RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

STATE OF MICHIGAN

IN THE SUPREME COURT

STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

MATTHEW SCOTT DUFF,

Defendant-Appellant.

| | |
|---|---|
| S Ct Case No. | 163961 |
| COA Case No. | 347603 |
| Cir Ct Case No. | 2018-267140-FH |
| Dist Ct Case No. | 1873027FD |

OAKLAND COUNTY PROSECUTOR'S OFFICE
By: Louis F. Meizlish (P75168)
Attorney for Appellee
1200 N. Telegraph Road
West Wing Building 14E
Pontiac, Michigan 48341
(248) 858-0656

HADDAD LAW FIRM, PLC
By: Issa G. Haddad (P71699)
Attorney for Appellant
30600 Telegraph Road, Suite 3150
Bingham Farms, Michigan 48025-4550
(248) 633-8500

# DEFENDANT-APPELLANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF 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.

HADDAD LAW FIRM, PLC
By: Issa G. Haddad (P71699)
Attorney for Appellant

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

## TABLE OF CONTENTS


| Item | Page |
|---|---|
| Index of Authorities | iv |
| Statement of Jurisdictional Basis | v |
| Statement of Questions Involved | vi |
| Statement of Facts | 1 |
| Arguments: | |
| I. AFTER TWO DEPUTIES FOCUSED THEIR ATTENTION UPON APPELLANT'S LAWFULLY PARKED VEHICLE, OPERATED THEIR MARKED PATROL VEHICLE TOWARDS APPELLANT'S VEHICLE AT APPROXIMATELY 10:00 P.M., PARKED THEIR MARKED PATROL VEHICLE BEHIND APPELLANT'S LAWFULLY PARKED VEHICLE IN SUCH A MANNER AS TO OBSTRUCT, IN WHOLE OR PART, APPELLANT'S LAWFUL MEANS OF EGRESS, ILLUMINATED APPELLANT'S VEHICLE WITH A HIGH-POWERED SPOTLIGHT, EXITING THEIR MARKED PATROL VEHICLE IN FULL POLICE REGALIA AND VISIBLY ARMED, APPROACHED BOTH SIDES OF APPELLANT'S LAWFULLY PARKED VEHICLE, AND POSSING QUESTIONS TO HIM, AT THAT POINT IN TIME THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE DEPUTIES' CONDUCT WOULD HAVE COMMUNICATED TO A REASONABLE PERSON THAT THEY WERE NOT FREE TO DECLINE THE DEPUTIES' REQUESTS OR OTHERWISE TERMINATE THE ENCOUNTER | 8 |

II. THE COURT OF APPEALS INCORRECTLY HELD IN *PEOPLE V ANTHONY* THAT A PERSON SITTING IN A PARKED VEHICLE IS SEIZED FOR FOURTH AMENDMENT PURPOSES "ONLY IF OFFICERS COMPLETELY BLOCK A PERSON'S PARKED VEHICLE WITH A POLICE VEHICLE" BECAUSE A PROPER FOURTH AMENDMENT ESCHEWS BRIGHT-LINE RULES AND REQUIRES AN QUANTITATIVE AND QUALITATIVE ANALYSIS OF THE TOTALITY OF ALL OF THE CIRCUMSTANCES SURROUNDING THE ENCOUNTER, WHICH ENTAILS MUCH MORE THAN MERELY DETERMINING WHETHER OR NOT OFFICERS COMPLETELY BLOCKED A PERSON'S PARKED VEHICLE WITH A POLICE VEHICLE ..... 8

Relief ..... 23

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

## INDEX OF AUTHORITIES

**Cases** **Page**

*Beason v Beason*,
435 Mich 791; 460 NW2d 207 (1990) ..... 14

*People v Anthony*,
327 Mich App 24; 932 NW2d 202 (2019) ..... 18, 20

*People v Burrell*,
417 Mich 439; 339 NW2d 403 (1983) ..... 14

*People v Cheatham*,
453 Mich 1; 551 NW2d 355 (1996) ..... 15

*People v Duff*,
504 Mich 995; 934 NW2d 214 (2019) ..... vi, 1, 5

*People v Lucynski*,
__ Mich __; __ NW2d __; 2022 WL 2964546 (2022) ..... *passim*

