your bumper in the corner of his vehicle, correct?
A Yes.
Q Okay. And if you were closer to him, it would mean your left bumper would have been closer to his vehicle, correct?
A My left bumper, by closer to --
Q Your left front bumper would have been closer to him if he were more than -- if you weren't at a 45-degree angle?

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A I don't get your -- what you're going at.
Q Okay. It's your testimony that you pulled up at a 45-degree angle to the corner of his bumper, correct?
A Correct.
Q All right. So, if you would have been closer to his vehicle -- or, I'm sorry. If you would have been not at a 45-degree angle, your left front bumper would have been closer to his right corner bumper?
A I still don't understand what you're saying about that. I mean --
Q All right. I will move on. The video -- hopefully, the video will speak for itself.
A Okay.
Q Now, was there -- the way you positioned your car in the parking lot, were there parking spaces on the left and right side?
A Yes.
Q Okay. And the way you positioned your vehicle, was it -- for Mr. Duff to back straight out, would he have hit your car?
A Yes. Straight back, he would have.
Q Okay. Now, if -- for him to exit, he would have to make a right-hand -- how many lanes is this driveway pulling in versus the -- the -- the -- for the -- the parking -- the parking spaces on both sides of you?

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A To -- how many lanes as in how big is the parking lot?
Q Yeah. How -- the area that you would -- if the car was full of park -- if the parking lot was full of cars and you were to drive your car where you -- where you drove in and saw Mr. Duff, how wide is that area? Is it one lane or two lanes?
A Well, it's -- it's a huge parking lot. It's a good-sized parking lot. It's --
Q The question is if the parking lot was full and the area -- you would go through the parking lot to search for a space; could two cars pass?
A Yes.
Q Okay. When you parked on a 45-degree angle, could two cars still pass?
A No.
Q Okay. Now -- now, when you got out of your vehicle, did you have your hand on your duty weapon when you approached the vehicle?
A I don't recall.
Q Okay. Is that normal in a high crime area?
A Possibly.
Q Okay. When you first approached the vehicle, you said that the window was already down?
A Yes, it was.
Q And the first thing you asked Mr. Duff was for his

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identification, correct?

A Yes.

Q Registration and insurance?

A Yes, and his -- and his driver's license.

Q His identification, his driver's license. And that's all consistent with in -- investigatory criminal investigation, correct?

A Yes.

Q Okay. Did you ever ask Mr. Duff if he was okay or if he needed an ambulance?

A I was assessing the situation as I was speaking with him.

Q Okay. So, do you recall if those questions ever came up?

A I don't recall if -- if I did or didn't.

Q Okay. They're not notated in your report though, are they?

A I don't believe so.

Q Okay. And when we watch the video, do you recall if there's anything in the video that even hinted towards those type of questions to see if this was a -- you know, to see -- at any point in time, did this ever turn from a criminal investigation to a -- to see if Mr. Duff was okay?

A After I made initial contact?

Q Yes.

A No.

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Q Okay. Prior to that, you testified that this was a criminal investigation, correct?
A Prior to me speaking with him?
Q Yes.
A I said it was a suspicious --
Q Suspicious?
A Yes.
Q Okay, not as a reason to stop him, okay. So, if you were to back straight up, he would hit your vehicle, correct?
A Straight back, yes.
Q Okay. When you first approached -- when you ask somebody for their identification, license, registration and insurance, are they free to leave at that point in time?
A No.
Q Now, you said that he -- the window was already down when you approached him?
A Yes.
Q Okay. And before -- and who made the -- who made the first communication? Did you ask him questions or did he ask you questions?
A I don't -- I believe I asked him questions.
Q Okay. There was two deputies there, one on each side of his car, correct?
A There was me and Deputy Flaviani.
Q Correct. And when -- when you first approached the

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vehicle, you were on the driver's side and the other deputy was on the passenger side, correct?

A Yes.

