

**STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Supreme Court No.: 165806

COA Docket No.: 353646
Circuit Ct. File No.: 20-15154-AR
District Ct. File No.: 20-0045-FD

v

DAVID ALLAN LUCYNSKI,
Defendant-Appellant.

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PLANTIFF-APPELLEE'S APPENDIX FOR SUPPLEMENTAL BRIEF IN
OPPOSITION

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**EXHIBIT #1: COPY OF TRANSCRIPT OF PRELIMINARY EXAM
TESTIMONY OF DEPUTY ROBINSON**

STATE OF MICHIGAN
IN THE 71B DISTRICT COURT FOR THE COUNTY OF TUSCOLA

2

3 PEOPLE OF THE STATE OF MICHIGAN,
4 Plaintiff,

4

5 V.

File No: 20-0045FD

5

6 DAVID ALLAN LUCYNSKI,
7 Defendant,

7

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PRELIMINARY EXAMINATION - EXCERPT
BEFORE: JASON B. BITZER, DISTRICT COURT JUDGE
Caro, Michigan, March 4, 2020

9

10

APPEARANCES:

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1 Caro, Michigan

2 Wednesday, March 4, 2020 at 12:19 p.m.

3 (Only testimony of Deputy Robinson ordered
4 transcribed)

5 THE COURT: The Court will now call the case
6 the People of the State of Michigan versus David Allan
7 Lucynski, case number 20-0045FD. Mr. Wanink is here on
8 behalf of the People. Mr. Jocuns is here with his
9 client, Mr. Lucynski; good afternoon to the two of you.

10 MR. WANINK: Good afternoon, Judge.

11 THE COURT: Before the Court proceeds with a
12 preliminary examination on this matter, Mr. Lucynski,
13 the Court has a matter to address with you, sir. You
14 have been ordered as part of your bond to attend random
15 drug and alcohol screens at a Chance to Change in Caro
16 and Mr. Lucynski, the Court received the results of
17 those tests and there's two tests from January of 2020
18 and there's one test from February 24, 2020 and the
19 results are abnormal, also called dilute tests. So,
20 we're gonna address that at some point here today, Mr.
21 Lucynski after your preliminary examination. But we're
22 gonna talk about whether or not any amendments need to
23 be made to your bond terms moving forward, if in fact
24 this case is transferred over to circuit court. So,
25 what I'm gonna do is I'm gonna give copies of Appendix 4

1 your attorney, Mr. Jocuns, I'm gonna give copies of this
2 to Mr. Wanink and after the preliminary examination
3 takes place we'll address this matter as well, okay?
4 Fair enough?

5 MR. JOCUNS: Thank you, Judge. Judge, I have
6 one request if that's possible --

7 THE COURT: Sure.

8 MR. JOCUNS: -- here. I have a bit of a
9 headache, is it possible if I could have my tea here --

10 THE COURT: Oh, absolutely.

11 MR. JOCUNS: -- I won't make a mess --

12 THE COURT: That is not a problem at all, Mr.
13 Jocuns.

14 MR. JOCUNS: -- I promise. Thank you, Judge.

15 THE COURT: I'll give ya that basic human
16 right, okay?

17 MR. JOCUNS: All right, thank you.

18 THE COURT: All right. So, Heather, can you
19 have somebody make copies of this for Mr. Wanink and Mr.
20 Jocuns, please?

21 MS. MALLOY: Sure.

22 THE COURT: Okay. All right, are both parties
23 ready to proceed at this time with the preliminary
24 examination?

25 MR. WANINK: Yes, your Honor. Plaintiff's Appendix 5

1 MR. JOCUNS: Defense is ready, your Honor.

2 THE COURT: Okay. Mr. Wanink, first witness,
3 please?

4 MR. WANINK: Thank you. People call Deputy
5 Ryan Robinson.

6 THE COURT: Okay. Deputy Robinson, I'm gonna
7 have you take a seat up here at the witness stand for
8 us, please? Before you take a seat, I'm gonna have you
9 raise your right hand for me, please? Do you solemnly
10 swear or affirm to tell the truth, the whole truth, and
11 nothing but the truth in this matter?

12 MR. ROBINSON: I do, your Honor.

13 THE COURT: Okay, thank you, please be seated.

14 RYAN ROBINSON

15 (At 12:22 a.m., sworn as a witness and
16 testified as follows)

17 DIRECT EXAMINATION

18 BY MR. WANINK:

19 Q Sir, can you please state your full name, spell your
20 last name for the record?

21 A Deputy Ryan Robinson; spelling is R-O-B-I-N-S-O-N.

22 Q Thank you, sir. Where are you currently employed?

23 A The Tuscola County Sheriff's Office.

24 Q And are you a certified road patrol officer?

25 A Yes, I am.

Plaintiff-Appellee's Appendix 6

1 Q And how long have you worked in that capacity?

2 A I've worked at the department for 13 years, I've been
3 strictly road patrol for about 11 years now.

4 Q And were you working in your capacity as a road patrol
5 officer with the sheriff's department, on or about
6 January 20, 2020?

7 A Yes, I was.

8 (At 12:24 p.m., PX# 1 marked)

9 (At 12:24 p.m., PX# 2 marked)

10 (At 12:24 p.m., PX# 3 marked)

11 (At 12:24 p.m., PX# 4 marked)

12 (At 12:24 p.m., PX# 5 marked)

13 (At 12:24 p.m., PX# 6 marked)

14 BY MR. WANINK:

15 Q Drawing your attention to that date, do you recall being
16 on patrol in the area of Old State Road, near -- in
17 Wisner Township?

18 A Yes.

19 Q And at approximately 10:01 a.m., do you recall making
20 contact with an individual by the name of David Allan
21 Lucynski?

22 A Yes.

23 Q And he was operating a red Chevy Cobalt at the time,
24 correct?

25 A That's, that's correct.

Plaintiff-Appellee's Appendix 7

1 Q And what is it that first drew you to this particular
2 vehicle with Mr. Lucynski?

3 A As I was traveling west on Old State Road, I noticed two
4 vehicles stopped in the middle of the roadway, facing
5 opposite directions, so driver side doors/windows were
6 to each other. Mr. Lucynski was in a, a red Chevy
7 Cobalt, again they were, they were stopped in the middle
8 of the roadway, not pulled off to the side or anything
9 like that.

10 Q So they were impeding the flow of traffic at the time?

11 A That's correct.

12 Q And so, upon coming upon this scene, what did you do?

13 A I continued traveling westbound, with the intention to
14 stop the red Cobalt for impeding traffic. As I got
15 close enough to see a license plate, the vehicle turned
16 southbound into a driveway there.

17 Q And so it turned off from Old State Road into a personal
18 residence?

19 A Yes, yes.

20 Q And did you make contact with the occupants of the red
21 Cobalt?

22 A Yes, I did.

23 Q And how many were there?

24 A There was one.

25 Q And you identified the driver?

Plaintiff-Appellee's Appendix 8

1 A Yes, I did.

2 Q And who was the driver identified as?

3 A David Allan Lucynski.

4 Q And the driver, would you recognize him if you saw him
5 again?

6 A Yes.

7 Q Is he present in the courtroom today?

8 A Yes, he is.

9 MR. JOCUNS: No objection to identification,
10 your Honor.

11 THE COURT: Okay, thank you, so noted.

12 MR. WANINK: Okay, I was just gonna ask may the
13 record reflect.

14 BY MR. WANINK:

15 Q So, this location in Wisner Township, is that in Tuscola
16 County?

17 A Yes, it is.

18 Q Is it in the state of Michigan?

19 A Yes.

20 Q And given that this is 10:01 a.m., in the morning, is it
21 daylight out?

22 A Yes.

23 Q And so, when you made contact with the defendant, what,
24 if anything, did you notice?

25 A When I made contact, right away I questioned if he,
Plaintiff-Appellee's Appendix 9

1 if he knew who had lived there, cause just prior to
2 making contact I did have time to run the plate and I, I
3 saw that the registered owner of the vehicle lived on
4 Dickson Road in Reese, not on Old State Road where he
5 had turned in. I made contact with him and as we were
6 talking, I detected an odor of marijuana coming from,
7 from him and also throughout the conversation I detected
8 an odor of intoxicating beverages as well.

9 Q And did you ask the defendant, with regards to when was
10 the last time he had consumed any alcohol or controlled
11 substance?

12 A Yes, I did.

13 Q And what did he indicate with regards to alcohol?

14 A He stated approximately 20 minutes ago at the boat
15 launch he drank one beer.

16 Q And with regards to marijuana, did he indicate whether
17 he had recently consumed marijuana?

18 A He said he consumed at the same time, at the boat
19 launch.

20 Q Did he say how much?

21 A I do not recall that.

22 Q And approximately how much time between the boat launch
23 and when you're having contact with him?

24 A The boat launch is just less than two miles away from
25 there. Again, I believe he said 20 minutes was, was the

Plaintiff-Appellee's Appendix 10

1 amount of time that passed but I, I wouldn't have any
2 way of knowing if, if that was accurate or not.

3 Q All right. And when you came upon him sitting in the
4 middle of Old State Road, you had no idea how long he'd
5 been sitting there?

6 A That's correct.

7 Q And so based on these admissions of alcohol use and
8 recent marijuana use, what did you do next?

9 A I decided to run him through some field sobrieties.

10 Q And why did you wanna do that?

11 A To determine whether or not he could be legally
12 operating a vehicle.

13 Q And have you come in contact with individuals who might
14 be potentially under the influence of controlled
15 substance before?

16 A Yes.

17 Q Did they exhibit any kind of physical signs?

18 A Yes.

19 Q What in particular are you trained to look for?

20 A Well, as far as controlled substances, sometimes there
21 is -- how do I explain it, kind of not really tired, but
22 like --

23 MR. JOCUNS: Your Honor, with all due respect,
24 I must object that this is speculation, this is kind of
25 vague. I mean they're saying controlled substances,

Plaintiff-Appellee's Appendix 11

1 kind of tired, I also don't believe that there's any
2 specific authority that is being referenced to that
3 comes with this alleged knowledge, other than what may
4 be personal experience.

5 THE COURT: Any response, Mr. Wanink?

6 MR. WANINK: That was my question, is what is
7 his personal experience --

8 THE COURT: That was the question, Mr. Jocuns,
9 so the objection is overruled.

10 BY MR. WANINK:

11 Q In particular with marijuana, what have you seen in
12 individuals that you believed to be under the influence?

13 A From time to time, they'll have dry mouth, blood shot
14 eyes, watery eyes; things of that nature.

15 Q And did you see any signs that you just described with
16 regards to the defendant?

17 A His eyes were blood shot.

18 Q And what was his demeanor at the time you had interacted
19 with him?

20 A He was, he was actually pretty laid back. He didn't
21 seem agitated, anything like that. He was kind of calm
22 during the whole interaction.

23 Q Okay. And at some point, did you ever, for officer
24 safety, try to ascertain whether he had any weapons on
25 his person?

Plaintiff-Appellee's Appendix 12

1 A Yes, I, I always ask if, if people have weapons on 'em,
2 I asked him the same thing.

3 Q And what did he do when you asked him this?

4 A He, he lifted his shirt to show me his, his waistband.

5 Q Okay, did he lift it all the way?

6 A Yeah, it was all the way up to his chest.

7 Q Okay, rather than just his waistband?

8 A That's correct.

9 Q And so, based on his admissions and what you're
10 observing you indicated you had decided to put him
11 through field sobriety evaluations?

12 A Yes.

13 Q In particular, what examinations did you conduct with
14 the defendant, regarding this traffic stop?

15 A I, I started with the Horizontal Gaze Nystagmus. I also
16 did the one-legged stand and the walk and turn to make
17 sure I had the three standardized field sobrieties. I
18 then also conducted a lack of convergence task and
19 finger-to-nose, along with alphabet and counting.

20 Q And have you received any specialized training with
21 regards to administering these tests?

22 A Yes.

23 Q What in particular did you receive?

24 A I'm certified in the standardized field sobrieties and
25 I've also been to ARIDE training.

Plaintiff-Appellee's Appendix 13

1 Q And what is ARIDE?

2 A It's the Advanced Roadside Impaired Driving course that
3 I took, it's just to kinda help further the SFSD's, it's
4 kind of -- I guess I'd say it's like a step above, just
5 the standardized to look for primarily drugs.

6 Q All right, so it teaches you additional examination
7 methods on the roadside for detecting persons under the
8 influence?

9 A Yes, that's correct.

10 Q Of na -- of, I guess controlled substances, I'll be more
11 specific?

12 A Yes.

13 Q With regards to the Horizontal Gaze Nystagmus test, have
14 you administered that test before?

15 A Yes, I have.

16 Q And what is it you're trained to look for?

17 A Well, there's multiple things, the first thing you have
18 to look for is kind of the medical assessment to see if
19 there's equal pupil size and equal tracking when you
20 hold a stimulus, in this case my finger, in front of
21 their face and go back and forth. As long as their eyes
22 will equally track and the pupils are, are the same
23 size, you, you can generally assume that there's nothing
24 medically going on and so you can continue. You then
25 look for a lack of smooth pursuit. Plaintiff's Appendix 14

1 pass the stimulus back and forth. You're looking for
2 distinct and sustained nystagmus at maximum deviation,
3 which is as far as their eye can go in each direction
4 and then you're also looking to see if there's nystagmus
5 prior to 45 degrees in both eyes, lastly you would check
6 to see if there's any vertical nystagmus.

7 Q And what do this nystagmus indicate to someone who's
8 doing an investigation?

9 A Generally if they're -- if someone is showing nystagmus
10 in their eyes it means that they've been consuming
11 intoxicating beverages.

12 Q Okay. And with someone who might be under the influence
13 of a controlled substance, is there anything you look
14 for?

15 A You know, sometimes when there's alcohol and other
16 controlled substances on, on board, I was taught that it
17 might not show nystagmus like you generally would see
18 with just alcohol. I always start out my field
19 sobrieties doing that just to see what I can, what I can
20 gather, but your eyes can do different things on
21 different substances.

22 Q And in this particular case, the defendant admitted to
23 you to consuming both marijuana and alcoholic beverages?

24 A That's correct.

25 Q Had you inquired to him whether he had any medical

Plaintiff-Appellee's Appendix 15

1 conditions prior to administering these tests?

2 A I did not ask him if he had medical conditions, but when
3 I was per -- asking him to do the one-legged stand, he
4 did tell me he had bad knees.

5 Q Did he ever indicate to you that he had any mental
6 issues or head trauma or anything like that during the
7 administration of the test?

8 A No.

9 Q Did he exhibit any signs as you were cons -- conducting
10 the HGN?

11 A It -- for injuries or anything --

12 Q Yes.

13 A Yeah, no. He didn't show any, any signs of mental
14 impairment or traumas or anything like that?

15 Q What, if anything, did you note when you conducted the
16 Horizontal Gaze Nystagmus on the defendant?

17 A He did have a lack of smooth pursuit in both eyes. At
18 maximum deviation there was a slight nystagmus but he
19 didn't have nystagmus prior to 45, he didn't have
20 vertical nystagmus.

21 Q And with regards to the one-legged stand, was the
22 defendant able to perform that test based on what he
23 told you about his health condition?

24 A No, he was not.

25 Q Okay. How about the walk-and-turn? What is that

1 test and how is it performed?