*People v Pagano*,
507 Mich 26; 967 NW2d 590 (2021) ..... 14

**Statutes**

MCL 600.215 ..... v

**Rules**

MCR 7.303 ..... v

MCR 7.305 ..... v

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

## 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).

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

## STATEMENT OF QUESTION INVOLVED

I. WHETHER A REASONABLE PERSON WOULD HAVE FELT THAT THEY WERE NOT FREE TO DECLINE THE DEPUTIES' REQUESTS OR OTHERWISE TERMINATE THE ENCOUNTER WHEN TWO DEPUTIES FOCUSED THEIR ATTENTION UPON APPELLANT'S LAWFULLY PARKED VEHICLE AT APPROXIMATELY 10:00 P.M., OPERATED THEIR MARKED PATROL VEHICLE TOWARDS APPELLANT'S VEHICLE, PARKED THEIR MARKED PATROL VEHICLE BEHIND APPELLANT'S LAWFULLY PARKED VEHICLE IN SUCH A MANNER AS TO OBSTRUCT, IN WHOLE OR PART, APPELLANT'S LAWFUL MEANS OF EGRESS, ILLUMINATED APPELLANT'S VEHICLE WITH A HIGH-POWERED SPOTLIGHT, EXITING THEIR MARKED PATROL VEHICLE IN FULL POLICE REGALIA AND VISIBLY ARMED, APPROACHED BOTH SIDES OF APPELLANT'S LAWFULLY PARKED VEHICLE, AND POSSING QUESTION TO HIM?

Appellant Answers: Yes.
Appellee Answers: No.
The Circuit Court Answered: Yes.
The Court of Appeals Answered: No.

II. WHETHER THE COURT OF APPEALS INCORRECTLY HELD IN *PEOPLE V ANTHONY* THAT A PERSON SITTING IN A PARKED VEHICLE IS SEIZED FOR FOURTH AMENDMENT PURPOSES "ONLY IF OFFICERS COMPLETELY BLOCK A PERSON'S PARKED VEHICLE WITH A POLICE VEHICLE" BECAUSE A PROPER FOURTH AMENDMENT ESCHEWS BRIGHT-LINE RULES AND REQUIRES AN QUANTITATIVE AND QUALITATIVE ANALYSIS OF THE TOTALITY OF ALL OF THE CIRCUMSTANCES SURROUNDING THE ENCOUNTER, WHICH ENTAILS MUCH MORE THAN MERELY DETERMINING WHETHER OR NOT OFFICERS COMPLETELY BLOCKED A PERSON'S PARKED VEHICLE WITH A POLICE VEHICLE?

Appellant Answers: Yes.
Appellee Answers: No.
The Circuit Court Did Not Address the Question.
The Court of Appeals Did Not Address the Question.

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

## 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)."[1]

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 A** (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*.

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

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

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 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 B** (*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. The Investigatory Stop

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.[2] **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.

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

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

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 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.[3] **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

[3] 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.

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

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.

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*

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

*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*.

**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 A** (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 B** (*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:

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

> 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 [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 B** (*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

RECEIVED by MSC 11/16/2022 11:56:32 PM

judges could reach given that it can exist only in argument and not in reality." **Appendix B** (*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 B** (*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 B** (*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).

Haddad Law Firm. PLC.

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

## ARGUMENT

### I. AFTER TWO DEPUTIES FOCUSED THEIR ATTENTION UPON APPELLANT'S LAWFULLY PARKED VEHICLE IN A PARKING LOT AT APPROXIMATELY 10:00 P.M., OPERATED THEIR MARKED PATROL VEHICLE TOWARDS APPELLANT'S VEHICLE, PARKED THEIR MARKED PATROL VEHICLE BEHIND APPELLANT'S LAWFULLY PARKED VEHICLE SO AS TO OBSTRUCT, IN WHOLE OR PART, APPELLANT'S LAWFUL MEANS OF EGRESS, ILLUMINATED APPELLANT'S VEHICLE WITH A HIGH-POWERED SPOTLIGHT, EXITED THEIR MARKED PATROL VEHICLE AND DISPLAYED THEIR FULL POLICE REGALIA WHILE VISIBLY ARMED, APPROACHED BOTH SIDES OF APPELLANT'S LAWFULLY PARKED VEHICLE, AND POSSING QUESTION TO HIM, AT THAT POINT IN TIME THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE DEPUTIES' CONDUCT WOULD HAVE COMMUNICATED TO A REASONABLE PERSON THAT THEY WERE NOT FREE TO DECLINE THE DEPUTIES' REQUESTS OR OTHERWISE TERMINATE THE ENCOUNTER

On October 5, 2022, the Court ordered the parties to brief "whether the totality of the circumstances surrounding the officers' conduct of partially obstructing the defendant's ability to move his vehicle would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter, see *People v Lucynski*, ___ Mich ___ (Docket No. 162833, decided July 26, 2022).

#### A. ***People v Lucynski***

In *People v Lucynski*, __ Mich __, __; __ NW2d __; 2022 WL 2964546 (2022), a Tuscola County Sheriff's Deputy was traveling westbound on a road in a rural area when he observed from some distance away two cars stopped in the middle of the road. *Id*. at 5. The vehicles were facing opposite directions with the drivers' windows next to one another and that the drivers appeared to be talking to one another with their windows down. *Id*. One of the vehicles was the defendant's car. *Id*. The Deputy did not observe any narcotics activity and did not hear what the drivers said, but he testified that he thought a drug transaction might have

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

occurred. *Id*. Even though there were no other vehicles on the road at that time, the Deputy believed that the vehicles were impeding traffic in violation of MCL 257.676b. *Id*. The Deputy saw both cars begin moving when he was approximately 800 feet away. *Id*. He did not have to slow down or avoid either vehicle, and he did not observe any erratic driving. *Id*.