MR. HADDAD: I have no further questions, Judge.

THE COURT: Any redirect?

MR. ZEMAN: Just briefly, your Honor.

REDIRECT EXAMINATION

BY MR. ZEMAN:

Q Deputy Pence, you described that the way that you had your vehicle positioned behind the defendant's vehicle with a 45-degree angle, approximately ten feet back. On cross, you said that if the defendant had pulled straight back, he would have hit your patrol vehicle; is that correct?

A Yes.

Q Is it -- the way you said that, you made it seem as if there might be some other way he could have pulled out. Is there some other way besides straight back the defendant could have pulled out of the parking lot, given the positions of your two vehicles?

A If he would have turned his wheel as he was backing out, he would have cleared my vehicle.

Q Okay. So, is that to say that if the defendant had backed out while also turning his vehicle, he could have pulled around your vehicle?

MR. HADDAD: Objection, calls for speculation.

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THE COURT: Overruled.

MR. HADDAD: Thank you.

BY MR. ZEMAN:

Q If you could answer the question?

A Yes.

Q Okay. So, there was -- and could the defendant have done that while staying on the -- on the, I guess, blacktop of the parking lot?

A Yes.

Q And he could have exited the parking lot?

A Yes.

MR. ZEMAN: No further questions, your Honor.

MR. HADDAD: I have a couple.

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MR. HADDAD:

Q when you parked behind the defendant, was it your intentions to not allow this vehicle to back up before you were done questioning him?

MR. ZEMAN: Objection, your Honor. His intention is irrelevant for the purposes of this hearing. It's again, what the of -- what the Court can see based on the evidence of the testimony -- the objective evidence of the testimony.

THE COURT: Well, I think the wit -- the

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witness' state of mind is always relevant. Overruled.

MR. ZEMAN: Would -- okay.

MR. HADDAD: Thank you.

BY MR. HADDAD:

Q Was it your intention to park behind him where the suspect vehicle could not back out until you were done talking to him?

A No.

Q No. So, if -- so, if the defendant didn't want to put his window down and talk to you, he was free not to do that, correct?

A Yes.

Q And he could have backed out by not interfering with you and you would have just let him drive away, correct?

A No, that would not have been the case, but --

Q Okay.

A -- he could have.

Q Okay. You said that would not have been the case. Explain that to me.

MR. ZEMAN: Objection, relevance, your Honor. I mean, that goes outside the scope of what actually occurred here.

THE COURT: I'll allow it. There's no jury, just me.

BY MR. HADDAD:

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Q Explain that to me.
A About --
Q If he were to back out to try to leave, would you have let him leave?
THE COURT: If you know.
THE WITNESS: He would have been -- he would have been able to leave, but I would have then activated my emergency lights and sirens.
MR. HADDAD: Okay, no further questions.
MR. ZEMAN: Well, your Honor, I do have some follow up. I -- I would say that the Court did not allow me to ask for the defendant's state of mind with regard to what he believed the suspicious -- suspicious activity may have been. I mean, given this line of questioning, I'd like to know what he suspected, why he would be pulling the vehicle over. I'm --
THE COURT: Well, the vehicle is already pulled over. What do you mean?
MR. ZEMAN: Well, okay. May -- may I pose the question and then, we can address whether or not you'll let me ask it?
THE COURT: Yeah, what's the question?
MR. ZEMAN: The question for the deputy would be when you pulled into the parking lot, what criminal activity were suspi -- were you specifically expecting may

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have been -- may have been going on in that parking lot.

THE COURT: Okay, and like I said, I'll take judicial notice that any crime in the world could always possibly be occurring.

MR. ZEMAN: Well, that's right, your Honor, but he did describe a particular set of circumstances in a particular place that would again lead to that state of mind that would -- that it goes to the officer's state of mind at that time. I -- I can rephrase the question.

THE COURT: I -- I think it's speculation, but I'll let you -- I'll let -- let's let him answer the question.