2 A So, the walk-and-turn, I always tell the people to get
3 into the starting position, which would be the right
4 foot in front of the left foot, touching heel to toe,
5 arms down to the sides. I always tell them to stay in
6 that position until instructed otherwise, because I
7 explain everything and then I demonstrate before I have
8 them conduct the test. I explained to him he needed to
9 walk heel to toe, touching heel to toe with every step
10 counting every step out loud for nine steps, taking a
11 series of small steps to turn around. I explained it as
12 a pivot, leaving one, one foot planted and pivot around
13 that foot and then come back nine steps in the same
14 manner. I explained once they start to -- start to do
15 the test, to not stop at all during the test, just do it
16 to its completion; keep their arms down to the side, not
17 to use 'em for balance.

18 Q And what were the results of the defendant's performance
19 on this evaluation?

20 A When I had him get into the initial starting position,
21 he was off balance, he was leaning to the side, had to
22 use his arms for balance to steady himself. But then
23 once he got straight up and down and arms locked to the
24 side, the rest of the test he was able to complete.

25 Q All right. And can any -- can the performance on this
Plaintiff-Appellee's Appendix 17

1 test be an indicator to you with regards to whether an
2 individuals under the influence?

3 A Yes.

4 Q How about with regards to controlled substances?

5 A Yes.

6 Q And so, did you see anything in that test that led you
7 to believe he was under the influence of a controlled
8 substance or alcohol?

9 A The inability to balance at the, at the beginning of the
10 -- at the instructional phase.

11 Q And how about the alphabet test?

12 A I just asked the people to go from A all the way to Z.
13 I asked Mr. Luczynski the same thing, I always just tell
14 'em I don't wanna hear them sing, I don't want them to
15 blend any letters, like MNOP, I always just tell 'em, I
16 want clear distinct pauses; A-B-C-D, like that. He
17 completed it both times, both times he left out the Q
18 and then in the first, first attempt through, he -- his
19 R-S and T, that he had switched around, but the second
20 time, the only thing he did is he just missed the letter
21 Q.

22 Q And so, with regards to the performance on that test,
23 were there any indicators that he may be under the
24 influence, in your view?

25 A Yes.

1 Q Counting test, how is that -- what did you have him do
2 in regards to the counting test?

3 A I always use a range of 21 to 43 going forward. He was
4 able to count 21 to 43 with no issues. I always use 98
5 to 82 backwards, when he got down to 89 he, he said 89,
6 87 and then he corrected himself and was able to say it
7 the, the -- properly.

8 Q Can this also be an indicator that someone's under the
9 influence?

10 A Yes.

11 Q You had him perform finger-to-nose and Romberg or did
12 you have him perform only one of those two?

13 A I had him do the finger-to-nose, I didn't do the
14 Romberg.

15 Q All right. And any issues that you noted with regards
16 to finger-to-nose?

17 A No.

18 Q Now you discussed lack of convergence, what is lack of
19 convergence?

20 A So, basically you have subject stand in front of you, I
21 instruct them that I'm -- need them to follow again my
22 finger with their eyes, not to move their head at all.
23 I explained to 'em, I'm gonna do a couple large circles,
24 I'm gonna come close to them, I'm not going to touch
25 them but they're to focus on my finger, where I'm trying

Plaintiff-Appellee's Appendix 19

1 to get them to essentially look cross-eyed and my
2 training has told me that -- has taught me that someone
3 under the influence of narcotics, marijuana, things like
4 that, those muscles are affected they're not able to
5 converge their eyes normally, that they'll, they'll pull
6 apart, they, they can't essentially look cross-eyed.

7 Q And so this is an evaluation done on the roadside
8 specific to controlled substance?

9 A Yes.

10 Q Is that part of your ARIDE training?

11 A Yes.

12 Q And so, how did the defendant perform on the lack of
13 convergence, what did you observe, if anything?

14 A I, I went through it twice and his eyes would start to
15 come in, but they, they would start pulling apart
16 immediately. He was not able to look cross-eyed. I
17 asked him if he normally could look cross-eyed and he
18 said that normally he could. But again, he was not able
19 to when I had him follow my finger.

20 Q And can that be an indicator that someone's under the
21 influence, in your training?

22 A Yes.

23 Q Have you administered that test before?

24 A Yes.

25 Q And have you observed lack of convergence before on

1 individuals?

2 A Yes.

3 Q Now, did you do anything to I guess capture the
4 defendant's performance on these tests?

5 A I was wearing a body camera, during the entire contact.

6 Q I'm gonna show you what's been marked as People's
7 Proposed Exhibit Number One, this is a disc, correct?

8 A Yes.

9 Q All right. And this disc contains the interaction --
10 recorded interaction between you and the defendant?

11 A Yes.

12 Q Is it a true and accurate depiction of your interaction
13 -- you've had a chance to see it before?

14 A Yes.

15 Q And is it a true and accurate depiction of your
16 interaction with the defendant during the roadside
17 evaluations?

18 A Yes, it is.

19 MR. WANINK: Showing People's Proposed Exhibit
20 One to defense counsel, move for its admission.

21 MR. JOCUNS: Your Honor, I have this Exhibit
22 here, but I just wanna bring to the court's attention, I
23 don't believe that it's being brought properly because
24 it's not in the confines of MRE 803(6) with 902(11), in
25 essence, they would need someone that would be from the
Plaintiff-Appellee's Appendix 21

1 actual central dispatch or simple affidavit so, I'm
2 leaving this to the discretion of the court, your Honor.

3 THE COURT: Any response, Mr. Wanink?

4 MR. WANINK: Your Honor, it's a -- it's -- the
5 witness has testified it's a true and accurate depiction
6 of the interaction with the defendant, it contains his
7 statements as well as the officers, which have been
8 testified here to today, so I don't believe there is any
9 hearsay issue. With regard to authentication, those
10 rules don't apply here at preliminary examination, plus
11 the officer has authenticated it here as well.

12 MR. JOCUNS: Actually with all due respect,
13 your Honor, that's incorrect --

14 THE COURT: Mr. Jocuns --

15 MR. JOCUNS: -- in regards to applying at exam,
16 they apply at all hearings. So, whatever the weight the
17 court would like to give that.

18 THE COURT: Okay, thank you. Based upon the
19 testimony of Deputy Ryan Robinson, he has in fact
20 authenticated People's Proposed Exhibit One to the
21 court's satisfaction for purposes of this hearing,
22 therefore the Court will receive and admit at this time,
23 People's Exhibit One.

24 (At 12:40 p.m., PK# 1 received into evidence)

25 MR. WANINK: Thank you. Plaintiff-Appellee's Appendix 22

1 BY MR. WANINK:

2 Q And so, ultimately was the defendant placed under
3 arrest?

4 A Yes.

5 Q And what did you arrest him for?

6 A Operating While Intoxicated.

7 Q And was there any kind of chemical test performed on the
8 defendant that day?

9 A I, I requested him to take a PBT and then also I
10 requested consent for blood.

11 Q Okay. And did he ultimately agree to a blood draw?

12 A Yes, he did.

13 Q And where did that blood draw take place?

14 A At McLaren Caro Hospital.

15 Q Ultimately there was another deputy who assisted you in
16 collecting that sample?

17 A That is correct, yes.

18 Q And there was a report generated for the results of the
19 analysis of the defendant's blood taken that day?

20 A Yes.

21 Q Was it taken that day?

22 A Yes.

23 Q I'm gonna show you what's been marked as People's
24 Proposed Exhibit Three, this is a laboratory report,
25 correct?

1 A Yes, it is.

2 Q All right and does it pertain to this particular
3 investigation?

4 A Yes, it does.

5 Q And it identifies the suspect as the defendant as well
6 as it bears your complaint number for this incident?

7 A Yes, correct.

8 Q You're confident this lab result pertains to the blood
9 drawn from the defendant on this date?

10 A Yes, it does.

11 MR. WANINK: Your Honor, I believe we have a
12 stipulation for purposes of exam as to the admission of
13 the result -- the results of the analysis without
14 further foundation.

15 MR. JOCUNS: And, your Honor, specifically,
16 this comes in as the statute and the court rule modified
17 a few years ago, so I received notice and this should
18 come in.

19 THE COURT: Okay.

20 MR. WANINK: Move for its admission.

21 THE COURT: Thank you, the Court will receive
22 and admit People's Exhibit Two (sic) at this time.

23 MR. WANINK: I think it's Three, your Honor --

24 THE COURT: Three --

25 MR. WANINK: -- I'm sorry.
Plaintiff-Appellee's Appendix 24

1 THE COURT: -- thank you.

2 (At 12:41 p.m., PX# 3 received into evidence)

3 BY MR. WANINK:

4 Q And to your knowledge, that showed positive for the
5 presence of THC in the defendant's blood?

6 A Yes, it did.

7 MR. WANINK: Thank you, I don't have any
8 further questions.

9 THE COURT: Okay, thank you. Mr. Jocuns, any
10 cross-examination of this witness?

11 MR. JOCUNS: Yes, your Honor.

12 THE COURT: Okay, please proceed.

13 CROSS-EXAMINATION

14 BY MR. JOCUNS:

15 Q Deputy Robinson, you've been with the Tuscola County
16 Sheriff's Department for 13 years?

17 A That's correct.

18 Q Eleven of those years you've been what's, what's been
19 called, you've been on the road, been a road officer,
20 correct?

21 A That's correct.

22 Q And during that time, you said on the record, when you
23 went to the academy at some point and time you took the
24 standard field sobriety training course, is that right?

25 A I didn't have it at the academy, initially it's

1 something that the department had to send me to
2 afterwards.

3 Q And then eventually, you took the, the Advanced Roadside
4 Impaired Driving Evaluator course?

5 A That's correct.

6 Q Okay and I'm gonna ask you some questions about that in
7 a little bit, but I'm gonna bring you back to a day of
8 January 20, you were in your normal capacity as a police
9 officer on that date?

10 A Yes.

11 Q And you were doing your normal patrol, it was in the
12 morning, it was somewhere right around 9:30, 10:00?

13 A Yes.

14 Q And at that time, you were -- you happened to be on
15 what's referred to a M-25 or Old State Road?

16 A Old State Road is a dirt road that runs along M-25.

17 Q Okay, so it's --

18 A They run parallel for, for a little bit there.

19 Q Okay, thank you for explaining that. And at some point,
20 you saw it was two cars was on Old State Road?

21 A Yes.

22 Q And it, it appeared that they were -- may have been
23 blocking other cars from going around or impeding
24 traffic?

25 A That's correct, yes.

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1 Q And you observed this for several seconds?

2 A Yes.

3 Q Okay. And you were more than 20 feet away?

4 A Yes.

5 Q More than 30 feet away?

6 A Yes.

7 Q Could you have been like as far as like a quarter of
8 mile?

9 A That might be pushing it. I, I wouldn't say it was
10 quite a quarter mile, less than a quarter a mile.

11 Q Okay. And at, at some point you -- the, the cars split
12 up and one of them went and took a turn, is that true?

13 A When, when they pulled apart one car continued to go
14 eastbound, the direction it was facing, the red Cobalt
15 went westbound in the direction it was facing.

16 Q Okay.

17 A So, I, I just followed the, the red Cobalt because that
18 was the direction I was already driving.

19 Q And you followed the red Cobalt for a quarter mile,
20 less?

21 A Not even that far, yeah, it was -- essentially maybe 300
22 feet, 400 feet.

23 Q So when the -- you were observing, you're behind the
24 Chevy Cobalt and you observed the car turn into a
25 driveway?

1 A That -- yes.

2 Q And you initiated your emergency lights?

3 A I did not at that time, no.

4 Q You pulled behind him in the driveway then?

5 A Yes.

6 Q You initiated your lights at that point?

7 A No, I did not.

8 Q He was already outside of the car?

9 A Yes.

10 Q He was standing up?

11 A He was standing out of the vehicle, yes.

12 Q And you initiated conversation?

13 A Yes.

14 Q And you indicated that you observed what would have been
15 referred to as an odor of intoxicants, is that right?

16 A That's correct.

17 Q And you probably presumed that this was alcohol?

18 A I initially detected the odor of marijuana but also odor
19 of intoxicants as well, yes.

20 Q And when you detected the odor of marijuana was it, was
21 it a faint odor of cannabis?

22 A It was a burnt odor, it -- I, I would say that it's
23 faint because it was a cold windy day, it wasn't -- I, I
24 didn't have my head right up in the car, I wasn't
25 standing right up next to him, so yes it was faint.

1 odor.

2 Q And you just initiated some conversation with him at
3 that point, right?

4 A Yes.

5 Q You probably asked him if he had anything to drink?

6 A Initially I didn't ask him if he had anything to drink,
7 I, I asked him if he'd been sm -- if he had had
8 marijuana with him, because I smelled that odor first.

9 Q He told you he did have marijuana with him?

10 A Yes.

11 Q And marijuana was in his car?

12 A Yes.

13 Q And he showed you where it was?

14 A He, he told me that it was in the vehicle, I later found
15 where it was sitting.

16 Q Okay and you found it in the, the driver's seat?

17 A It, it has -- the, the gear shift selector is in the
18 middle, between the front two seats and it was right to
19 the right of the gear shifter.

20 Q And it was in a bag?

21 A No.

22 Q It was in a, a film canister?

23 A No, it was just laying on that console.

24 Q Was it in a piece of marijuana paraphernalia or was it a
25 joint or was it just like loose cannabis?

1 A Oh, it was -- yes, the, the, the marijuana was rolled up
2 into a rolling paper, it was -- I, I refer to it as a
3 marijuana cigarette.

4 Q Okay. You can say joint here as well, too.

5 A Well, I just -- that's the way --

6 Q Okay.

7 A -- that I write my reports and I don't wanna use just
8 common --

9 Q I understand. And so, this was a, a -- was a one
10 marijuana cigarette?

11 A Yes.

12 Q And it was just freshly rolled, did you make that
13 determination?

14 A I haven't -- I have no way of knowing if it was freshly
15 rolled, it was burnt at one end was the only thing I
16 know about it. I, I don't know when that could have
17 been rolled.

18 Q Okay. And it could have been burnt for a day or two?

19 A It could have, yes.

20 Q And you took that into evidence as well?

21 A Yes, I did.

22 Q Okay. And after you had this initial conversation with
23 Mr. Lucynski, Deputy Robinson, you decided that you were
24 gonna administer standard field sobriety tests, is that
25 true?

1 A Yes.

2 Q Okay. And do you recall the first test that you had
3 actually administered?

4 A That was the Horizontal Gaze Nystagmus.

5 Q Okay. So when you did the Horizontal Gaze Nystagmus, he
6 was standing by his car, is that right?

7 A Yes.

8 Q Okay. And your patrol car was behind that a few feet?

9 A Yes.

10 Q And I think it was behind and to the right?

11 A It wasn't offset very much because essentially it's just
12 a one lane driveway. I can't say if it was offset or
13 not, but it was behind his vehicle.

14 Q And that -- and you did not have your emergency lights
15 on at that point, correct?

16 A At that point I did not.

17 Q And when you administered the HGN test, you did like you
18 normally do and you, you had something that's either a
19 light, pen like and you go to one side, you go to the
20 middle and then you go to the other side, is that how
21 you administer it?