The Deputy testified that he followed the defendant's car "with the intention to stop [the vehicle] for impeding traffic." *Id*. The Deputy followed the defendant in a marked patrol vehicle and turned onto the same one-lane driveway that defendant had entered, parking a few feet behind defendant's car and blocking the only path of egress. *Id*. While a single lane was cleared within the driveway, the surrounding area was covered with several inches of snow. *Id*. The Deputy did not activate the siren or the emergency lights on his patrol vehicle. *Id*.

Upon pulling into the driveway behind the defendant, the Deputy started to exit his car prior to putting the car in the parked position. *Id*. When the Deputy exited his patrol car, the defendant was standing next to the driver's side door of his vehicle facing the Deputy. *Id*. The Deputy immediately asked whether the defendant lived there, and the defendant responded that it was a friend's house as he walked toward the deputy. *Id*. The Deputy asked the defendant what he was doing on the road, to which the defendant replied, "Just talking about fishing." *Id*. During this period, the defendant attempted to put his hands in his pockets. *Id*. The Deputy ordered him not to do so, and the defendant complied. *Id*. The Deputy then said, "I didn't know if maybe there was a drug deal going on, and that when I ran the plate it [came] back to" an address in Reese, Michigan. *Id*. The defendant denied any drug transaction and said that Reese was where he lived and that he worked just up the road. *Id*. After confirming the name of the homeowner, the Deputy asked the defendant if the defendant had his driver's license, to which the defendant replied in the negative. *Id*. Upon further questioning by the Deputy, the defendant

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

responded that he did not have a valid driver's license. *Id*. This all occurred within the first two minutes of Robinson pulling into the driveway. *Id*.

The possibility of a citation for impeding traffic was never mentioned during Robinson's encounter with defendant. *Id*. However, because the Deputy smelled the odor of marijuana and alcohol emanating from the defendant and noticed that the defendant's eyes were bloodshot, he proceeded to investigate whether defendant was intoxicated. *Id*. The defendant admitted to smoking marijuana about 20 minutes earlier and to consuming alcohol during the day. *Id*. Defendant then consented to a search of his vehicle, and the Deputy found both marijuana and an open container of alcohol inside. *Id*. The Deputy performed several field-sobriety tests, and based upon those tests, the defendant was arrested. *Id*. No citation for impeding traffic was issued, but the defendant was charged with operating while intoxicated (OWI), driving with a suspended license, and having an open container of alcohol in the vehicle. *Id*.

The district court held that the prosecution had failed to prove that the Deputy had sufficient cause to initiate the stop. *Id*. at 6. The court held that the prosecution had presented nothing more than "an inchoate or unparticularized suspicion or hunch" that was legally insufficient to believe that a drug transaction had transpired. *Id*. The district court further held that the impeding-traffic statute, MCL 257.676b(1), could not be violated without a showing that "real, not imagined, traffic was actually impeded or obstructed in some way by a person or a vehicle." *Id*. No evidence of such impediment was presented by the prosecution, and thus the court determined that the traffic stop was invalid. *Id*. Accordingly, the district court held that all evidence obtained from the stop would be inadmissible in any proceeding moving forward, and it dismissed the OWI charge. *Id*.

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

The prosecution sought leave to appeal in the Circuit Court, which denied leave to appeal. *Id*. The prosecution then sought leave to appeal in the Court of Appeals, which granted leave to appeal and ultimately found that no seizure for Fourth Amendment purposes had occurred. *Id*. The panel emphasized that while the Deputy had followed defendant, the Deputy had not activated his overheard emergency lights or otherwise signal for the defendant to pull over. *Id*. at 7. Rather, the Court of Appeals concluded that the defendant had voluntarily pulled into a driveway and that the Deputy pulled in and parked behind the defendant's car. *Id*. The defendant then approached the Deputy and began voluntarily answering the Deputy's questions. *Id*. The Court of Appeals held that, based on the totality of the circumstances, the earliest point at which the encounter with the Deputy could have become a seizure implicating the Fourth Amendment was when the defendant admitted to not having a valid driver's license because that was the earliest point at which a reasonable person would not have felt free to leave. *Id*. Subsequent investigation into and arrest for suspicion of OWI was deemed justifiable because defendant had been seen driving and the deputy observed signs of possible intoxication. *Id*.

This Court granted leave to appeal to address, *inter alia*, "whether the deputy sheriff seized the defendant when he pulled his patrol vehicle behind the defendant's vehicle in a driveway." *People v Lucynski*, 508 Mich 947, 947; 964 NW2d 571 (2021).