MR. ZEMAN: Okay. That's -- that's all I'm asking the deputy --

THE COURT: I'm interested.

BY MR. ZEMAN:

Q -- is based on the circumstances that you've already described with regard to where -- with regard to where the vehicle was and what you saw prior to your pulling into that parking lot, what crim -- kind of criminal activity were you suspecting might be afoot?

A Possibly drug use, being that the -- the area that it's in, alcohol --

Q Okay.

A -- and like I said, a med -- possibly a medical issue

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where he pulled over and needed some help.

MR. ZEMAN: Okay, nothing else, your Honor.

MR. HADDAD: Nothing further, your Honor.

THE COURT: Okay, may the witness be excused?

MR. ZEMAN: Yes, your Honor.

THE COURT: All right, you may step down, deputy, you're done.

THE WITNESS: Thank you.

THE COURT: Okay, call your next witness.

MR. ZEMAN: The People have no further witnesses, your Honor.

THE COURT: Any witnesses for the defense?

MR. HADDAD: No witnesses for the defense, your Honor.

THE COURT: Defense rests?

MR. HADDAD: Defense rests.

THE COURT: All right. So, you've got your videos and you want the Court to review the parts two and three entered as Exhibits One and Two?

MR. ZEMAN: That's right, your Honor.

THE COURT: I'll take a look at them. I may require additional information from you, but I don't know, okay?

MR. ZEMAN: Yes, your Honor.

THE COURT: So, let's have -- usually, I do

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findings of fact, conclusions of law, but I don't think it's really necessary. Do you want to do findings of fact, conclusions of law? I'll allow it if you want it.

MR. ZEMAN: Your Honor, I would note that the People's original response to defendant's motion did not include law or argument with regard to the reasonable suspicion.

THE COURT: Do you want to add that?

MR. ZEMAN: I -- I would, your Honor, just --

THE COURT: Okay.

MR. ZEMAN: -- because of the additional evidence that's come out.

THE COURT: Why don't the two of you do that?

MR. ZEMAN: Thank you, your Honor.

THE COURT: If you want to.

MR. HADDAD: (Indiscernible).

THE COURT: We'll give you -- how many days do you need to get that done? Ten days? Two weeks? Three weeks?

MR. HADDAD: Your pleasure, counsel.

MR. ZEMAN: Fourteen days, your Honor. Within fourteen days from today.

THE COURT: Fourteen days. Okay, you've got fourteen days to file supplemental briefs and I'll have you back for ruling from the Court on -- let's say, 14

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days is October 18th and then, I'm not here on the 25th. Wait, I'm leaving early on the 25th, so let's say November 8th.

MR. ZEMAN: Okay, so that's a Thurs --

THE COURT: That'll be a status -- that's a Thursday.

MR. ZEMAN: Thursday? Okay.

THE COURT: Yeah, that'll be a status and I probably will issue a written decision, so you'll have your decision by then, but if you don't, I'll rule verbally on that date in open court, November 8th, okay?

MR. HADDAD: I have a conflict that morning, your Honor.

THE COURT: We'll make it afternoon, then.

MR. HADDAD: It's a -- it's a jury trial in the 36th District Court. It's supposed to begin on the 7th and is the Court available on Tuesday, the 6th?

MR. ZEMAN: It's -- I mean, I'm -- I'm usually available when you're available.

THE COURT: You want to come Tuesday, the 6th, in the morning?

MR. ZEMAN: That's fine, your Honor, yeah.

THE COURT: You want to do it on a Tuesday?

MR. HADDAD: That's fine, (indiscernible).

THE COURT: Tuesday, the 6th in the morning is

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good.

MR. HADDAD: I can be available.

MR. ZEMAN: Okay.

THE COURT: Okay, we'll make a note. So, what date -- let's make sure you meet with my clerk and know the 14 days when your supplemental briefs are due.