22 A Can, can I just clarify something --

23 Q Absolutely.

24 A -- when I started the field sobrieties, I did activate
25 my lights at that point.

Plaintiff-Appellee's Appendix 31

1 Q Your activated your lights?

2 A Yes, I activated my lights --

3 Q Thank you for sharing that.

4 A -- at that, at that point I did.

5 Q And these are your emergency lights?

6 A Yes.

7 Q Thank you for clarifying. So you administered the HGN
8 the way that you learned in S.F.S.T. course?

9 A That's correct.

10 Q The same way that you learned in the Advanced Roadside
11 Impaired Driving Evaluator course?

12 A Yes.

13 Q And you're supposed to look for a few different cues?

14 A That's correct.

15 Q Lack of smooth pursuit?

16 A Yes.

17 Q Lack of smooth pursuit at maximum deviation and in this
18 circumstance, I believe that you had indicated that
19 there was a distinct nystagmus at maximum deviation on
20 the left and the right eye, is that true?

21 A That's correct.

22 Q And this is a, a TH -- this is a THC inv -- this is
23 before or after you gave the PBT?

24 A That was before I gave a PBT.

25 Q That was before you give a PBT?

1 A Right.

2 Q And as a matter of fact, for Horizontal Gaze Nystagmus,
3 there is approximately 86 different factors that can
4 cause that, that's something you learn in the ARIDE
5 course, right?

6 A I don't remember an exact number, I'll be honest. I
7 don't have any way to, to know if that's the number of
8 things that can cause that or not.

9 Q Dry eyes can cause it, humidity can cause it, someone
10 has a headache, things like that that can cause
11 nystagmus, that's also true, isn't it?

12 MR. WANINK: Your Honor, I guess I object, the
13 officer's already testified he doesn't remember. So --

14 THE COURT: He doesn't remember the exact
15 number of the ways that it can be affected, but Mr.
16 Jocus can go through the different things that he
17 believes could affect the results of the test and ask
18 him if he realizes that could be an impediment to the
19 test results or not. So, I think the question is fine,
20 the objection is overruled and Mr. Jocus you can
21 proceed.

22 MR. JOCUNS: Thank you.

23 BY MR. JOCUNS:

24 Q So and as, as a matter of fact, one of the things that
25 you do not find Horizontal Gaze Nystagmus from is from

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1 cannabis use, is that true?

2 A Generally that's correct, yes.

3 Q Okay. And in your ARIDE course, there -- you also
4 learned the appropriate way to administer these tests,
5 is that also true?

6 A Yes.

7 Q And in the ARIDE course, you also learned about
8 something called optokinetic nystagmus?

9 A It might have been called a different term, if you're
10 referring to when the flashing lights, if someone's
11 focusing and, and the flashing lights, I had him turn
12 away from the lights while I was doing the HGN task. He
13 wasn't facing my patrol car.

14 Q Regardless if it's facing your lights or not, those
15 lights could still cause optokinetic nystagmus, is that
16 not correct?

17 A Well, I had him turn away from it, it wasn't nighttime,
18 so, so he wouldn't be able to see those flashing off of
19 me or surrounding areas, anything like that.

20 Q Okay and just to be sure, you're not a trained doctor?

21 A That's correct.

22 Q You're not a pharmacologist?

23 A I am not.

24 Q You're not a physicist?

25 A I am not.

1 Q You're not a chemist?

2 A That is true.

3 Q You're not a biologist?

4 A Nope.

5 Q You're not a physiatrist?

6 A I am not.

7 Q So you really don't have knowledge as to what may cause
8 that matter, would that be a fair statement?

9 A That is -- that's a fair statement, correct.

10 Q And at some point you also administered some other tests
11 as well, one of them you -- is the one-legged stand,
12 right?

13 A That is correct.

14 Q And before you administered the one-legged stand, you
15 asked him if he had any physical injuries or any sort of
16 disability or something that would prevent him from
17 performing the task, correct?

18 A He, he told me he had bad knees.

19 Q Okay. You asked him before you administered the test?

20 A I don't recall if I asked him or if he offered that
21 information when I started to explain to him how to
22 perform it.

23 Q You are aware that in the S.F.S.T. manual and the ARIDE
24 manual, 2006 and 2013, that they indicate that you're
25 supposed to do that, is that fair statement?

1 A Yes.

2 Q And you've taken -- when was the most recent time you've
3 taken the ARIDE test, by the way?

4 A It's been several years, I would say probably, probably
5 five years.

6 Q Okay.

7 A I don't know for sure, that's just what it seems like it
8 might be.

9 Q So, when he performed a one-leg tes -- and, and again,
10 we got -- ask -- no one really passes or fails the
11 standard field sobriety test, right?

12 A Correct.

13 Q It's just your own personal observations?

14 A It's -- there are cues to look for during the tasks and
15 it's kind of looked at as a whole, as kind of a totality
16 of, of how they do overall.

17 Q Okay, so for the one-leg stand, he had a -- I think he
18 did one side, he had difficult time doing it because he
19 had issues with one of his knees or one of his legs, is
20 that, does that sound correct?

21 A That is correct.

22 Q Okay. So, let's talk about the walk-and-turn, this is
23 another one of the, the three standard -- standard field
24 sobriety tests through National Highway Traffic Safety
25 Association, which I'm sure you're aware of, is that right?

1 A That's correct.

2 Q Okay. And when you administered the walk-and-turn, 9
3 paces there, 9 paces -- you make a little turn and 9
4 paces back, is that right?

5 A Yes.

6 Q And then when he did that, you say that he lost balance
7 at the starting position, right?

8 A Yes.

9 Q And you also indicated that his arms may have swayed a
10 little bit?

11 A Yes.

12 Q Would they have been outside, maybe about six inches?

13 A When he was getting into the starting position, his, his
14 arms moved more than 6 inches away from his body --

15 Q Okay, so he was --

16 A -- to gain his balance.

17 Q -- adjusting?

18 A He was, he was trying to gain his balance.

19 Q Okay. And so, right when he took the test or right when
20 he started taking the steps, he performed the task well,
21 wouldn't you -- would that be not an accurate statement?

22 A I didn't note any other issues with it, other than at
23 the starting position.

24 Q The rest of the test was completed correctly --

25 A Yes.

1 Q -- those are your words, right?

2 A Yes.

3 Q And then there's some other tests that you give that
4 really just to, to kind of flow in there to get the big
5 picture for you being the, the witness of a DUI
6 investigation, is that also an accurate statement?

7 A Yes, there are other tests that we use.

8 Q Like the, the alphabet test, that's not a standard field
9 sobriety test --

10 A Correct, it's the --

11 Q -- and you gave the alphabet test?

12 A Correct.

13 Q And you say that he muffed on the Q, right?

14 A Correct.

15 Q He also told you that he has difficult time spelling and
16 things of -- like the alphabet at times, he indicated
17 that to you?

18 A He did. Prior, prior to asking anyone to say the
19 alphabet, I ask what grade they've completed, he stated
20 he had a 12th grade education.

21 Q And then the same would be true with the counting test,
22 correct?

23 A Correct.

24 Q And you said that your standard that you personally is,
25 I believe you go from 98 and then count down to 42?

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1 A Ninety-eight to 82 backwards.

2 Q Ninety-eight to 82.

3 A Yeah.

4 Q And is there any other counting that you have somebody
5 do?

6 A Twenty-one to 43 forward.

7 Q Okay. And all the numbers were stated correctly?

8 A The 21 to 43 was stated correctly going forward; 98 to
9 82, when he got down to the 80's, he said 89, 87 and he
10 had to correct himself to go, 89, 88, 87; everything was
11 correct after that.

12 Q Okay. And you were the officer that -- you, you were
13 the officer in charge, right?

14 A That's -- I was the only officer there.

15 Q I mean, just -- there was a little smidgen when you, I
16 believe it was, Deputy Alexander, I think that was his
17 name, that had to help with the blood draw?

18 A Well, it's actually Deputy Wade now --

19 Q I'm sorry about that.

20 A -- I made a mistake in, in my report and listed her as
21 Alexander. She has been married, so her, her last name
22 now is Deputy Wade.

23 Q It's the same human being --

24 A Yes.

25 Q -- with a different name?

1 A Yes.

2 Q Thank you. And so, that was the only person that had
3 helped and it was just for a smidgen of this
4 investigation and actually for the blood draw, right?

5 A Right. I got called away for a track with the
6 department K9.

7 Q Okay. And -- excuse me -- he was slurring his speech?

8 A I wouldn't say that he was slurring his speech, I don't
9 recall that. No, I don't, I don't recall him slurring
10 his speech.

11 Q Okay. As a matter of fact, in your police report, you
12 indicated his speech was clear?

13 A Okay.

14 Q As far as your -- because Advanced Roadside Impaired
15 Driving Eva -- you said that this is actually one step
16 forward on top of the F.S.T.'s, you did say something
17 like that when Mr. Wanink just questioned on direct
18 exam, right?

19 A That is correct.

20 Q And that's actually supposed to be more thorough
21 training?

22 A Yes.

23 Q And as a matter of fact as part of the more thorough
24 training, you're not just looking for someone that's,
25 you know a drunk driver, some

1 that right?

2 A That's correct.

3 Q And you're looking at, you know, if someone's on Xanax
4 or some other sort of narcotic, right?

5 A There are different drug classes, yes, that we look for.

6 Q And you're familiar with in March of 2019 of the
7 Impaired Driving Commission report?

8 A I guess I don't know exactly what you're referring to.

9 Q It would come up with the Michigan State Police updates
10 that you actually get briefed on by your sheriff and
11 local law enforcement, are, are you familiar with that
12 document, it's about 17 pages?

13 A I receive legal updates from time to time, but I guess I
14 don't know by the date which -- what exactly you're
15 referring to.

16 Q So, you would also agree that you're familiar with the,
17 the National Highway Traffic and Safety Association or
18 what's referred to as NHTSA, true?

19 A Correct.

20 Q And you're also aware that they had a study in 2017 that
21 talks about standard field sobriety tests?

22 A Again, just, just by dates, I don't necessarily remember
23 exactly when they put things out --

24 Q Well clearly -- how about we just talk about your ARIDE
25 training?

1 A Okay.

2 Q As part of your ARIDE training, it's also true that they
3 -- that there's two other tests that you're supposed to
4 be doing if you're looking for a narcotic, something
5 besides alcohol, is that right?

6 A Yes.

7 Q Okay, one of those tests is the Romberg test?

8 A That is correct.

9 Q And you had him perform the Romberg test?

10 A I did not --

11 Q Okay.

12 A -- I forgot.

13 Q I'm sorry, did -- I'm sorry, did you say you forgot?

14 A I forgot to administer that, correct?

15 Q That might have been something that's important, right?

16 A I feel --

17 Q And the Romberg is like when you, you have him stand
18 back, eyes closed, count to 30, does this sound right?

19 A Es -- estimate the passage of 30 seconds in their mind,
20 yes.

21 Q And then plus or minus 5 seconds, that would be within
22 an acceptable ratio, right?

23 A Correct.

24 Q So, as far as concern, that was within an acceptable
25 ratio, cause you didn't administer the test? And one of

1 those other tests is the lack of convergence, correct?

2 A Yes.

3 Q And you indicated that you circle around one eye and
4 then the other eye and you said that there was a problem
5 with that?

6 A Well you, you do circles around the whole face so that
7 both eyes are tracking the entire time and then you move
8 in between the eyes, toward the nose, but you don't
9 actually touch the person.

10 Q But you also agree that the actual standard field
11 sobriety tests, they have nothing to do with alcohol --
12 or excuse me, they have nothing to do with anything
13 other than alcohol?

14 A Well --

15 Q It's in your ARIDE manual.

16 A -- well, they, they tell us to perform standardized --
17 the SFST's on, on all people that might be impaired
18 under any substance, just to get a base.

19 Q And, I'm sorry, I have -- I'm back tracking to the, the
20 walk and turn, which you did say he did that test
21 correctly after the initial slow start, correct?

22 A Correct.

23 Q Okay. And again, some of the other tests that you had
24 gi -- administered, that aren't necessarily a formal
25 test; finger-to-nose, you said that he performed that

1 correctly?

2 A Yes.

3 Q And his demeanor, was he -- was he combative?

4 A Not at all.

5 Q Okay. As a matter of fact, you would say that he was
6 courteous?

7 A Yes, he was, he was cooperative the entire time.

8 Q Respectful?

9 A Yes.

10 Q Okay.

11 MR. JOCUNS: Your Honor, I have nothing
12 further for Deputy Robinson.

13 THE COURT: Okay. Deputy Robinson, quick
14 question before I allow Mr. Wanink to redirect. You
15 stated that when you first witnessed Mr. Lucynski's
16 vehicle, his vehicle was on Old State Road and it was
17 stopped in the road, speaking to another vehicle who was
18 on the opposite side of the road, correct?

19 THE WITNESS: Yes, the opposite lane, yes.

20 THE COURT: Opposite lane, thank you. Besides
21 those two vehicles, was there any other vehicle's on Old
22 State Road that you observed at that time?

23 THE WITNESS: Just my vehicle.

24 THE COURT: Okay. And you're vehicle was
25 where before Mr. Lucynski's car took off from that fixed
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1 location?

2 THE WITNESS: I would have been to the, to the
3 east of their location, driving west.

4 THE COURT: And approximately how far away
5 were you from the two parked -- well not parked cars,
6 stopped cars in the roadway before Mr. Lucynski's car
7 started to proceed in the direction that his car was
8 facing?

9 THE WITNESS: Before he pulled away?

10 THE COURT: Correct.

11 THE WITNESS: I guess I would say about 800
12 feet or so.

13 THE COURT: Did you at any time, Deputy
14 Robinson, see the two vehicles that were idling or
15 stopped and Old State Road actually block, obstruct,
16 impede, or interfere with the normal flow of traffic on
17 Old State Road?

18 THE WITNESS: No, there were no other vehicles
19 on that stretch, other than us.

20 THE COURT: Okay, thank you. Mr. Wanink, any
21 redirect based on the Court's questions or Mr. Jocuns
22 questions?

23 MR. WANINK: Yes, your Honor.

24 REDIRECT EXAMINATION

25 BY MR. WANINK:

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1 Q In addition, Deputy Robinson, when you observed these
2 vehicles, did you find the behavior odd?

3 A Yes.

4 Q And --

5 MR. JOCUNS: Your Honor, I mean it's a little
6 bit vague in the statement, I mean I have to object
7 here, I don't understand what you mean by, behavior is
8 odd.

9 MR. WANINK: I just --

10 THE COURT: Well, he can ask, he can ask that
11 question --

12 MR. JOCUNS: Okay, thank you, Judge.

13 THE COURT: -- I suspect, Mr. Jocuns, that Mr.
14 Wanink's gonna ask why exactly he considered that
15 behavior to be odd in his next question, but --

16 MR. WANINK: Yes.

17 THE COURT: -- I may be mistaken by that, but
18 for purposes of the prelim, that objection will be
19 overruled. Mr. Wanink, the question will stand and you
20 can proceed with your next question at this time.

21 BY MR. WANINK:

22 Q Deputy Robinson, what was going through your mind as you
23 watched these two vehicles park next to each other,
24 facing in opposite directions, stationary in the middle
25 of the roadway?

1 A Again, they had driver side window and a driver side,
2 they were obviously communicating. There were no houses
3 along that stretch, they weren't parked in front of any
4 residences. They weren't at the bridge where people
5 commonly stop to fish from the bridge. My initial
6 thought was that there, there may have been a drug deal
7 or something going on, because it was a rural area and
8 no one was around.