This Court recognized, as a threshold matter, that there are arguably two separate standards to apply. When a person has an independent desire to leave, a seizure occurs within the meaning of the Fourth Amendment "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Lucynski*, 2022 WL 2964546, at 8. "[I]f a person has no desire to leave for reasons unrelated to the police presence, the coercive effect of the encounter can be measured better by asking whether a

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id*. (internal quotations omitted). "The 'test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation.'" *Id*. (citation omitted). "Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to leave will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Id*. (internal quotations omitted).

The Court noted that while the Deputy did not activate his overhead emergency lights or siren, he parked a few feet behind the defendant's car in the single-lane driveway, blocking the vehicle in a driveway surrounded by several inches of snow on the ground and lacking an alternative path for exiting the driveway. *Lucynski*, 2022 WL 2964546, at 11. This Court found other facts to be "important," namely that the encounter occurred on a cold January morning in rural Michigan in one of a handful of residential driveways off a dirt road. *Id*. at 12. The Deputy followed the defendant's car for a short period before following defendant onto the driveway. *Id*. The Deputy quickly began exiting his car before the car even came to a full stop. *Id*.

This Court found that the record was silent as to whether the defendant had an independent desire to keep moving but concluded that under either of the two standards, the defendant was seized for Fourth Amendment purposes. *Id*. Specifically, this Court held that "[u]nder the totality of the circumstances, [the] defendant was seized at the moment [the Deputy], in his marked police vehicle, blocked defendant's car, resulting in no means for defendant to exit the single-lane driveway." *Id*.

> Applying similar logic, using a marked police vehicle to block a civilian vehicle's ability to exit a single-lane driveway to facilitate questioning or an investigation is a show of force on behalf of the police that can give rise to a seizure within the meaning of the Fourth Amendment. Under the circumstances of this case,

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

> including the rural setting, the way the encounter was initiated by the officer swiftly following defendant down a private driveway, and the fact that the officer's police vehicle blocked defendant's car in the driveway, a reasonable person would not have felt free to leave the scene, even though the police officer did not activate emergency lights or a siren. The same facts would cause a reasonable person to feel compelled to answer questions posed by the officer who had followed him and blocked his path of egress from the driveway of a home he did not own.
>
> * * *
>
> If a reasonable person in defendant's place did not have an independent desire to leave, but nevertheless did not want to interact with [the Deputy], the other options available to them would have been to attempt to enter a home that they did not own (and without knowledge whether the owner was home) or wander off into a frozen field some distance from town in a rural area. Neither would be a viable option from the perspective of a reasonable person after having been followed and then blocked in by a police officer. Accordingly, the Court of Appeals erred by holding that defendant was not seized until after he had made incriminating statements about not having a valid driver's license. Rather, under the facts of this case, defendant was seized at the moment the officer blocked defendant's car in the driveway with a marked police vehicle. The next question is whether there was legally sufficient suspicion of criminal activity at that moment. [*Lucynski*, 2022 WL 2964546, at 12-13.]

**B. <u>Analysis</u>**

The *Lucynski* case presents the use of a marked patrol vehicle which lies at one end of the seizure continuum. The deputy there completely blocked the means of egress of the defendant's vehicle. A reasonable person in such circumstances would not feel free to terminate the encounter and go about their day because the deputy's interference with their physically ability to leave would clearly communicate to a reasonable person that they were not free to terminate the encounter. However, such a conclusion does not suggest that interference with one's physically ability to leave is a *sine qua non* in order to give rise to a seizure for Fourth Amendment purposes. Interference with a subject's physically ability to leave may be a *sufficient* condition for finding that such a seizure occurred, but it is by no means a *necessary* condition to reach such a finding.

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

The lower court here found that the deputy "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." **Appendix A** (Order Granting Motion to Suppress, p 2). The lower court further noted that "[t]he *Deputy* testified that if Mr. Duff were to back his vehicle straight out, he would have hit the officer's car …." *Id*. The lower court further found that "[t]he defendant's only means to exit [wa]s driving over the grass in front of him …." *Id*. Thus, the lower court concluded, "[u]nder those circumstances, a reasonable person would have believed that he or she was not free to leave; thus constituting a seizure." *Id*. Based upon these findings, *Lucynski* is controlling and suppression of evidence is required.

The prosecution nevertheless invites this Court to usurp the lower court's exclusive providence as factfinder and to supplant the lower court's findings based upon a cold appellate court record. In support of its argument, the prosecution offers nothing more than a grainy screenshot from a dashcam – the same video observed and considered by the lower court. This Court "review[s] a lower court's factual findings in a suppression hearing for clear error." *People v Pagano*, 507 Mich 26, 31; 967 NW2d 590 (2021). A factual finding is clearly erroneous when this Court is "left with a definite and firm conviction that a mistake was made." *People v Burrell*, 417 Mich 439, 459; 339 NW2d 403 (1983). "'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that *their function is not to decide factual issues de novo*.'" *Beason v Beason*, 435 Mich 791, 802 n 5; 460 NW2d 207 (1990) (emphasis added; citation omitted). "'The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, *is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence*.'" *Id*. (citation omitted). See

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

also *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996) ("An appellate court must give deference to the trial court's findings at a suppression hearing."). "'To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong ….'" *Cheatham*, 453 Mich at 30 n 53. Rather, it "'must ... strike [the Court] as wrong with the force of a five-week old, unrefrigerated dead fish.'" *Id*.