MR. HADDAD: Okay.

MR. ZEMAN: Thank you, your Honor.

THE COURT: Okay? Anything further?

MR. HADDAD: On that -- on the November 6th, is that 8:30, 9:00, 9:30?

THE COURT: It's always 8:30.

MR. HADDAD: Eight-thirty, yes, Judge.

THE COURT: All right, Court is in recess.

MR. ZEMAN: Thank you, your Honor.

MR. HADDAD: Thank you, your Honor.

THE CLERK: All rise.

(At 10:37 a.m., proceedings concluded.)

* * * * * *

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STATE OF MICHIGAN)

COUNTY OF OAKLAND)ss.

I certify that this transcript is a true and accurate transcription to the best of my ability of the proceeding in this case before the Honorable Denise Langford Morris, as recorded by the clerk.

Proceedings were recorded and provided to this transcriptionist by the Circuit Court and this certified reporter accepts no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceeding or for the content of the recording provided.

Dated: February 4, 2019

/S/ Krista S. Michels

Krista S. Michels, CER #8490

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EXHIBIT D

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Court of Appeals, State of Michigan

ORDER

People of MI v Matthew Scott Duff

Docket No. 347603

LC No. 2018-267140-FH

Colleen A. O'Brien
Presiding Judge

Deborah A. Servitto

Elizabeth L. Gleicher
Judges

The Court orders that the delayed application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review.

Colleen A. O'Brien
Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

MAR 27 2019
Date

Jerome W. Zimmer Jr.
Chief Clerk

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EXHIBIT E

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KeyCite Yellow Flag - Negative Treatment
Distinguished by People v. Anthony, Mich.App., January 22, 2019

413 Mich. 492
Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Edward James FREEMAN, Defendant-Appellant.

Docket No. 61632.
|
June 14, 1982.

Synopsis
The Oakland Circuit Court, Robert B. Webster, J., found defendant guilty of carrying a pistol in an automobile, and defendant appealed. The Court of Appeals affirmed in an unpublished per curiam opinion and application for leave to appeal was filed. In lieu of granting leave to appeal, the Supreme Court reversed the conviction holding that officers lacked articulable suspicion of criminal activity and that gun found when officers asked defendant to leave vehicle he was sitting in must be suppressed.

Reversed.

Coleman, C. J., and Williams, J., concurred in result.

West Headnotes (6)

[1] **Arrest** Particular cases

Driver who was sitting in vehicle was "seized" within meaning of Fourth Amendment when police officers asked him to leave his automobile and to produce identification. U.S.C.A.Const.Amend. 4.

8 Cases that cite this headnote

[2] **Arrest** Reasonableness; reason or founded suspicion, etc

Balance between public interest and individual's right to personal security free from arbitrary interference by law officers may sometimes permit limited police intrusions upon citizen's freedom of movement on less than probable cause but such investigatory stops comport with reasonableness requirement of Fourth Amendment only if police have articulable basis for suspecting criminal activity. U.S.C.A.Const.Amend. 4.

3 Cases that cite this headnote

[3] **Arrest** Necessity for cause for arrest

Officers who observed idling, occupied vehicle with its parking lights on, parked in otherwise darkened, deserted parking lot, near darkened house, at 12:30 a. m. but who did not believe felony had been or was being committed and had no information that might connect vehicle or driver with crime lacked articulable basis for suspecting criminal activity so as to justify intrusion into driver's privacy. U.S.C.A.Const.Amend. 4.

14 Cases that cite this headnote

[4] **Arrest** Reasonableness; reason or founded suspicion, etc

Lone automobile idling in darkened parking lot late at night does not, without more, support reasonable suspicion of criminal activity.

11 Cases that cite this headnote

[5] **Arrest** Reasonableness; reason or founded suspicion, etc

Whether particular selection of facts renders investigatory stop reasonable is of necessity a matter to be determined under all circumstances of each individual case.