9 Q Have you encountered that kind of situation before?

10 A Yes.

11 Q All right. And so, did that also play into the reason
12 why you focused on this red Cobalt?

13 A Yes.

14 Q And as a matter of fact, the vehicle was obstructing the
15 flow of traffic at the time?

16 A When I first saw them, yes.

17 Q All right, could other cars get through with this red
18 Cobalt sitting in the lane that you were in?

19 A No.

20 Q Now, in addition to-- and following up on what Mr.
21 Jocuns asked you, the SFST's, the other SFST's, such as
22 the walk-and-turn, things like that, are you also
23 taught, as part of your training to observe their
24 ability, the subjects ability to follow directions?

25 A Yes.

1 Q And what can a subjects ability to follow directions or
2 difficulty in following directions tell you as an
3 officer in evaluating whether the person's under the
4 influence?

5 A It, it tells us that they, they might be impaired if
6 they're not able to divide their attention between
7 multiple things.

8 Q All right. So, you look for divided attention with
9 regards to how you administer the test and how they
10 performed?

11 A Yes.

12 Q Did you observe whether or not the defendant had any
13 difficulty following directions, as you were
14 administering the test?

15 A Yes.

16 Q Was that another indicator for you that he may be under
17 the influence?

18 A Yes.

19 Q All right, thank you.

20 ~~THE COURT:~~ MR. WANINK: I have nothing further.

21 THE COURT: Okay, thank you. Mr. Jocuns, any
22 recross of Deputy Robinson at this time?

23 MR. JOCUNS: Extremely brief.

24 RECROSS-EXAMINATION

25 BY MR. JOCUNS:

1 Q So, in your 11 years on -- as a patrol officer with the
2 Tuscola County Sheriff Department, you've observed drug
3 deals that would occur in the middle of nowhere?

4 A I've observed people stopped on the side of the road,
5 here's been other reports that I've read where officers
6 have, have come across drug deals. I've --

7 Q This is on Old State Road?

8 A Not on Old State.

9 Q Oh, okay.

10 A It's a rural area, is why I suspected it, a rural area
11 with no houses around, nobody else around the area.

12 Q And you said, no one around the area, right?

13 A That's correct.

14 Q Okay. So, and, and you're familiar with rural
15 communities?

16 A Yes.

17 Q And a good chunk of Tuscola County, you would say, is
18 rural community?

19 A Yes.

20 Q Also a good chunk of the Thumb you would probably say
21 too, right?

22 A Yes.

23 Q And so, sometimes when people see each other that they
24 know, is it not uncommon to stop the car, roll down the
25 window and say, hey, yo?

1 A I wouldn't say that's uncommon.

2 Q It would be on the -- right, so it's, it's not something
3 that you would say is odd then?

4 A Correct.

5 Q Okay.

6 MR. JOCUNS: Nothing further for the witness.

7 THE COURT: Okay, anything else, Mr. Wanink?

8 MR. WANINK: No, thank you.

9 THE COURT: Okay. Thank you, sir, you're all
10 set.

11 (At 1:07 p.m., witness excused)

12 (At 1:07 p.m., testimony of deputy ordered
13 transcribed concluded)

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I certify that this transcript, consisting of 50 pages
is a complete, true, and correct transcript of and excerpt of
the testimony taken in these proceedings on January 15, 2020
as recorded by Heather Malloy and transcribed by Shelly R.
Foley.

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Dated: March 9, 2020

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Shelly R. Foley CER 5659
Certified Court Recorder
440 North State Street
Caro, Michigan 48723
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**EXHIBIT #2: COPY OF DISTRICT COURT OPINION AND ORDER
OF MARCH 27, 2020**

STATE OF MICHIGAN
IN THE 71-B JUDICIAL DISTRICT COURT FOR THE COUNTY OF TUSCOLA

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v

File No. 20-0045FD
Hon. Jason E. Bitzer
District Court Judge

DAVID ALLAN LUCYNSKI,
Defendant,

Mark E. Reese P47247
Prosecuting Attorney
BY: ERIC WANINK
207 E. Grant St., Suite 1
Caro, MI 48723
(989) 672-3900

BERNARD A. JOCUNS P65478
Attorney for Defendant
385 W. Nepessing St.
Lapeer, MI 48446
(810) 245-8900

At a session of said Court held in the courthouse, in the City of Caro, County of Tuscola,
State of Michigan, on this 27th day of March, 2020

PRESENT: HONORABLE JASON E. BITZER
District Court Judge

OPINION AND ORDER

On March 4, 2020, the Court conducted the Preliminary Examination in *The People of the State of Michigan v David Allan Lucynski, 20-0045-FD*. The Prosecution called the arresting officer, Deputy Ryan Robinson of the Tuscola County Sheriff's Office, as their first witness.

Deputy Robinson testified that on January 20, 2020, he was on road patrol in Wisner Township, Tuscola County, State of Michigan. Deputy Robinson testified that at approximately 10:01 a.m. he effectuated a traffic stop on the Defendant, David Allan Lucynski, on Old State Road. Following that traffic stop, Deputy Robinson testified that he detected an odor of marijuana and of intoxicating beverages as he was speaking to Lucynski. Deputy Robinson then asked Lucynski if he had used marijuana or alcohol recently. Lucynski responded that he had used both approximately twenty (20) minutes prior to the stop at the nearby boat launch. Deputy Robinson testified that Lucynski had blood shot eyes, which Deputy Robinson attributed to Lucynski's recent use of

marijuana. Deputy Robinson then conducted the following Field Sobriety Tests on Lucynski:

- 1) Horizontal Gaze Nystagmus.
- 2) One-Legged Stand
- 3) Walk and Turn
- 4) Alphabet Test
- 5) Counting Test
- 6) Finger-to-Nose

Deputy Robinson testified that he had observed Lucynski exhibit actions during the performance of these tests that could be indicators of impairment. Following these tests, Lucynski was placed under arrest. He agreed to a blood draw which took place at McClaren Caro Hospital. The laboratory report of this blood sample was admitted into the Preliminary Examination record as Exhibit 3. This report revealed the presence of THC in Lucynski's blood.

However, as the Court inquired during its summation at the end of the Preliminary Examination, is the evidence obtained as a result of this traffic stop on Lucynski admissible? Generally, seizures, which includes traffic stops, are reasonable for purposes of the Fourth Amendment only if based on probable cause. *People v Hamp*, 170 Mich App 24, 32, 428 N.W.2d 16 (1988), vacated in part 437 Mich 865; 462 NW2d 589 (1990) (citing *Dunaway v New York*, 442 US 200, 207-209; 99 S Ct 2248; 60 L Ed 2d 824 (1979))

However, an Officer may conduct an investigative stop and seizure of a motor vehicle if the officer has an "articulable and reasonable suspicion that the vehicle or one of its occupants is violating the law" *People v Matthew Williams*, 236 Mich App 610, 612; 601 NW2d 138 (1999). "A valid investigatory stop must be justified in its inception and must be reasonably related in scope to the circumstances that justified interference by the police with a person's security. Justification must be based on an objective manifestation that the person stopped was or was about to be engaged in criminal activity as judged by those versed in the field of law enforcement when viewed under the totality of the circumstances. The detaining officer must have had a particularized and objective basis for the suspicion of criminal activity." *People v Champion*, 452 Mich 92, 98-99; 549 NW2d 849 (1996), citing *People v Shabaz*, 424 Mich 42, 378 NW2d 451 (1985). "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *Id.* at 98, citing *United States v. Sokolow*, 490 US 1; 109 S Ct 1581; 104 L Ed2d 1 (1989).

This includes, but is not limited to, reasonable suspicion that the Defendant has committed a civil infraction. *People v Dillon*, 296 Mich App 506, 510; 822 NW2d 611 (2012) citing *People v Williams*, 236 Mich App 610, 612; 601 NW2d 138 (1999). If the traffic stop and seizure of the Defendant was not supported by probable cause or articulable and reasonable suspicion, then all evidence seized as a result of the

unconstitutional stop and seizure must be excluded from trial. See *People v Goldston*, 470 Mich 523, 528; 682 NW2d 667 (2004).

Deputy Robinson testified first that he had stopped Lucynski's vehicle because Lucynski's vehicle was impeding traffic in violation of MCL 257.626b(1). To support that conclusion, Deputy Robinson testified that he observed Lucynski's vehicle stopped on Old State Road having a conversation with an individual in a different vehicle in the opposite lane. Deputy Robinson estimated that when he got approximately eight hundred (800) feet away from where the vehicles were stopped on Old State Road, the vehicles started to pull away. Further, the Court and Deputy Robinson had the following exchange:

THE COURT: Did you at any time, Deputy Robinson, see the two vehicles that were idling or stopped on Old State Road actually block, obstruct, impede, or interfere with the normal flow of traffic on Old State Road?

THE WITNESS: Deputy Robinson: No, there were no other vehicles on that stretch, other than us.

Secondly, on redirect, Deputy Robinson testified that his initial thought after observing these vehicles in the roadway was that there was potentially an illicit drug transaction taking place. Those were the only two reasons given for the traffic stop of Lucynski.

In analyzing these two reasons for the traffic stop, the Court first will address its ability to consider the exclusion of evidence at the Preliminary Examination stage of proceedings. Pursuant to MCR 6.110(D), the Court has the ability to exclude evidence that is not admissible during the Preliminary Examination. Therefore, if the evidence was obtained as a result of an unconstitutional seizure of the Defendant, the evidence would not be admissible for purposes of the Preliminary Examination.

The Court will first address the second reason provided by Deputy Robinson for the stop, namely his belief that a drug deal was taking place between the two vehicles. Again, Deputy Robinson's testimony was this traffic stop was effectuated at approximately 10:00 a.m. in broad daylight on a rural, dirt road. He further testified that he has no prior personal or second-hand knowledge of drug deals taking place on Old State Road. He did not testify that he witnessed an exchange of any items or money between the two vehicles. He did not testify that he witnessed any furtive actions on the part of either vehicle prior to the stop of the Defendant, or any nervous looking occupants of said vehicles prior to the stop of the Defendant. He did not testify that prior to the stop that he was familiar with the vehicles or their occupants and had knowledge of prior drug-related activity on their part.

In summary, this belief by Deputy Robinson that the vehicles were engaged in a drug deal was an inchoate or unparticularized suspicion or hunch. Therefore, as it relates to this testified reason for the traffic stop of Lucynski, neither probable cause nor reasonable suspicion was present.

As it relates to the contention that Lucynski was "impeding traffic" in violation of MCL 257.676b(1), the Court must first analyze the content of that particular statute. MCL 257.676b(1) provides as follows:

Subject to subsection (2), a person, without authority, shall not block, obstruct, impede, or otherwise interfere with the normal flow of vehicular or pedestrian traffic upon a public street or highway in this state, by means of a barricade, object, or device, or with his or her person. This section does not apply to persons maintaining, rearranging, or constructing public utility facilities in or adjacent to a street or highway.

Again, Deputy Robinson testified that besides the two vehicles, including Lucynski's, stopped on Old State Road, he was the only other vehicle at that time that he observed on that road. He testified that he was approximately eight hundred (800) feet away when the two vehicles started to pull away. He testified that the two vehicles were not blocking, obstructing, impeding, or interfering with any traffic on Old State Road.

The Prosecution has stated that showing an actual impediment to the normal flow of traffic is not necessary to support a violation of this statute. In support of that contention, the People cite to an unpublished case, *People v Salters*, 2001 WL 765852, No. 215396 (Jan. 26th, 2001). Specifically, that case held as follows:

The intent of the statute was clearly to prohibit a vehicle from impeding vehicular or pedestrian traffic to promote public safety. Consistent with this purpose, we conclude that the statute did not require a showing of an actual impediment to the smooth flow of traffic in order to establish a violation of the statute.

Pursuant to MCR 7.215(C), an unpublished opinion is not precedentially binding under the rule of stare decisis. However, the Court may use it as persuasive authority. Neither Counsels' briefs address any additional cases as it pertains to the interpretation of this particular Statute.

Upon the Court's own research, the Tennessee Supreme Court in *State of Tennessee v Hannah*, 259 SW3d 716 (Tennessee 2008) analyzed its "impeding traffic" statute, Tennessee Code Annotated section 55-8-154(a) (2004). In this case, the Defendant was operating a motor vehicle at a speed of twenty (20) to twenty-five (25) miles per hour in a thirty-five (35) mile per hour zone. *Id.* at 719. The police followed the Defendant's vehicle for fifteen (15) to seventeen (17) blocks before initiating the traffic stop for impeding traffic. *Id.* No other traffic violations were observed by the police during this time. *Id.* After the stop was effectuated, drugs were discovered in the vehicle. *Id.*

The Defendant had filed a motion to suppress, arguing that there was no constitutionally legitimate reason his vehicle was stopped by law enforcement. *Id.* During this hearing, the investigating officer testified that the vehicle's slow speed was

unusual for the area because other automobiles would generally exceed the posted maximum speed limit. *Id.* The Officer testified that though the vehicle never forced approaching automobiles to completely stop in the roadway, that most traffic was doing double that vehicle's speed. *Id.* He further testified that when approaching automobiles would come up behind the vehicle that they would have to brake fairly quickly and change lanes in order to pass. *Id.* The Officer also noted that there was moderate traffic even for that time of night on that road. *Id.*

The Trial Court reviewed Tennessee Code Annotated section 55-8-154(a), which provides: "No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or compliance with law." *Id.* The Trial Court concluded that the Defendant's vehicle did not violate this statute, and granted the Motion to Suppress. *Id.* at 719-720.

The Tennessee Supreme Court reviewed cases from Minnesota, Montana, Pennsylvania, Wisconsin, Illinois, North Dakota, Oregon, and Texas. In doing so, the court noted that the decisions from these states focused on whether a driver's slow speed blocked or otherwise backed-up traffic. *Id.* at 722. The Court then concluded from this exhaustive research that if a driver's slow speed *does not affect other motorists* then the driver is not impeding traffic. *Id.* at 722-723. In particular, the Court cited the Illinois case of *People v. Brand*, 71 Ill App 3d 698, 28 Ill Dec 83, 390 NE2d 65, 68 (1979), which held that a police officer lacked reasonable suspicion to initiate a stop of the defendant's automobile for impeding traffic when there was no evidence in the record that the defendant's slow speed affected other drivers. *Id.* at 722. The Tennessee Supreme Court sent the case back to the trial level because of a misinterpretation of this statute by the Trial Court, albeit with the reasoning cited above as the framework for the Trial Court to base their decision on.

While this case is not precedentially binding, it like the *Salters* case, can be used as persuasive authority. Certainly, the Court concedes that there are obvious differences between the Tennessee State Statute cited above and MCL 257.676b(1). And certainly the Court concedes that the facts of the cases are different in that the Tennessee case dealt with a slow vehicle, while in this instant action, the Defendant's vehicle was momentarily stopped in the roadway. But the general premise of the statutes is similar and the language is substantially similar in key areas as illustrated below:

Michigan: . . . block, obstruct, impede, or otherwise interfere with the normal flow of vehicular or pedestrian traffic . . .