Although the prosecution may disagree with the lower court's assessment of the record evidence, a finding that is maybe wrong or even probably wrong is not clearly erroneous. *Cheatham*, 453 Mich at 30 n 53. The prosecution offers little more than its own disagreement and second-guessing of the lower court's ruling packed as clear error. Nothing in the lower court's ruling on this issue strikes with the force of a five-week old, unrefrigerated dead fish, especially when the lower court's findings are granted the deference to which they are entitled. Accordingly, the lower court's finding cannot reasonably be characterized as clearly erroneous. *Id*.

Even assuming *arguendo* that the lower court did err in its findings – which it did not – any such error would be harmless at best insofar as a reasonable person still would not have believed that they were free to leave based upon the undisputed facts of this case. When the deputies in this case maneuvered their marked patrol vehicle into the school parking lot, a reasonable person sitting in a lawfully parled vehicle would have believed that they were free to leave because the deputies could have been turning into the school parking lot for any number of reasons wholly unrelated to the person present in the parking lot. Although a reasonable person most likely would have believed that they were free to leave under such circumstances, the deputies' presence would have caused a reasonable person to become alerted to the deputies' and to heed their presence in the school parking lot.

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

When the deputies began maneuvering their marked patrol vehicle towards the sole parked vehicle present in the parking lot, a reasonable person sitting in that vehicle would have started to develop the belief that perhaps they were not free to leave because they were potentially the reason for the deputies' presence in the parking lot. Although a reasonable person would have believed that they were free to leave at this point during the encounter, the deputies' presence coupled with their vehicle approaching in the direction of the parked vehicle would have caused a reasonable person to focus their attention upon the approaching deputies and to consider the fact that they might be the focus of the deputies' presence in the parking lot.

When the deputies drove their marked vehicle through the parking lot and maneuvered it in close proximity to the parked vehicle, which was the only other vehicle in the parking lot at 10:00 P.M., a reasonable person inside the parked vehicle would have known that this was an official law enforcement vehicle due to its government markings and overhead emergency lights. A reasonable person would have believed that they were not free to leave because at that point during the encounter the deputies had made clear that the individual in the parked motor vehicle was the focus of the deputies' investigation and that the person's presence in the parked vehicle was the basis for the deputies' presence in the school parking lot as well.

When the deputies parked their marked patrol vehicle in a manner which impeded – whether in whole or in part – the parked vehicles' means of lawful egress, a reasonable person's belief that they were not free to leave would have been confirmed. A reasonable person would reach this conclusion because by that point during the encounter the deputies had made clear that the individual in the parked motor vehicle was the focus of the deputies' investigation and that their presence was the purpose for the deputies' presence in the school parking lot.

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

When the deputies turned on their high-powered spotlights to illuminate the parked motor vehicle and its occupant, a reasonable person would again have had their belief confirmed that they were not free to leave. A reasonable person at that point would believe that they were not free to place their vehicle into reverse, activate their white backup lights, and begin operating their vehicle in the direction of the deputies.

Anecdotal experience teaches that operating a motor vehicle towards law enforcement officers would or could be interpreted by the approaching deputies as an attempted assault upon them with a motor vehicle – an interpretation that can result in immediate catastrophic, if not deadly, consequences for the driver of the vehicle that is moving in reverse towards the deputies. When citizens conduct themselves in such a manner and law enforcement officers respond with deadly force, the government is swift to claim that the officers had no way of knowing the driver's intentions when they accelerated their vehicle in reverse towards the officers. Conversely, in cases such as the present when the occupant of the motor vehicle submits to the display of government force, the government argues that the occupant was always free to leave if only they had put their car into reverse and accelerated towards the approaching deputies, who purportedly would have stepped aside and waived as the vehicle fled the scene. That is, when individuals attempt to leave scenarios presented by the facts of this case, they are frequently met with physical if not deadly force, yet when individuals submit to law enforcement officers under facts similar to this case, the government maintains that the individual was free to leave had they chose to do so. Such rhetoric based upon hypothetical counterfactuals creates undue danger for both citizens and officers alike, particularly in light of the increasingly tense relations between contemporary law enforcement and the public.

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

When the deputies exited their marked patrol vehicle and approached both sides of the parked vehicle, a reasonable person again would have had confirmed their belief that they were not free to leave because at that point it was clear that the officers had focused their investigation on the vehicle and the individual inside the vehicle. At this juncture, a reasonable person inside the vehicle would have observed both of the deputies in full police regalia bearing holstered weapons along with other possible weaponry visible to the occupant of the vehicle. A reasonable person would know at this point that the deputies were clearly on official business and that the individual in the parked vehicle was the subject of that business and not free to leave.