[6] **Searches and Seizures** Motor Vehicles

Officers who observed idling, occupied vehicle with parking lights on, parked in otherwise darkened, deserted parking lot, near darkened house, at 12:30 a. m. but who did not believe felony had been or was being committed and did not have information connecting vehicle or driver with crime lacked articulable basis for suspicion that driver was involved in criminal

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activity, and pistol found under seat when officers requested driver to vacate vehicle and produce identification was improperly seized and would be suppressed. M.C.L.A. § 750.227; U.S.C.A.Const.Amend. 4.

16 Cases that cite this headnote

Attorneys and Law Firms

****879** ***493** Frank J. Kelley, Atty. Gen., Robert A. Derengoski, Sol. Gen., L. Brooks Patterson, Pros. Atty., Robert C. Williams, Chief Appellate Asst. Pros. Atty., and Lawrence J. Bunting, Asst. Pros. Atty., for the People.

Renfrew, Moir, Miskin & Stover, P. C., Royal Oak (by William A. Basse, Troy), for defendant-appellant.

Opinion

PER CURIAM.

Edward James Freeman was convicted of carrying a pistol in an automobile.[1] We hold that Freeman's pretrial motion to suppress the pistol and quash the information should have been granted, and accordingly reverse his conviction. The record does not establish that the officers who approached Freeman's vehicle and detained him while requesting that he produce identification and a vehicle registration—a seizure which led to discovery of the pistol—possessed objective facts justifying a reasonable, articulable suspicion that Freeman was involved in criminal activity.

I

At approximately 12:30 a. m. on August 21, 1976, two patrolling Hazel Park police officers observed a lone automobile parked, with its parking lights on and its motor apparently running, near a darkened house in a private parking lot adjoining the Hazel Park Race Track. The officers approached the car and asked the defendant, who was alone ***494** and occupied the driver's seat, to leave the vehicle and to produce identification and a registration. Defendant produced his driver's license and a recent bill of sale for the vehicle, but no registration. Because the bill of sale did not contain a vehicle identification number (VIN), the officers used a flashlight to obtain the VIN from a plate just inside the windshield while they remained outside the vehicle. In the process, the officer holding the flashlight saw an open beer bottle on the front passenger seat floor.

The officer opened the driver's door and reached across the front seat to seize the bottle. As he did so, he glimpsed the rear sights of a pistol protruding from beneath the driver's seat. The officer removed the bottle, which was about three-quarters full, and seized the pistol.

Freeman's pretrial motion to suppress the pistol and to quash the information was denied, and he was convicted by a jury. The Court of Appeals affirmed in an unpublished opinion, stating in part:

> "In order to justify an investigatory 'stop' as initially occurred here, the police must have a 'reasonable belief "that criminal activity *may* be afoot." ' * * *
>
> "Considering the time of night and the presence of a vehicle with its motor running in a parking lot where it apparently did not belong, the police had a reasonable basis for investigating the situation." (Emphasis in original.)

II

[1] **[2]** Freeman was "seized" within the meaning of the ***495** Fourth Amendment[2] when the police officers asked him to leave his automobile and to produce identification.[3] Although the "balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers"[4] may sometimes permit ****880** limited police intrusions upon a citizen's freedom of movement on less than probable cause,[5] such investigatory stops comport with the reasonableness requirement of the Fourth Amendment only if the police "have an articulable basis for suspecting criminal activity".[6]

[3] The people argue that the officers' observation of (1) an idling, occupied vehicle with its parking lights on, parked in an otherwise darkened, deserted parking lot, (2) near a darkened house, (3) at 12:30 a. m. provided sufficient basis for their suspicion that criminal activity might be afoot. We disagree.

In *Brown v. Texas*[7] the United States Supreme Court found inadequate justification for police officers to stop a

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man observed walking away from ***496** another man in an alley in an area with a high incidence of drug traffic and to insist that he identify himself, where the only testimony offered in support of the stop was that the situation "looked suspicious" and the officers "had never seen that subject in that area before".