Tennessee: . . . impede the normal and reasonable movement of traffic

The Court believes that the Tennessee Supreme Court's interpretation follows the most important maxim of statutory interpretation, which is to afford the text of the statute its plain and ordinary reading. Applying the same, common sense approach to the interpretation of MCL 257.676b(1), this Court finds that a

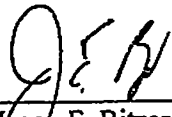
violation of that statute requires a showing that real, not imagined, traffic was actually impeded or obstructed in some way by a person or a vehicle. The scant, cursory conclusion of Michigan Court of Appeals in *Salter* does not offer any insight as to why that panel of the Court of Appeals believed otherwise. Therefore, in comparing the two persuasive authorities cited within this brief, the Court gives more credence to *State of Tennessee v Hannah, supra*, and the plethora of cases from other jurisdictions that are cited within that opinion.

Therefore, because the testimony of Deputy Robinson was that Lucynski's vehicle was not actually impeding or obstructing any actual traffic, the Court finds that he lacked probable cause or reasonable suspicion to effectuate the traffic stop. Therefore, the Court finds that the evidence obtained after the Traffic stop should be excluded from evidence in this matter.

In reviewing the legally admissible evidence in this matter, the Court finds that there is not probable cause to support the bind over on Count 1, and the Court will dismiss this Count.

The Court will therefore set Count 2, Operating while License Suspended-2nd or Subsequent Offense and Count 3, Open Intoxicants in a Vehicle for a Pre-Trial in this matter. However, because the Court has found the traffic stop of Lucynski to be without probable cause or reasonable suspicion, the evidence found as a result of that stop is not admissible in any subsequent hearing of trial on those two misdemeanor counts.

Dated: March 27, 2020



Jason E. Bitzer P71710
District Court Judge

EXHIBIT #3: COPY OF FELONY COMPLAINT

2020000074 JM

STATE OF MICHIGAN
71B JUDICIAL DISTRICT
54TH JUDICIAL CIRCUITPAGE 1 OF 2
COMPLAINT
FELONY

CASE NO. 2020BD0074

DISTRICT:

CIRCUIT:

20-0045 FD

District Court ORI: MI- MI790015J

440 N. STATE STREET CARO, MI 48723 989-672-3800

Circuit Court ORI: MI- MI790025J

440 N. STATE STREET CARO, MI 48723 989-672-3720

THE PEOPLE OF THE
STATE OF MICHIGAN V
DAVID ALLAN LUCYNSKI
9774 W. DIXON RD.
REESE, MI 48757

Victim or complainant

DEP. RYAN ROBINSON

Complaining Witness

DET/SGT. JAMES HOOK

Date: On or about 01/20/2020

Co-defendant(s) (if known)

City/Twp./Village:

Wisner Township

County in Michigan

TUSCOLA

Defendant TCN

0620206360H

Defendant CTN

79-20000074-01

Defendant SIB

1378101H

Defendant DOB

Police agency report no.

79TCSD 200000240

Charge:

See below

Maximum penalty:

[] A sample for chemical testing for DNA identification profiling is
on file with the Michigan State Police from a previous case.Oper./Chauf.
CDL

Vehicle Type

Defendant DLN

Witnesses

DEP. RYAN ROBINSON *

DEP. JORDAN WADE *

GAYLE MCMULLEN *

SHANNON GWIZDALA *

DEP. WILLIAM WEBSTER

JUDY ANN LUCYNSKI

MSP LAB ANALYST

DR. ABDO

STATE OF MICHIGAN, COUNTY OF TUSCOLA

The complaining witness says that on the date and at the location described, the defendant, contrary to law,

COUNT 1: OPERATING WHILE INTOXICATED

did, operate a vehicle upon a highway, Old State Road at or near M-25, while under the influence of a combination
of alcoholic liquor and a controlled substance, contrary to MCL 257.625(1). [257.6251-A]MISDEMEANOR: 93 Days and/or \$100.00-\$500.00 and/or 360 hours community service; rehabilitative program(s)
(see MCL 257.625b(5)); vehicle immobilization mandatory with a prior (see MCL 257.904d); costs of prosecution;
reimburse government for emergency response and expenses for prosecuting defendant (see MCL 769.1f)

THIRD OFFENSE NOTICE - FELONY

Take Notice that the defendant was previously convicted of operating while intoxicated on or about 09/22/1988 in
the 71B District Court, Caro, MI, and of operating impaired on or about 08/24/2002 in the 81st District Court,
Standish, MI, and of operating while intoxicated on or about 08/25/2003 in the 71B District Court, Caro, MI.Therefore, upon conviction, the defendant will be subject to an enhanced sentence under MCL 257.625(9) or
MCL 257.625(11), and vehicle forfeiture under MCL 257.625n. [257.6256D]FELONY: \$500.00-\$5,000.00; and either 1 to 5 Years, or probation with 90 Days to 1 Year in jail; at least 48 hours
to be served consecutively, and 60 to 180 Days community service; rehabilitative program(s) (see MCL
257.625b(5)); costs of prosecution; reimburse government for emergency response and expenses for prosecuting
defendant (see MCL 769.1f); mandatory vehicle immobilization of not less than 1 year or more than 3 years. (see
MCL 257.904d)Court shall order law enforcement to collect a DNA identification profiling sample before sentencing or disposition, if
not taken at arrest.☐ The complaining witness asks that the defendant be apprehended and dealt with according to law.

Warrant authorized on	01/21/2020	by:
	Date	
 Erica K. Walle P80987, Prosecuting Official		
☐ Security for costs posted		

Complaining Witness Signature

Subscribed and sworn to before me on

Date

Judge/Magistrate/Clerk

Bar no.

Plaintiff-Affelle S. [unclear]

COPY

STATE OF MICHIGAN 71B JUDICIAL DISTRICT 54TH JUDICIAL CIRCUIT		PAGE 2 OF 2 COMPLAINT FELONY		CASE NO. 202000074 DISTRICT: CIRCUIT:	
District Court ORI: MI- MI790015J 440 N. STATE STREET, CARO, MI 48723 989-672-3800		Circuit Court ORI: MI- MI790025J 440 N. STATE STREET, CARO, MI 48723 989-672-3720			
THE PEOPLE OF THE STATE OF MICHIGAN		V DAVID ALLAN LUCYNSKI 9774 W. DIXON RD. REESE, MI 48757		Victim or complainant DEP. RYAN ROBINSON	
Co-defendant(s) (if known)				Complaining Witness DET/SGT. JAMES HOOK	
				Date: On or about 01/20/2020	
City/Twp/Village Wishar Township	County in Michigan TUSCOLA	Defendant TCN 0620206360H	Defendant CTN 79-20000074-01	Defendant SID 1378101H	Defendant DOB [REDACTED]
Police agency report no. 79TCSD 200000240	Charge See below	Maximum penalty			
[] A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.		Oper/Chauf. CDL	Vehicle Type	Defendant DLN [REDACTED]	
Witnesses					
DEP. RYAN ROBINSON *		SHANNON GWIZDALA *		MSP LAB ANALYST	
DEP. JORDAN WADE *		DEP. WILLIAM WEBSTER		DR. ABDQ	
GAYLE MCMULLEN *		JUDY ANN LUCYNSKI			

STATE OF MICHIGAN, COUNTY OF TUSCOLA

The complaining witness says that on the date and at the location described, the defendant, contrary to law,

COUNT 2: OPERATING - LICENSE SUSPENDED, REVOKED, DENIED

did operate a motor vehicle upon Old State Road at or near M-25, a highway, while his operator's license was suspended or revoked; as prohibited by MCL 257.904(1); contrary to MCL 257.904(3)(a). [257.9041B]

MISDEMEANOR: 93 Days and/or \$500.00; vehicle immobilization (see MCL 257.904d)

SECOND OR SUBSEQUENT OFFENSE NOTICE

Take notice that the defendant was previously convicted of violating MCL 257.904, on or about 03/03/1998, in the 71B District Court, Caro, MI, and on or about 07/17/1998, in the 71B District Court, Caro, MI, and on or about 04/20/1999, in the 71B District Court, Caro, MI, and on or about 12/03/2015, in the 74th District Court, Bay City, MI.

Therefore, upon conviction, the defendant may be subject to an enhanced sentence under MCL 257.904(3)(b), and vehicle immobilization under MCL 257.904d. [257.9041C]

MISDEMEANOR: 1 Year and/or \$1,000.00

COUNT 3: ALCOHOL - OPEN CONTAINER IN VEHICLE

did transport or possess an alcoholic liquor in a container that was open, uncapped, or upon which the seal was broken, within the passenger area of a vehicle upon a highway in this state; contrary to MCL 257.624a.

[257.624A]

MISDEMEANOR: 90 Days and/or \$100.00; community service; substance abuse screening

Court shall order law enforcement to collect a DNA identification profiling sample before sentencing or disposition, if not taken at arrest.

☐ The complaining witness asks that the defendant be apprehended and dealt with according to law.

Warrant authorized on 01/24/2020 by:	Complaining Witness Signature
 Date	Subscribed and sworn to before me on _____
Erica K. Walle P88987, Prosecuting Official	Date
☐ Security for costs posted.	Judge/Magistrate/Clerk
	Bar no.

COPY

EXHIBIT #4: COPY OF ORDER OF THE CIRCUIT COURT DATED MAY 6, 2020

STATE OF MICHIGAN
IN THE 54TH CIRCUIT COURT FOR THE COUNTY OF TUSCOLA

PEOPLE OF THE STATE OF MICHIGAN,

VS.

File No: 20-15154-AR
Hon. Amy Grace Gierhart

ORIGINAL

DAVID ALLAN LUCYNSKI,
Plaintiff,

MARK E. REENE (P47247)
Tuscola County Prosecutor
BY: Eric F Wanink (P64002)
Chief Assistant Prosecutor
207 E. Grant Street, Ste 1
Caro, MI 48723
(989) 672-3900

BERNARD A. JOCUNS, JR (P65478)
Bernard Anthony Jocuns & Assoc, PLLC
Attorney for Defendant
385 West Nepessing St
Lapeer, MI 48446
(810) 245-8900

FILED

MAY - 6 2020

TUSCOLA COUNTY CLERK
LETTING

ORDER REGARDING APPLICATION FOR LEAVE TO APPEAL

At a session of said Court held in the
Courthouse Building, City of Caro,
State of Michigan, on May 6, 2020.

PRESENT: THE HONORABLE AMY GRACE GIERHART
54th Circuit Court Judge

This matter is before the Court on an Application for Leave to Appeal, NOW
THEREFORE:

IT IS HEREBY ORDERED that the Court orders that the application for leave to appeal
is DENIED, as the district court was within its discretion to dismiss Count 1 of the complaint
after preliminary examination.

Dated: May 6, 2020

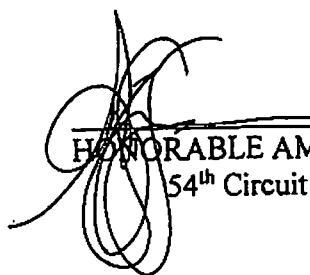

HONORABLE AMY GRACE GIERHART (P51305)
54th Circuit Court Judge



EXHIBIT #5: COPY OF ORDER OF THE COURT OF APPEALS DATED JULY 21, 2020

Court of Appeals, State of Michigan

ORDER

People of Michigan v David Allan Lucynski

Docket No. 353646

LC No. 20-015154-AR

Michael F. Gadola
Presiding Judge

Stephen L. Borrello

Michael J. Kelly
Judges

The application for leave to appeal is GRANTED. The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(E)(3). This appeal is limited to the issues raised in the application and supporting brief. MCR 7.205(E)(4).



Presiding Judge



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

July 21, 2020

Date


Chief Clerk

**EXHIBIT #6: COPY OF ORDER OF THE COURT OF APPEALS DATED
DECEMBER 17, 2020**

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAVID ALLAN LUCYNSKI,

Defendant-Appellee.

UNPUBLISHED
December 17, 2020

No. 353646
Tuscola Circuit Court
LC No. 20-015154-AR

Before: LETICA, P.J., and RIORDAN and CAMERON, JJ.

PER CURIAM.

The People of the State of Michigan appeal by leave granted.¹ Defendant, David Allan Lucynski, was charged with operating a vehicle while intoxicated ("OWI"), third offense, MCL 257.625(9)(c); operating a motor vehicle while license suspended or revoked ("DWLS"), second offense, MCL 257.904(3)(b); and possession or transportation of an open alcoholic container in a vehicle, MCL 257.624a(1). Following a preliminary examination, the district court denied the People's motion to bind Lucynski over on the OWI charge, dismissed the OWI charge, and held that certain evidence would be suppressed in future proceedings concerning Lucynski's remaining misdemeanor charges. The People appealed to the circuit court, which denied the People's interlocutory application for leave to appeal based on its finding that the district court acted within its discretion. We reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

On January 20, 2020, Tuscola County Sheriff Deputy Ryan Robinson was on duty when he observed "two vehicles stopped in the middle of the roadway, facing opposite directions[.]" Deputy Robinson noted that the vehicles were positioned so that the driver's side windows were facing each other. According to Deputy Robinson, the vehicles were impeding traffic even though there was no other traffic in the area at that time. As Deputy Robinson approached the vehicles,

¹ *People v Lucynski*, unpublished order of the Court of Appeals, entered July 14, 2020 (Docket No. 353646).

one of the vehicles traveled westbound and the other vehicle traveled eastbound. Lucynski was driving the vehicle that traveled westbound. Deputy Robinson followed Lucynski for 300 to 400 feet before Lucynski pulled into a driveway. Thereafter, Deputy Robinson parked his police cruiser behind Lucynski's vehicle and exited the cruiser. Lucynski was already out of his vehicle.

Deputy Robinson approached Lucynski, who smelled like marijuana and "intoxicating beverages[.]" Deputy Robinson noted that Lucynski had bloodshot eyes and that his demeanor was "pretty laid back." Lucynski admitted that he had consumed alcohol about 20 minutes before. Lucynski also admitted that he had marijuana in his vehicle and that he did not have a driver's license because it was suspended. Lucynski submitted to field sobriety tests, which supported Deputy Robinson's suspicion that Lucynski was intoxicated. After Lucynski refused to submit to a preliminary breath test, Deputy Robinson placed Lucynski under arrest. Thereafter, Lucynski submitted to a preliminary breath test, which revealed that Lucynski had a blood alcohol content of .035. Later, Lucynski's blood was drawn to test for intoxicants, and the sample reflected the presence of THC.

Lucynski was charged with OWI, third offense; DWLS, second offense; and possession or transportation of an open alcoholic container in a vehicle.² The preliminary examination was held on March 4, 2020. In relevant part, the People presented the testimony of Deputy Robinson, and Deputy Robinson's body camera footage was admitted into evidence. At the close of proofs, the People argued that bindover of the OWI charge was appropriate because there was sufficient cause for Deputy Robinson to conduct the traffic stop under MCL 257.676b(1).³ Lucynski opposed bindover on the OWI charge, arguing that there was "an issue in regards to the actual stop." The district court took the matter under advisement and permitted the parties to file written briefs on the issue of whether Lucynski's Fourth Amendment rights were violated.