The fact that the officers did not simply maneuver their patrol vehicle adjacent to the parked vehicle and roll down their window to speak to the occupant of the parked vehicle only bolsters the fact that the deputies were not merely there to pose a simple question or two to the occupant of the vehicle. *Cf. People v Anthony*, 327 Mich App 24, 37; 932 NW2d 202 (2019) ("Pulling up alongside the F-150 did not, without more, constitute a 'traffic stop' ….") By illuminating the parked vehicle, exiting their marked patrol car, and then approaching the parked vehicle visibly armed and in full police regalia, the deputies conveyed to the individual inside the vehicle that they certainly were not free to leave and that they were the subject of the deputies' investigation. The fact that the deputies did not approach on the same side of the vehicle but, rather, approached both sides of the vehicle so as to maximize their plain view search of the interior of the vehicle would further confirm to a reasonable person that the deputies were not there to engage in consensual and cordial conversation at 10:00 PM.

When the officers continued to approach the parked vehicle, all of the foregoing would have repeatedly confirmed the belief of a reasonable person seated inside the parked vehicle that they were not free to leave. If any doubt remained in a reasonable person's mind up to this point

during the encounter, it would have been dissipated when the deputies approached the driver's window of the parked vehicle and began questioning the occupant. At this point, it would be clear to a reasonable person occupying the parked vehicle that they were in fact the subject of the deputies' investigation, and that the individual in the parked vehicle was in fact not free to leave the encounter.

According to *Lucynski*, the deputies' obstruction of the sole means of egress of Mr. Duff's lawfully parked vehicle constituted a seizure for Fourth Amendment purposes. Whether or not it was spatially possible for the Mr. Duff's vehicle to maneuver in a manner to evade the deputies' is not the proper analytical focus because the correct standard focuses on what a reasonable person would have cognitively believed, not what they possibly could have physically achieved. It is the belief of a reasonable person that controls the analysis, not spatial distances or other metaphysical considerations. In the instant case, a reasonable person would have concluded that they were not free to leave before the point at which the deputies claimed to have detected indicia of intoxication about Mr. Duff. Accordingly, leave to appeal or other relief should be granted.



Haddad Law Firm. PLC.

RECEIVED by MSC 11/16/2022 11:56:32 PM

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

## II. THE COURT OF APPEALS INCORRECTLY HELD IN *PEOPLE v ANTHONY* THAT A PERSON SITTING IN A PARKED VEHICLE IS SEIZED FOR FOURTH AMENDMENT PURPOSES "ONLY IF OFFICERS COMPLETELY BLOCK A PERSON'S PARKED VEHICLE WITH A POLICE VEHICLE" BECAUSE A PROPER FOURTH AMENDMENT ESCHEWS BRIGHT-LINE RULES AND REQUIRES AN QUANTITATIVE AND QUALITATIVE ANALYSIS OF THE TOTALITY OF ALL OF THE CIRCUMSTANCES SURROUNDING THE ENCOUNTER, WHICH ENTAILS MUCH MORE THAN MERELY DETERMINING WHETHER OR NOT OFFICERS COMPLETELY BLOCKED A PERSON'S PARKED VEHICLE WITH A POLICE VEHICLE

The Court's October 5, 2022, Order further directed the parties to brief "whether *People v Anthony*, 327 Mich App 24, 40 (2019), correctly held that 'only if officers completely block a person's parked vehicle with a police vehicle is the person seized.'" For all of the reasons that follow, the Court of Appeals did not correctly hold in *Anthony* that "only if officers completely block a person's parked vehicle with a police vehicle is the person seized."

### C. ***People v Anthony***

In *People v Anthony*, 327 Mich App 24; 932 NW2d 202 (2019), two Detroit Police Department Officers were on routine patrol in a fully marked scout car when the officer seated in the front passenger seat observed defendant's parked Ford F-150 pickup truck farther up the street, facing in the direction from which the officers' car was coming. *Id*. at 29. The officer, who was the sole witness at the evidentiary hearing, testified that the F-150 was "parked in the middle of the street," by which, he testified, he meant that it was impeding traffic. *Id*. The officers decided to investigate the alleged traffic offense and drove to where defendant's car was parked, pulling up alongside it. *Id*. at 29-30. As the officers drove down the street to the where the F-150 was located, they did not have their overhead lights activated. *Id*. at 30. The officer testified that the windows of the police car were down; the F-150 had tinted windows; and at

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

least one of them was partially down. *Id*. As the police car approached the area where defendant's car was parked, the officer seated in the front passenger seat, while still inside the police car, immediately smelled a strong odor of burned marijuana, which caused him to determine that he had probable cause to investigate possible offenses involving marijuana, so he and his partner then got out of the police car. *Id*. They approached defendant's pickup on foot, determined that defendant was in the driver's seat, ordered him to roll his window down the rest of the way, and ordered him out of the truck. *Id*. The officers handcuffed defendant and placed him in the backseat of the police car. *Id*. A second individual who had been in the back seat of the F-150 also was ordered out of the truck, was investigated, and ultimately was released without charges. *Id*. After the two men had been removed, the officers searched and found residue of smoked marijuana in a cup holder inside the truck. *Id*. The police then continued their search, during which they found a .45 caliber pistol. *Id*. After arriving at the police station, the officer also wrote defendant a ticket for impeding traffic. *Id*.