In the instant case, the officers' preliminary examination testimony regarding their observations of Freeman's parked automobile similarly fails to support a reasonable suspicion that criminal activity may have been afoot. The officers testified that they did not believe a felony had been or was being committed and had no information that might connect the vehicle or its driver with a crime. They merely stated that the automobile aroused their suspicions without explaining what criminal activity they suspected or how their factual observations supported those suspicions. [8]

[4] **[5]** **[6]** A lone automobile idling in a darkened parking lot late at night does not, without more, support a reasonable suspicion of criminal activity. People may temporarily stop their automobiles in such locations for a variety of reasons: to rest, to check directions, to rendezvous with others, to converse, etc. It is not an offense for an individual to be upon the private property of another unless he has ***497** entered "after having been forbidden so to do by the owner or occupant" or refused to depart after having been told to do so. [9] Of course, the presence of an automobile in these circumstances may, in combination with other specific, objective facts—*e.g.*, a report linking a vehicle of the same description to recent criminal activity [10] — support a reasonable suspicion warranting brief seizure of the vehicle's occupant for limited on-the-scene inquiry. However, the record in this case is devoid of any reference to other specific facts which would cast a suspicious light upon the presence of Freeman's vehicle in ****881** the parking lot. As the initial stop was unwarranted, all incriminating evidence flowing therefrom should have been suppressed. [11]

We reverse Freeman's conviction and remand for entry of an order quashing the information.

KAVANAGH, LEVIN, FITZGERALD, RYAN and MOODY, JJ., concur.

COLEMAN, C. J., and WILLIAMS, J., concur in result.

All Citations

413 Mich. 492, 320 N.W.2d 878

Footnotes

1 M.C.L. § 750.227; M.S.A. § 28.424.

2 U.S.Const., Am. IV.

3 See *Brown v. Texas*, 443 U.S. 47, 50, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), and *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1395–96, 59 L.Ed.2d 660 (1979). At the preliminary examination, one of the officers testified that Freeman was not free to go "until I found out who he was and why he was parked there".

4 *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2578–79, 45 L.Ed.2d 607 (1975).

5 See *Terry v. Ohio*, 392 U.S. 1, 20–22, 88 S.Ct. 1868, 1879–80, 20 L.Ed.2d 889 (1968).

6 *Michigan v. Summers*, 452 U.S. 692, 699, 101 S.Ct. 2587, 2592, 69 L.Ed.2d 340 (1981). See also *United States v. Cortez*, 449 U.S. 411, 417–418, 101 S.Ct. 690, 694–95, 66 L.Ed.2d 621 (1981), declaring that the detaining officers' assessment of all the circumstances must yield "a particularized and objective basis for suspecting the particular person stopped of criminal activity".

7 *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

8 At Freeman's preliminary examination, one officer responded to the prosecutor's inquiry about his purpose for approaching Freeman's vehicle: "Well, just being in the area of the ah, a closed house, no lights on in the

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house, just a suspicious—suspicious vehicle—* * * being parked there running." The same officer testified that the circumstances were "unusual" and that he asked Freeman to get out of his vehicle "[to] find out who he was and why he was in that particular area at that time of night".

As the Court recognized in *Brown v. Texas, supra*, 443 U.S. at p. 52, fn. 2, 99 S.Ct. at p. 2641, fn. 2, such vague and conclusory testimony must be distinguished from "the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer".

9 M.C.L. § 750.552; M.S.A. § 28.820(1).

10 Whether a particular collection of facts renders the investigatory stop reasonable is of necessity a matter to be determined under all the circumstances of each individual case, *United States v. Cortez, supra.* We do not suggest that the example given or the factors mentioned in the text are necessarily or generally significant or supply sufficient grounds in every case.

11 See *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

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