In a March 27, 2020 opinion and order, the district court concluded that Deputy Robinson lacked both probable cause and the requisite articulable, reasonable suspicion to conduct a traffic stop. In relevant part, the district court analyzed the plain language of MCL 257.626b(1) and concluded that Deputy Robinson could not have had an articulable, reasonable suspicion that Lucynski was "actually impeding or obstructing actual traffic" because Deputy Robinson testified that "Lucynski's vehicle was not actually impeding or obstructing any actual traffic[.]" Based on the district court's conclusion that the stop was unconstitutional, the district court held that "the evidence obtained after the Traffic stop [w]ould be excluded from evidence" for purposes of the preliminary examination. The district court then found that probable cause did not exist to bind Lucynski over on the OWI charge and dismissed it. The district court indicated that it would set the remaining misdemeanor counts for trial. In doing so, the district court held that "the evidence found as a result of th[e] stop is not admissible in any subsequent hearing o[r] trial on those two misdemeanor counts."

² A search of Lucynski's vehicle revealed marijuana and a plastic cup of beer.

³ Although not argued by the People, it appears that a traffic stop could have been initiated based on Lucynski's violation of MCL 257.672.

The People appealed to the circuit court. In a May 6, 2020 order, the circuit court denied the People's interlocutory application for leave to appeal, holding that "the district court was within its discretion to dismiss Count 1 of the complaint after [the] preliminary examination." The People then appealed to this Court, and the interlocutory application was granted.

II. STANDARDS OF REVIEW

"We review issues of constitutional law de novo." *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). "When reviewing a district court's bindover decision, we review the court's determination regarding the sufficiency of the evidence for an abuse of discretion, but we review the court's ruling concerning questions of law de novo." *People v Flick*, 487 Mich 1, 9; 790 NW2d 295 (2010). We also review a trial court's decision to dismiss criminal charges against a defendant for an abuse of discretion. *People v Stone*, 269 Mich App 240, 242; 712 NW2d 165 (2005). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). A trial court "necessarily abuses its discretion when it makes an error of law." *People v Feeley*, 499 Mich 429, 434; 885 NW2d 223 (2016) (quotation marks and citation omitted).

III. ANALYSIS

A. DISTRICT COURT PROCEEDINGS

The People argue that the district court erred by refusing to bind Lucynski over on the OWI charge and by dismissing the OWI charge. The People also challenge the district court's decision to suppress evidence in future proceedings concerning the DWLS and open intoxicant charges. We agree, but for reasons that are different from those advanced by the People on appeal.

"The purpose of a preliminary examination is to determine whether probable cause exists to believe that a crime was committed and that the defendant committed it." *People v Bennett*, 290 Mich App 465, 480; 802 NW2d 627 (2010) (quotation marks and citation omitted). "Probable cause is established if a person of ordinary caution and prudence [could] conscientiously entertain a reasonable belief of the defendant's guilt." *Id.* (quotation marks and citation omitted). At the preliminary-examination stage, the prosecutor is not required to "prove each element beyond a reasonable doubt, but must present some evidence of each element." *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). "If, during the preliminary examination, the court determines that evidence being offered is excludable, it must, on motion or objection, exclude the evidence." MCR 6.110(D)(2). "Generally, evidence obtained in violation of the Fourth Amendment is inadmissible as substantive evidence in criminal proceedings." *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000).

In this case, the district court excluded the evidence based on its conclusion that a Fourth Amendment violation occurred. "The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *Id.* at 417. A person is seized if, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *People v Corr*, 287 Mich App 499, 506-507; 788 NW2d 860 (2010) (quotation

marks and citation omitted). The basic purpose of the Fourth Amendment “is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” *Carpenter v United States*, ___ US ___, ___; 138 S Ct 2206, 2213; 201 L Ed 2d 507 (2018) (quotation marks and citation omitted).

Although an officer generally needs a warrant to search and seize, there are several exceptions to the warrant requirement. *People v Barbarich*, 291 Mich App 468, 472; 807 NW2d 56 (2011). One such exception for a warrantless seizure exists when a police officer possesses “information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it.” *People v Cohen*, 294 Mich App 70, 74-75; 816 NW2d 474 (2011) (quotation marks and citation omitted). Probable cause to justify an arrest means that the facts and circumstances within the police officer’s knowledge are sufficient to warrant a prudent person to believe that, based on the circumstances shown, the suspect has committed, is committing, or is about to commit an offense. *Id.* at 75.

Another exception is an investigatory or *Terry*⁴ stop. *Barbarich*, 291 Mich App at 473. Under this doctrine,

a police officer may approach and temporarily detain a person for the purpose of investigating possible criminal behavior even though there is no probable cause to support an arrest. A brief detention does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot. Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case, on the basis of an analysis of the totality of the facts and circumstances. A determination regarding whether a reasonable suspicion exists must be based on commonsense judgments and inferences about human behavior. [*People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005) (quotation marks and citations omitted).]

However, not all encounters between a police officer and private citizens constitute seizures. *Id.* “When an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person’s liberty, and the person is not seized.” *Id.* at 33. Similarly, a police officer’s decision to follow someone does not by itself amount to intimidating conduct that would cause a reasonable person to believe that he or she was not at liberty to leave. *People v Jackson*, 175 Mich App 562, 563-564; 438 NW2d 84 (1988).

In *People v Sinistaj*, 184 Mich App 191, 196; 457 NW2d 36 (1990), this Court noted examples “which might constitute a seizure, even where the person made no attempt to leave[.]” Specifically, this Court noted the following examples:

[T]he threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of

⁴ *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

language or tone of voice indicating that compliance with the officer's request might be compelled. [*Id.* (quotation marks and citation omitted).]

In this case, we conclude that Deputy Robinson's initial interaction with Lucynski did not amount to a seizure implicating the Fourth Amendment. Although Deputy Robinson testified that Lucynski impeded traffic, Deputy Robinson did not turn on his lights or signal for Lucynski to pull over. Instead, Deputy Robinson followed Lucynski for 300 to 400 feet. After Lucynski voluntarily pulled into a driveway, Deputy Robinson pulled into the driveway behind him. The body camera footage reveals that, after Deputy Robinson pulled into the driveway, Lucynski was standing outside of his parked vehicle and appeared to be approaching a house that was situated at the end of the driveway. When Deputy Robinson asked Lucynski if he lived there, Lucynski responded that a friend lived there. Lucynski then approached Deputy Robinson and began voluntarily answering Deputy Robinson's questions, which included what Lucynski had been doing on the roadway with the driver of the other vehicle and whether the homeowner was home.

After a short period of time, Deputy Robinson asked Lucynski if he had his driver's license on his person, to which Lucynski responded "nope." Deputy Robinson then asked Lucynski if he had a driver's license. Lucynski responded "nope" and eventually admitted that his license was suspended. Deputy Robinson did not indicate that Lucynski was under arrest at that point. Rather, Deputy Robinson asked if Lucynski had "a valid id" on his person, and Lucynski provided his identification to Deputy Robinson. Deputy Robinson then asked Lucynski if he had a "pocket knife or anything like that" on his person. Lucynski denied that he did. Thereafter, Deputy Robinson asked Lucynski if he had marijuana on his person, noting "I smell marijuana." Based on Deputy Robinson's questions, Lucynski admitted that he had marijuana in his vehicle and that he had been drinking "a little bit." Specifically, he admitted to drinking "one can." Deputy Robinson indicated on his radio that he was going to be "out with a subject" and instructed Lucynski to stand in front of Lucynski's vehicle. Deputy Robinson then proceeded to guide Lucynski through a series of field sobriety tests.

We conclude that the earliest that the Fourth Amendment was implicated was when Lucynski admitted that he did not have a driver's license, which is when a reasonable person in Lucynski's position might have concluded that he was not free to leave. However, at that point, Deputy Robinson had probable cause to arrest Lucynski. Instead of immediately arresting Lucynski, however, Deputy Robinson investigated further and asked Lucynski whether he had consumed substances. This was permissible given that Deputy Robinson had noticed that Lucynski had bloodshot eyes, that there was an odor of alcohol and marijuana coming from Lucynski's person, and that Lucynski's demeanor was "pretty laid back." See *People v Rizzo*, 243 Mich App 151, 157-158; 622 NW2d 319 (2000). Deputy Robinson discovered that Lucynski had marijuana in the vehicle that he had been driving and that he had consumed alcohol that day. Based on Lucynski's statements, Deputy Robinson's observations, and Lucynski's performance during the field sobriety tests, Deputy Robinson found probable cause to arrest Lucynski for OWI. Thereafter, Lucynski consented to his blood being drawn, and the results revealed the presence of THC in his system.

In the time preceding the seizure, Lucynski's body language was relaxed, he did not attempt to leave, and he did not demonstrate an unwillingness to answer questions. Rather, Lucynski was entirely cooperative. Although Lucynski was not told that he was "free not to

respond,” this “hardly eliminates the consensual nature of the response[s].” See *Jenkins*, 472 Mich at 33 (quotation marks and citation omitted). There is no indication that Deputy Robinson had weapons displayed and at no point during the initial conversation did Deputy Robinson touch Lucynski’s person. Moreover, Deputy Robinson spoke to Lucynski in a normal, respectful tone of voice. Although Deputy Robinson asked Lucynski a myriad of questions and asked him for his identification, a police officer’s brief and noncoercive questioning, or mere request for identification, does not constitute a seizure. See *id.*

Therefore, the district court erred by analyzing the initial conversation between Deputy Robinson and Lucynski as if the protections of the Fourth Amendment were implicated. Considering the totality of the circumstances, Deputy Robinson had a reasonable suspicion sufficient to warrant transforming the consensual encounter into an investigatory stop and eventually into a lawful arrest. Because the seizures were lawful under the Fourth Amendment, the district court erred by excluding the evidence produced by the investigatory stop and arrest when deciding whether probable cause existed to support the bindover and erred by suppressing the evidence in future hearings concerning the remaining misdemeanor charges.⁵

With respect to whether the district court abused its discretion by denying the People’s motion for bindover on the OWI charge, Lucynski does not argue that probable cause did not exist to support the bindover when considering the improperly excluded evidence. Moreover, upon review of the evidence presented at the preliminary examination, it is clear that probable cause existed to support that Lucynski committed the crime of OWI. Therefore, the district court abused its discretion by refusing to bind Lucynski over for trial and by dismissing the OWI charge. Consequently, we reverse the district court’s March 27, 2020 order.

B. CIRCUIT COURT PROCEEDINGS

The People argue that the circuit court abused its discretion by denying the interlocutory application for leave to appeal. As already stated, the circuit court held that it was proper to deny the People’s application based on the circuit court’s conclusion that the district court acted within its discretion. Given the above analysis, we agree with the People that the circuit court abused its discretion. See *Feeley*, 499 Mich at 434 (holding that a trial court “necessarily abuses its discretion

⁵ Based on this conclusion, we need not address Lucynski’s argument that MCL 257.676b(1) requires an actual impediment to traffic. However, even if we were to accept Lucynski’s assertion that the statute requires an actual impediment to traffic, we note that this Court has addressed this issue in at least one prior opinion. Specifically, in *People v Salters*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2001 (Docket No. 215396), p 2, we concluded that the purpose of MCL 257.676b(1) does “not require a showing of an actual impediment to the smooth flow of traffic in order to establish a violation of the statute.” Based on this, the *Salters* Court concluded that a traffic stop was proper, even though “[n]o other traffic was in the area at the time” of the stop. *Id.* Therefore, even under Lucynski’s reading of MCL 257.676b(1), the evidence should not have been suppressed because the traffic stop was based on Deputy Robinson’s reasonable mistake of law or fact. See *Heien v North Carolina*, 574 US 54, 60-68; 135 S Ct 530; 190 L Ed 2d 475 (2014).

when it makes an error of law”) (quotation marks and citation omitted). Therefore, we reverse the circuit court’s May 6, 2020 order.

IV. CONCLUSION

In sum, because a Fourth Amendment violation did not occur, we conclude that the district court erred by excluding evidence from the preliminary examination proceeding and by holding that the evidence produced by investigatory stop and arrest would be excluded from future proceedings concerning Lucynski’s DWLS and open intoxicant charges. We further conclude that the district court abused its discretion by denying the People’s motion for bindover on the OWI charge and by dismissing the OWI charge. Therefore, we reverse the district court’s March 27, 2020 order, reverse the circuit court’s May 6, 2020 order, and remand to the district court for reinstatement of the OWI charge and for entry of an order reflecting that the matter is bound over to the circuit court for further proceedings.

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

/s/ Anica Letica
/s/ Michael J. Riordan
/s/ Thomas C. Cameron

**EXHIBIT #7: COPY OF ORDER OF THE MICHIGAN SUPREME COURT DATED
OCTOBER 6, 2021**

Order

October 6, 2021

162833

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

DAVID ALLAN LUCYNSKI,
Defendant-Appellant.

Michigan Supreme Court
Lansing, Michigan

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

SC: 162833
COA: 353646
Tuscola CC: 20-015154-AR

On order of the Court, the application for leave to appeal the December 17, 2020 judgment of the Court of Appeals is considered, and it is GRANTED, limited to the issues: (1) whether the defendant impeded traffic, in violation of MCL 257.676b(1), where there was no actual traffic to impede at that time; (2) if not, whether the deputy sheriff made a reasonable mistake of law by effectuating a traffic stop of the defendant for violating MCL 257.676b(1), see *Heien v North Carolina*, 574 US 54 (2014); and (3) whether the deputy sheriff seized the defendant when he pulled his patrol vehicle behind the defendant's vehicle in a driveway. The appellant's brief and appendix shall be filed by January 31, 2022, with no extensions except upon a showing of good cause. The time for filing the remaining briefs shall be set as forth in MCR 7.312(E). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.



10929

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 6, 2021


Plaintiff-Appellee's Appendix 75
Clerk

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EXHIBIT #8: COPY OF THE ORDER OF THE MSC DATED JULY 26, 2022

Syllabus

Chief Justice:
Bridget M. McCormackJustices:
Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

Reporter of Decisions:
Kathryn L. Loomis

PEOPLE v LUCYNSKI

Docket No. 162833. Argued April 26, 2022 (Calendar No. 2). Decided July 26, 2022.