The Court of Appeals reversed the trial court's suppression of evidence, finding that a seizure occurs "only if officers completely block a person's parked vehicle with a police vehicle is the person seized." *Id*. at 40.

**D. Analysis**

The error with the *Anthony* Court's analysis is misguided because, again, it focused upon spatial possibilities between physical objects rather than what a reasonable person would have deduced from the developing situation with police presence. Applying the *Anthony* Court's spatial possibility approach, when police pull up behind a vehicle stopped at a red light, they have thereby seized the occupants of the vehicle in front of them whose egress has been obstructed. Clearly, this is not the law. At the other end of the continuum, if the show of force

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

by several police vehicles effectuated an investigatory stop of an individual sitting in a parked vehicle, but the occupant could somehow maneuver his vehicle away from the officers, no seizure would result due to the spatial possibility of egress. Clearly, this is not the law.

These absurd results obtain because whether or not it is spatially possible to elude law enforcement officers is not the proper standard to be applied. A reasonable person's belief is ignored and spatial relationships are improperly used as a proxy. While spatial relationships are certainly relevant when assessing the beliefs of a reasonable person, spatial relationships are but merely one factor among a totality that must be considered when ascertaining what a reasonable person would have believed under the circumstances. When a law enforcement vehicle completely obstructs the egress of a parked vehicle, clearly the reasonableness of the belief that the person is not free to leave increases due to the blockage of egress. However, this does not suggest that the opposite proposition holds true and that whenever a person's means of egress is left accessible – in whole or in part – no seizure results during the encounter. Stated alternatively, completely blocking a person's means of egress is a sufficient to find that a seizure occurred, but it is not necessary under a totality of the circumstances analysis. Rather, it is merely one non-dispositive factor among the totality to be considered.

In the instant case, the lower court found that deputies parking their marked patrol vehicle 10 feet away at a 45-degree angle behind Mr. Duff's lawfully parked vehicle in such a manner that if Mr. Duff had backed his vehicle straight out his vehicle would have struck the patrol car, deputies activating their spotlight, and deputies pointing their spotlight at Mr. Duff who was sitting in the driver's seat of his lawfully parked automobile would have caused a reasonable person to have believed that they were not free to leave. **Appendix A** (Order Granting Motion to Suppress, p 2). Considering the totality of the circumstances and applying

RECEIVED by MSC 11/16/2022 11:56:32 PM

the analytical framework of the cognitive beliefs of a reasonable person and not a spatial relational framework, a reasonable person would have in fact believed that they were not free to terminate the encounter prior to the deputies subsequently developing reasonable suspicion to justify the seizure – a seizure that had already taken place earlier during the encounter. Accordingly, leave to appeal or other relief should be granted.

## RELIEF

WHEREFORE, Appellant respectfully request this Honorable Court to grant leave to appeal and/or to find that the seizure at issue was unlawful and to grant any other relief to which it may appear that Appellant is entitled.

Respectfully submitted,

/s/ Issa G. Haddad

HADDAD LAW FIRM, PLC
By: Issa G. Haddad (P71699)
Attorney for Appellant
30600 Telegraph Road, Suite 3150
Bingham Farms, Michigan 48025-4550
(248) 633-8500

Dated: November 16, 2022

Haddad Law Firm. PLC.

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

STATE OF MICHIGAN

IN THE SUPREME COURT

STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

MATTHEW SCOTT DUFF,

Defendant-Appellant.

| | |
|---|---|
| S Ct Case No. | 163961 |
| COA Case No. | 347603 |
| Cir Ct Case No. | 2018-267140-FH |
| Dist Ct Case No. | 1873027FD |

OAKLAND COUNTY PROSECUTOR'S OFFICE
By: Louis F. Meizlish (P75168)
Attorney for Appellee
1200 N. Telegraph Road
West Wing Building 14E
Pontiac, Michigan 48341
(248) 858-0656

HADDAD LAW FIRM, PLC
By: Issa G. Haddad (P71699)
Attorney for Appellant
30600 Telegraph Road, Suite 3150
Bingham Farms, Michigan 48025-4550
(248) 633-8500

**PROOF OF SERVICE**

The undersigned certifies that s/he served a copy of Defendant-Appellants' Supplemental Brief in Support of 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: November 16, 2022

/s/ Issa G. Haddad
Affiant

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

STATE OF MICHIGAN

IN THE SUPREME COURT

STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

MATTHEW SCOTT DUFF,

Defendant-Appellant.