David A. Lucynski was charged in the 71B District Court with operating a vehicle while intoxicated (OWI), MCL 257.625(9)(c); driving with a suspended license, MCL 257.904(3)(b); and operating a vehicle with an open container of alcohol in the vehicle, MCL 257.624a(1). On a January morning, Tuscola County Sheriff's Deputy Ryan Robinson observed two cars stopped in the middle of the road; the vehicles were facing opposite directions with the drivers' windows next to one another, and the drivers appeared to be talking to one another with their windows down. One of the vehicles was defendant's car. Robinson testified at the preliminary examination that he believed that the vehicles were impeding traffic in violation of MCL 257.676b, even though there were no other vehicles on the road at the time. Robinson also testified that he thought a drug transaction might have occurred. Robinson followed 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. Neither the siren nor the emergency lights on Robinson's vehicle were activated. When Robinson exited his patrol car, defendant was standing next to the driver's side door of his car, facing Robinson. Robinson immediately asked whether defendant lived there, and defendant responded that it was a friend's house as he walked toward the deputy. Robinson asked defendant if defendant had his driver's license, to which defendant replied in the negative; upon Robinson's further questioning, defendant responded that he did not have a valid driver's license. Robinson testified that because he smelled the odor of marijuana and alcohol emanating from defendant and noticed that defendant's eyes were bloodshot, he proceeded to investigate whether defendant was intoxicated. Defendant admitted to smoking marijuana about 20 minutes earlier and to consuming alcohol during the day. Defendant then consented to a search of his vehicle, and Robinson found both marijuana and an open container of alcohol inside. Robinson performed several field-sobriety tests, and defendant was arrested. At the preliminary examination, defendant's attorney asked to submit briefing to challenge the validity of the stop under MCL 257.676b and to argue that the evidence obtained by the police should be excluded. The district court, Jason E. Bitzer, J., allowed briefing and later held that the prosecution failed to prove that Robinson had sufficient cause to initiate the stop. The court held that MCL 257.676b(1) could not be violated without a showing that traffic was actually impeded in some way. Accordingly, the court held that all evidence obtained from the stop would be inadmissible in any proceeding moving forward, and it dismissed the OWI charge. The prosecution sought leave to appeal in the Tuscola Circuit Court, and the court, Amy Gierhart, J.,

denied the application. The prosecution then sought leave to appeal in the Court of Appeals, and the Court of Appeals granted the application, limiting the issues to those raised in the application. Despite this, the Court of Appeals resolved the appeal based on a legal theory that the parties had not raised in the trial court or on appeal: whether defendant had been seized at all. In an unpublished per curiam opinion issued December 17, 2020 (Docket No. 353646), the Court of Appeals, LETICA, P.J., and RIORDAN and CAMERON, JJ., held that based on the totality of the circumstances, the earliest point at which the encounter with Robinson could have become a seizure implicating the Fourth Amendment was when 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. Subsequent investigation into and arrest for suspicion of OWI was deemed justifiable because defendant had been seen driving and the deputy had observed signs of possible intoxication. The Court held that even if MCL 257.676b(1) required actual impediment of traffic, under *People v Salters*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2001 (Docket No. 215396), the evidence should not have been suppressed because a traffic stop would have been based on Robinson's reasonable mistake of law. Accordingly, the Court of Appeals held that the district court abused its discretion when it held that the Fourth Amendment was violated and thus that the district court erred by excluding evidence from the seizure and by dismissing the OWI charge. Defendant sought leave to appeal in the Supreme Court, and the Supreme Court granted the application, limited to three issues: (1) whether Robinson seized defendant when Robinson pulled his patrol vehicle behind defendant's vehicle in the driveway; (2) whether defendant impeded traffic in violation of MCL 257.676b(1) when there was no actual traffic to impede at that time; and (3) if not, whether Robinson made a reasonable mistake of law by effectuating a traffic stop of defendant for violating MCL 257.676b(1). 508 Mich 947 (2021).

In an opinion by Justice WELCH, joined by Chief Justice MCCORMACK and Justices BERNSTEIN, CLEMENT (as to Parts I, II(A), and II(B)), and CAVANAGH, the Supreme Court *held*:

Defendant was seized under the Fourth Amendment when a police officer blocked the driveway and defendant's path of egress with a marked patrol car because, under the totality of the circumstances, a reasonable person would not have felt free to leave or to terminate the interaction; the impeding-traffic statute, MCL 257.676b(1), is only violated if the normal flow of traffic has actually been disrupted; and no reasonable mistake of law occurred because the police officer's mistaken reading of MCL 257.676b(1), an unambiguous statute, was not objectively reasonable.

1. The Fourth Amendment of the United States Constitution protects individuals from being subjected to unreasonable searches and seizures. A person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that they were not free to leave. While police officers generally need a warrant to search or seize someone, there are recognized exceptions to this general rule, such as an investigatory stop. A brief seizure for investigative purposes does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot. In this case, Robinson did not initiate a formal traffic stop for a violation of MCL 257.676b(1), despite his testimony that this was his intention when he began following defendant. Robinson pulled onto the driveway behind defendant, parked a few feet behind defendant, and blocked the exit. Robinson did not turn his emergency lights on, sound his siren, or direct defendant to pull over on the side of the road. What was not clear under the facts of this case was whether defendant had an independent desire to keep moving. The driveway and home belonged

to his friend. The record was silent on whether defendant was planning to visit with his friend before Robinson began following defendant or whether defendant was planning to keep driving. However, under either of these hypothetical scenarios, defendant was seized. Defendant was seized at the moment Robinson, in his marked police vehicle, blocked defendant's car, resulting in no means for defendant to exit the single-lane driveway. 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—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 Robinson, 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 have been 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.

2. MCL 257.676b(1) provides, in relevant part, that a person, without authority, shall not block, obstruct, impede, or otherwise interfere with the normal flow of vehicular, streetcar, or pedestrian traffic upon a public street or highway in this state by means of a barricade, object, or device or with his or her person. The parties did not dispute that defendant could be a "person" and his vehicle an "object" under MCL 257.676b(1); therefore, it was assumed without deciding that MCL 257.676b(1) applies to a person operating a vehicle on a roadway. The clear terms of MCL 257.676b(1) require some evidence that the accused's conduct actually affected the usual smooth, uninterrupted movement or progress of the normal flow of traffic on the roadway, which requires an assessment of traffic at the time of the alleged offense. MCL 257.676b(1) is not violated if the normal flow of traffic was never impeded, blocked, or interfered with. The potential interference with hypothetical or nonexistent traffic is not sufficient because this interpretation ignores the phrase "normal flow of . . . traffic" in MCL 257.676b(1) and would lead to the untenable situation in which every person crossing a street and every vehicle attempting to park along the side of a road would potentially be guilty of a civil infraction even if no other vehicles or pedestrians were present on the roadway. In this case, the prosecution did not introduce evidence sufficient to establish even reasonable suspicion to believe that defendant violated MCL 257.676b(1) because the normal flow of vehicular traffic on the road was not impeded or disrupted. It was undisputed that no vehicles other than Robinson's, defendant's, and a third unidentified driver's were on the road during the relevant time period. Robinson admitted that he did not have to slow his car down or go around either vehicle. Accordingly, there was no evidence in the record to sustain the accusation that defendant violated MCL 257.676b(1).

3. The Fourth Amendment is not violated if a police officer's suspicion that the defendant's conduct was illegal is based on an objectively reasonable mistake about what the law required. The subjective understanding of the particular officer involved is not examined. Objectively

reasonable mistakes of law occur in exceedingly rare circumstances in which an officer must interpret an ambiguous statute. Additionally, while qualified immunity applies to officers so long as they have not violated a clearly established statutory right, the mistake-of-law doctrine is not as forgiving. In this case, to the extent that Robinson's seizure of defendant was based on a belief that MCL 257.676b(1) was violated, Robinson's mistake of law was not objectively reasonable. One cannot be guilty of violating MCL 257.676b(1) without evidence that the normal flow of actual traffic was disrupted, and Robinson admitted that no disruption had occurred. The Court of Appeals' reliance on *Salters* was not persuasive. In *Salters*, the Court of Appeals based its holding entirely on the perceived purpose of MCL 257.676b(1) instead of also engaging with the text of the statute; the Court of Appeals in this case made the same error by failing to independently analyze MCL 257.676b(1). Additionally, *Salters* had not been cited or relied on for its conclusory interpretation of MCL 257.676b in any appellate decision in Michigan until the Court of Appeals' decision in this case. A single unpublished decision coming out the other way does not transform an unambiguous statute into an ambiguous one.

4. Given that defendant was seized the moment Robinson blocked the driveway and prevented egress, defendant's incriminating statements and the officer's visual and olfactory observations that the Court of Appeals relied upon to justify further inquiry and an eventual arrest were obtained in violation of defendant's Fourth Amendment rights. Prior to Robinson blocking defendant in, defendant had not made any incriminating statements, and thus such statements could not have justified a seizure. A suspected violation of MCL 257.676b(1) also could not serve as reasonable suspicion. Accordingly, there was no lawful justification for the seizure, and the district court did not err by holding that the seizure violated defendant's constitutional rights.

Reversed and remanded to the Court of Appeals to determine whether application of the exclusionary rule was the appropriate remedy for the violation of defendant's Fourth Amendment rights.

Justice CLEMENT, concurring in part and dissenting in part, joined the majority opinion as to Parts I, II(A), and II(B), because she agreed that the traffic stop constituted a seizure under the Fourth Amendment and that this seizure was not justified by reasonable suspicion of criminal wrongdoing. However, Justice CLEMENT joined the dissent as to its Part II because she believed that the evidence should not have been excluded given that the unconstitutional seizure was a result of Robinson's reasonable mistake of law.

Justice ZAHRA, joined by Justice VIVIANO (and by Justice CLEMENT as to Part II), dissenting, would have held that Robinson did not stop or in any way seize defendant when he pulled his patrol car into the driveway behind defendant's parked car and that because there was no seizure, this case did not require interpretation of MCL 257.676b(1). Parking cars one after another is typically the way a driveway functions; there is nothing inherently coercive about a police officer parking behind another car in a driveway. An objectively reasonable person would not have felt obligated to talk to Robinson simply because he was a law enforcement officer who parked his police car in the driveway behind that person's car. Further, in this case, Robinson approached defendant in a courteous, nonthreatening fashion and engaged defendant in conversation. Only one officer was present, and he did not activate his emergency lights or siren, draw his gun, or give any orders or commands. Accordingly, no seizure occurred as a matter of law until after defendant incriminated himself. Justice ZAHRA further concluded that even if

Robinson had seized defendant, the Fourth Amendment was not violated because Robinson's actions were the product of a reasonable mistake of law. Robinson did not have the benefit of the majority's interpretation of the impeding-traffic statute at the time of the alleged offense. In fact, the only opinion at the time of these events that had interpreted the impeding-traffic statute, *Salters*, had reached the exact opposite conclusion, and that determination had stood unchallenged for more than 20 years. It was reasonable for Robinson to interpret the statute as the Court of Appeals had. Under the majority's ruling, to be reasonable, police officers must be so adept and assured in their own statutory interpretation that they would reject longstanding conclusions by Court of Appeals judges if they anticipate that the Supreme Court will one day disagree; law enforcement officers should not be held to a higher standard of legal interpretation than judges.

OPINION

Chief Justice:
Bridget M. McCormack

Justices:
Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch

FILED July 26, 2022

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 162833

DAVID ALLAN LUCYNSKI,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH

WELCH, J.

The Fourth Amendment protects individuals from being subjected to unreasonable searches and seizures. While police officers generally need a warrant to search or seize someone, there are recognized exceptions to this general rule. If an officer has at least a reasonable suspicion of criminal activity, based on articulable facts, then a temporary warrantless seizure is constitutional. *Terry v Ohio*, 392 US 1, 20-27; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Reasonable suspicion can be based on a mistaken belief that someone

violated the law, so long as that mistake is objectively reasonable. *Heien v North Carolina*, 574 US 54, 60-63, 66; 135 S Ct 530; 190 L Ed 2d 475 (2014).

When a defendant challenges the constitutionality of an alleged seizure, there are two questions that must be answered. First, when was the defendant seized by the officer, if at all? And second, at that moment, was the seizure constitutional? In this case, to determine whether a seizure was constitutional, we also must determine whether the officer's interpretation of the applicable statute, MCL 257.676b(1), was correct, and if not, whether the mistake was objectively reasonable.

The officer in this case claimed that he followed defendant because he believed that defendant committed a traffic violation that would have justified the subsequent seizure, questioning, search, and arrest of defendant. The district court held that there was no traffic violation, that the seizure was unconstitutional, that defendant would not be bound over for operating while intoxicated (OWI), and that the unlawfully obtained evidence must be suppressed. The prosecution argued that a "reasonable mistake" occurred as to the traffic violation, that suppression of the evidence was not required, and that the bindover decision was incorrect. The Court of Appeals agreed and further held that defendant had not been seized until after he made incriminating statements, and thus the district court erred.

Accordingly, we must decide when defendant was seized and if, at that moment, the officer had reasonable suspicion that defendant had committed a crime or, if not, whether the officer's mistaken belief was objectively reasonable. First, we hold that defendant was seized under the Fourth Amendment when the officer blocked the driveway and defendant's path of egress with a marked patrol car because, under the totality of the circumstances, a reasonable person would not have felt free to leave or to terminate the

interaction. Second, the “impeding traffic” statute at issue, MCL 257.676b(1), is only violated if the normal flow of traffic is actually disrupted. Third, the officer’s mistaken reading of this unambiguous statute was not objectively reasonable, and thus no reasonable mistake of law occurred.

Accordingly, we reverse the judgment of the Court of Appeals and remand this case to that Court to determine whether application of the exclusionary rule was the appropriate remedy for the violation of defendant’s Fourth Amendment rights.

I. BACKGROUND

On a brisk January morning, Tuscola County Sheriff’s Deputy Ryan Robinson was traveling westbound on Old State Road in rural Wisner Township when he observed two cars stopped in the middle of the road from some distance away.¹ At the preliminary-examination hearing, Robinson testified that 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. One of the vehicles, a red Chevrolet Cobalt, was defendant’s car. Robinson 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 occurred. Even though there were no other vehicles on Old State Road at the time, Robinson testified at the preliminary-examination hearing that he believed the vehicles were impeding traffic in violation of MCL 257.676b. Robinson also testified that he saw both cars begin moving

¹ Old State Road is a two-mile stretch of rural road, which Deputy Robinson described as “dirt” or unpaved. Old State Road is approximately 10 miles east of Bay City, Michigan, and appears to provide access to a handful of farms and residential homes before reconnecting to Michigan Highway 25.

when he was approximately 800 feet away, he did not have to slow down or avoid either vehicle, and he did not observe any erratic driving.

Robinson testified that he followed defendant's car "with the intention to stop the red Cobalt for impeding traffic." Robinson followed 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. While a single lane was cleared within the driveway, the surrounding area was covered with several inches of snow. Neither the siren nor the emergency lights on Robinson's vehicle were activated by the officer.

Body-camera footage of the encounter that followed was introduced at the preliminary-examination hearing. Robinson, upon pulling into the driveway behind defendant, started to exit his car prior to putting the car in the parked position. When Robinson exited his patrol car, defendant was standing next to the driver's side door of the Cobalt facing Robinson. Robinson immediately asked whether defendant lived there, and defendant responded that it was a friend's house as he walked toward the deputy. Robinson asked what defendant was doing on the road, to which defendant replied, "Just talking about fishing." During this period, defendant had moved to put his hands in his pockets, and Robinson ordered him not to do so; defendant complied with the directive. Robinson 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. Defendant denied any drug transaction and said that Reese was where he lived and that he worked just up the road. After confirming the name of the homeowner, Robinson asked defendant if defendant had his driver's license, to which defendant replied in the negative; upon Robinson's further

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

The possibility of a citation for impeding traffic was never mentioned during Robinson's encounter with defendant. However, Robinson testified that because he smelled the odor of marijuana and alcohol emanating from defendant and noticed that defendant's eyes were bloodshot, he proceeded to investigate whether defendant was intoxicated. Defendant admitted to smoking marijuana about 20 minutes earlier and to consuming alcohol during the day. Defendant then consented to a search of his vehicle, and Robinson found both marijuana and an open container of alcohol inside. Robinson performed several field-sobriety tests, and based upon those tests, defendant was arrested.² No "impeding traffic" citation was issued, but defendant was charged with operating while intoxicated (OWI), driving with a suspended license, and having an open container of alcohol in the vehicle.