| | |
|---|---|
| S Ct Case No. | 163961 |
| COA Case No. | 347603 |
| Cir Ct Case No. | 2018-267140-FH |
| Dist Ct Case No. | 1873027FD |

OAKLAND COUNTY PROSECUTOR'S OFFICE
By: Louis F. Meizlish (P75168)
Attorney for Appellee
1200 N. Telegraph Road
West Wing Building 14E
Pontiac, Michigan 48341
(248) 858-0656

HADDAD LAW FIRM, PLC
By: Issa G. Haddad (P71699)
Attorney for Appellant
30600 Telegraph Road, Suite 3150
Bingham Farms, Michigan 48025-4550
(248) 633-8500

## INDEX OF APPENDICES

| Appendix | Description |
|---|---|
| A | Order Granting Motion to Suppress |
| B | *People v Duff*, unpublished opinion *per curiam* of the Court of Appeals, issued November 23, 2021 (Docket No. 354406) |
| C | Evidentiary Hearing Transcript |
| D | Court of Appeals entered an Order dated March 27, 2019 |

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

# EXHIBIT A

FILED Received for Filing Oakland County Clerk 7/15/2020 9:19 AM

RECEIVED by MSC 11/16/2022 11:56:32 PM

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).

RECEIVED by MSC 11/16/2022 11:56:32 PM

## 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.

RECEIVED by MSC 11/16/2022 11:56:32 PM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUTY OF OAKLAND

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

RECEIVED by MSC 11/16/2022 11:56:32 PM

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

# EXHIBIT B

RECEIVED by MSC 11/16/2022 11:56:32 PM

2021 WL 5504189
Only the Westlaw citation is currently available.

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:

 © 2022 Thomson Reuters. No claim to original U.S. Government Works. 

RECEIVED by MSC 11/16/2022 11:56:32 PM

> 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

 © 2022 Thomson Reuters. No claim to original U.S. Government Works. 

RECEIVED by MSC 11/16/2022 11:56:32 PM

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

RECEIVED by MSC 11/16/2022 11:56:32 PM

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

RECEIVED by MSC 11/16/2022 11:56:32 PM

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.

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

# EXHIBIT C

RECEIVED by MSC 11/16/2022 11:56:32 PM

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

APPEARANCES:

For the People: JEFFREY D. ZEMAN (P76610)
Oakland County Prosecutor's Office
1200 North Telegraph Road Bldg 14E
West Wing
Pontiac, Michigan 48341-1032
(248) 858-8796
zemanj@oakgov.com

For the Defendant: ISSA G. HADDAD (P71699)
Haddad Law Firm, PLC
30600 Telegraph Road, Suite 3150
Bingham Farms, Michigan 48025-4589
(248) 633-8500
issa@haddlaw.com

Transcript Provided by: Accurate Transcription Services, LLC
Firm # 8493
(734)944-5818

Transcribed by: Krista S. Michels, CER #8490

RECEIVED by MSC 11/16/2022 11:56:32 PM

TABLE OF CONTENTS

PAGE

WITNESSES

DEPUTY JASON PENCE

Direct Examination by Mr. Zeman..... 9
Cross-Examination by Mr. Haddad..... 20
Redirect Examination by Mr. Zeman..... 32
Cross-Examination by Mr. Haddad..... 33

EXHIBITS RECEIVED

People's #1&2 (CDs of in-car video in patrol car)..... 8

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 --



RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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.



RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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.



RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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.



RECEIVED by MSC 11/16/2022 11:56:32 PM

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

RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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:



RECEIVED by MSC 11/16/2022 11:56:32 PM

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?



RECEIVED by MSC 11/16/2022 11:56:32 PM

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.



RECEIVED by MSC 11/16/2022 11:56:32 PM

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.



RECEIVED by MSC 11/16/2022 11:56:32 PM

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.



RECEIVED by MSC 11/16/2022 11:56:32 PM

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?



RECEIVED by MSC 11/16/2022 11:56:32 PM

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?



RECEIVED by MSC 11/16/2022 11:56:32 PM

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?



RECEIVED by MSC 11/16/2022 11:56:32 PM

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.



RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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,



RECEIVED by MSC 11/16/2022 11:56:32 PM

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,



RECEIVED by MSC 11/16/2022 11:56:32 PM

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?



RECEIVED by MSC 11/16/2022 11:56:32 PM

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?



RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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.



RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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.



RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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:



RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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



RECEIVED by MSC 11/16/2022 11:56:32 PM

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.)

* * * * * *

RECEIVED by MSC 11/16/2022 11:56:32 PM

RECEIVED by MSC 11/16/2022 11:56:32 PM

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

RECEIVED by MSC 11/16/2022 11:56:32 PM

Haddad Law Firm. PLC.

# EXHIBIT D

RECEIVED
MAR 2 9 2019

RECEIVED by MSC 11/16/2022 11:56:32 PM

# 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