A. THE DISTRICT AND CIRCUIT COURT PROCEEDINGS

Robinson testified at defendant's preliminary-examination hearing to the facts outlined earlier. However, Robinson conceded on redirect examination that his "initial thought was that there, there may have been a drug deal or something going on, because it was a rural area and no one was around." While the deputy knew of drug exchanges in rural areas, he knew of none on Old State Road. He also acknowledged that it is not

² Defendant also consented to a breath test and a blood draw, and after making the arrest, Robinson took defendant to a hospital for the blood draw.

uncommon for people to stop their vehicle, roll down their window, and talk with acquaintances on rural roads.

Defendant's attorney asked to submit briefing to challenge the validity of the stop under MCL 257.676b and to argue that the evidence obtained by the police should be excluded. The prosecution countered that the evidence was sufficient and that, based on the facts and the statute at issue, the officer had sufficient probable cause to initiate the stop. Additionally, the prosecution argued that a reasonable mistake of law or fact does not mandate the suppression of evidence under United States Supreme Court precedent.

The district court allowed briefing and later held that the prosecution failed to prove that Robinson had sufficient cause to initiate the stop. 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. As to the alleged impeding-traffic violation under MCL 257.676b(1), the court held that the statute 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." No evidence of such impediment was presented by the prosecution, and thus the court determined that the traffic stop was invalid. Accordingly, the court held that all evidence obtained from the stop would be inadmissible in any proceeding moving forward, and it dismissed the OWI charge. The court did not address the prosecution's reasonable-mistake-of-law argument.

The prosecution-sought leave to appeal in the Tuscola Circuit Court, which was denied. The prosecution then sought leave to appeal in the Court of Appeals.

B. COURT OF APPEALS PROCEEDINGS

The Court of Appeals granted the prosecution's application, limiting the issues to those raised in the application. *People v Lucynski*, unpublished order of the Court of Appeals, entered July 21, 2020 (Docket No. 353646). Despite this, the Court of Appeals resolved the appeal based on a legal theory that was not raised by the parties in the trial court or on appeal. Specifically, the panel focused on whether defendant was seized at all, a point that neither party contested in the lower courts.³

The Court acknowledged the constitutional right to be free from unreasonable searches and seizures and that “[a] person is seized if, ‘in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’ ” *People v Lucynski*, unpublished per curiam opinion of the Court of Appeals, issued December 17, 2020 (Docket No. 353646), pp 3-4 (citation omitted). The panel relied on *People v Jenkins*, 472 Mich 26, 33; 691 NW2d 759 (2005), for the proposition that “ ‘[w]hen an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person’s liberty, and the person is not seized.’ ” *Lucynski*, unpub op at 4. The Court also acknowledged that a temporary detention for questioning is constitutionally reasonable when based on reasonable suspicion of criminal activity under *Terry*. *Id.*

The panel noted that while Robinson had followed defendant, Robinson did not turn on his lights or signal for defendant to pull over. Rather, defendant voluntarily pulled into

³ Both in the district court and in its application to the Court of Appeals, the prosecution argued that Robinson had intended to initiate and did initiate a traffic stop when he pulled into the driveway behind defendant. The question whether defendant was seized at all was first raised by the Court of Appeals during oral argument.

a driveway, and Robinson pulled in and parked behind defendant's car. "Lucynski then approached Deputy Robinson and began voluntarily answering Deputy Robinson's questions, which included what Lucynski had been doing on the roadway with the driver of the other vehicle and whether the homeowner was home." *Id.* at 5. The Court of Appeals held that based on the totality of the circumstances, the earliest point at which the encounter with Robinson could have become a seizure implicating the Fourth Amendment was when 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.⁴ 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.

In a footnote, the Court held that even if MCL 257.676b(1) requires actual impediment of traffic, in light of unpublished authority holding to the contrary, i.e., *People v Salters*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2001 (Docket No. 215396), "the evidence should not have been suppressed because the traffic stop was based on Deputy Robinson's reasonable mistake of law or fact." *Lucynski*, unpub op at 6 n 5, citing *Heien*, 574 US at 60-68.

The panel concluded by holding that the district court abused its discretion when it held that the Fourth Amendment was violated and thus that the district court erred by excluding evidence from the seizure and by dismissing the OWI charge. Accordingly, the circuit court abused its discretion by denying leave to appeal. Defendant then sought leave

⁴ Stated differently, the panel concluded that Robinson did not seize defendant merely by following him into the driveway and blocking defendant's car. Rather, the encounter became a seizure a little less than two minutes later.

to appeal in this Court. We granted defendant's application for leave to appeal, limited to three issues:

(1) whether the defendant impeded traffic, in violation of MCL 257.676b(1), where there was no actual traffic to impede at that time; (2) if not, whether the deputy sheriff made a reasonable mistake of law by effectuating a traffic stop of the defendant for violating MCL 257.676b(1), see *Heien v North Carolina*, 574 US 54 (2014); and (3) 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 (2021).]

II. ANALYSIS

We are tasked with determining whether the district court erred by refusing to bind defendant over for trial on the OWI charge. To bind a criminal defendant over for trial, the district court must find probable cause to believe that the defendant committed a felony. *People v Magnant*, 508 Mich 151, 161; 973 NW2d 60 (2021). "This requires evidence as to each element of the charged offense that would 'cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt.' " *Id.*, quoting *People v Shami*, 501 Mich 243, 250-251; 912 NW2d 526 (2018).⁵

Defendant does not dispute that if all relevant evidence presented by the prosecution at the preliminary-examination hearing is considered, probable cause existed to support his bindover on the OWI charge. However, defendant argues that the evidence supporting his

⁵ A district court's bindover decision is reviewed "for an abuse of discretion, which occurs when the district court's decision falls outside the range of principled outcomes." *Magnant*, 508 Mich at 161. A trial court abuses its discretion when it bases its ruling on an error of law. *People v Rajput*, 505 Mich 7, 11; 949 NW2d 32 (2020). Questions of statutory interpretation and questions of constitutional law are reviewed de novo. *Magnant*, 508 Mich at 161; *People v Lockridge*, 498 Mich 358, 373; 870 NW2d 502 (2015). The district court's factual determinations are reviewed for clear error. *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012).

bindover—i.e., his admissions to the officer, the field-sobriety tests, and the blood-draw results—must be suppressed because it was obtained in violation of his constitutional rights against unreasonable search and seizure and thus constitutes fruit of the poisonous tree. See *People v Stevens (After Remand)*, 460 Mich 626, 633-634; 597 NW2d 53 (1999). Without the admission of this evidence, probable cause does not exist supporting the OWI charge. Accordingly, we must first determine whether defendant was unconstitutionally seized.

A. DEFENDANT WAS SEIZED WHEN THE POLICE BLOCKED THE ONLY PATH OF EGRESS FROM A DRIVEWAY USING A MARKED POLICE VEHICLE

The United States Constitution guarantees an individual's right to be free from unreasonable searches and seizures. US Const, Am IV.⁶ As Justice Stewart explained in *United States v Mendenhall*, 446 US 544, 553-555; 100 S Ct 1870; 64 L Ed 2d 497 (1980) (opinion of Stewart, J.):

[A] person is “seized” only when, *by means of physical force or a show of authority*, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. . . . As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.

* * *

⁶ Const 1963, art 1, § 11 has historically been interpreted coextensively with the Fourth Amendment, “absent compelling reason to impose a different interpretation.” *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011) (quotation marks and citation omitted). See also *Sitz v Dep't of State Police*, 443 Mich 744, 764-779; 506 NW2d 209 (1993). No party has presented an argument under the Michigan Constitution, and therefore, we do not reach the issue whether a compelling reason warrants a different interpretation.

We conclude that a person has been “seized” 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. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled. [Emphasis added.]

The United States Supreme Court eventually adopted Justice Stewart’s *Mendenhall* test,⁷ with the added caveat that if “a person ‘has no desire to leave’ for reasons unrelated to the police presence, the ‘coercive effect of the encounter’ can be measured better by asking whether ‘a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.’ ” *Brendlin v California*, 551 US 249, 255; 127 S Ct 2400; 168 L Ed 2d 132 (2007) (emphasis added), quoting *Florida v Bostick*, 501 US 429, 435-436; 111 S Ct 2382; 115 L Ed 2d 389 (1991). Hence, there are arguably two separate standards to apply—one when a person has an independent desire to leave and another if the person does not—even if they are effectively two sides of the same coin. 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.” *Michigan v Chesternut*, 486 US 567, 573; 108 S Ct 1975; 100 L Ed 2d 565 (1988). “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.*

⁷ See *Immigration & Naturalization Serv v Delgado*, 466 US 210, 215; 104 S Ct 1758; 80 L Ed 2d 247 (1984).

This Court has adopted the same general principles, as recognized in *Jenkins*, 472 Mich at 32-33:

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. *People v Mamon*, 435 Mich 1, 11; 457 NW2d 623 (1990). When an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person’s liberty, and the person is not seized. *Florida v Royer*, 460 US 491, 497-498, 103 S Ct 1319; 75 L Ed 2d 229 (1983) (plurality opinion).

Some interactions with the police do not rise to the level of a “seizure” under the Fourth Amendment. As noted in *Jenkins*, when there is no show of force and an officer approaches an individual in a public place and asks for “voluntary cooperation through noncoercive questioning,” there will generally be no seizure. *Jenkins*, 472 Mich at 33. See also *Royer*, 460 US at 497. When exactly an interaction crosses the line and becomes a seizure, thus triggering the protections of the Fourth Amendment, is a difficult question that often sparks disagreement.

A warrantless search or seizure is presumed unconstitutional unless shown to be within one of several established exceptions. See *Illinois v Gates*, 462 US 213, 236; 103 S Ct 2317; 76 L Ed 2d 527 (1983); *People v Hughes*, 506 Mich 512, 524-525; 958 NW2d 98 (2020); *People v Reed*, 393 Mich 342, 362; 224 NW2d 867 (1975). One frequently implicated exception to the prohibition on warrantless seizures that is relevant in this case is the investigatory stop. ~~A brief seizure for investigative purposes does not violate the~~ Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot. *Terry*, 392 US at 22, 30-31; *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001). Like an investigatory stop, a traffic stop is “ ‘more analogous to a so-

called “*Terry* stop” . . . than to a formal arrest.’ ” *Rodriguez v United States*, 575 US 348, 354; 135 S Ct 1609; 191 L Ed 2d 492 (2015), quoting *Knowles v Iowa*, 525 US 113, 117; 119 S Ct 484; 142 L Ed 2d 492 (1998), in turn quoting *Berkemer v McCarty*, 468 US 420, 439; 104 S Ct 3138; 82 L Ed 2d 317 (1984).

As previously stated, Robinson did not initiate a formal traffic stop for a violation of MCL 257.676b(1),⁸ despite his testimony that this was his intention when he began following defendant.⁹ Pulling defendant over on the side of the road would have been a seizure. Instead, Robinson pulled onto the driveway behind defendant, parked a few feet behind defendant, and blocked the exit. Robinson did not turn his lights on, sound his siren, or direct defendant to pull over on the side of the road. Because Robinson did not outwardly communicate his subjective intentions to defendant, they are not relevant in determining when defendant’s encounter with Robinson became a seizure.

⁸ “[T]he Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *Kansas v Glover*, 589 US ___, ___; 140 S Ct 1183, 1187; 206 L Ed 2d 412 (2020) (quotation marks and citation omitted). See also *Whren v United States*, 517 US 806, 810; 116 S Ct 1769; 135 L Ed 2d 89 (1996) (“[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”). We have recognized the same principle under state law. See *People v Dunbar*, 499 Mich 60, 66; 879 NW2d 229 (2016) (“ ‘A police officer who witnesses a person violating [the Michigan Vehicle Code, MCL 257.1 through MCL 257.923] . . . , which violation is a civil infraction, may stop [and temporarily] detain the person’ ”), quoting MCL 257.742(1) (alterations in original).

⁹ That a police officer intended to stop or seize an individual does not mean that a seizure has occurred for Fourth Amendment purposes, because the constitutional question focuses on the objective manifestations of intent, see *Brendlin*, 551 US at 260, although subjective intentions might be relevant when they are conveyed to the person confronted, see *Michigan v Chesternut*, 486 US 567, 576; 108 S Ct 1975; 100 L Ed 2d 565 (1988).

We must therefore decide when a reasonable person in defendant's shoes would either (1) have not felt free to leave or (2) have ceased to feel free to decline Robinson's requests or otherwise terminate the encounter. *Brendlin*, 551 US at 255. Was it when defendant admitted to lacking a valid driver's license, as the Court of Appeals held, or was it sooner? In this regard, three decisions from the United States Court of Appeals for the Sixth Circuit are particularly relevant because each involves similar constitutional questions and relatively similar facts.¹⁰

In *United States v See*, 574 F3d 309, 311 (CA 6, 2009), a police officer saw the defendant and two other men in an unlit car parked in the lot of a public-housing complex in a high-crime neighborhood at about 4:30 a.m. The officer parked his patrol car in front of the defendant's vehicle in a manner that prevented the defendant from driving away. *Id.* The subsequent encounter led to a search of the defendant's vehicle, during which a firearm was found. *Id.* at 312. The defendant sought to suppress the evidence obtained from the search. The Sixth Circuit affirmed the district court's holding that blocking the defendant's vehicle " 'to determine the identity of the occupants and maintain the status quo while obtaining this information was a warrantless *Terry* seizure.' " *Id.* at 313. As the panel noted, "Given the fact that [the officer] blocked See's car with his marked patrol car, a reasonable person in See's position would not have felt free to leave." *Id.* Because the Sixth Circuit also held that reasonable suspicion did not support the seizure, it further held

¹⁰ The decisions of intermediate federal courts are not binding on this Court, although they may be considered for their persuasive value. See *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

that the seizure was unlawful and that suppression of the evidence resulting from the seizure was appropriate. *Id.* at 313-315.

In *United States v Gross*, 662 F3d 393, 396 (CA 6, 2011), during an early morning patrol, an officer noticed a vehicle legally parked in a parking lot of a public-housing complex with its engine running but with no apparent driver. The officer “noticed a barely-visible passenger” who was slumped over in the front passenger seat. *Id.* The officer “parked his police vehicle directly behind the [car] and turned on his vehicle spotlights.” *Id.* The officer then approached the vehicle on foot, identified himself through the closed window, and questioned the defendant. *Id.* at 397. After noticing a partially consumed bottle of liquor in the car, the officer asked for identification or identifying information, which the occupant provided after several repeated questions. *Id.* The officer ran a warrant check and discovered that the defendant had an outstanding felony warrant, which led to the defendant’s arrest and the discovery of incriminating evidence. *Id.*

Relying on *See*, the court held that the officer’s act of parking his vehicle behind the defendant’s legally parked car in a manner that prevented the car from leaving was a warrantless seizure and thus required reasonable suspicion of misconduct, which was lacking.¹¹ *Id.* at 399-400. Additionally, the panel emphasized that the officer in *Gross* had

¹¹ The panel rejected the government’s argument that the officer was merely engaged in a community-caretaker function under *United States v Koger*, 152 F Appx 429, 430-431 (CA 6, 2005). *Gross*, 662 F3d at 400-401. In *Koger*, the officers had approached an illegally stopped vehicle that was blocking a local highway and had a sleeping or unconscious driver. *Koger*, 152 F Appx at 430. The court found that the illegality of that situation justified a brief seizure, and the community-caretaker function was merely an alternative rationale. *Gross*, 662 F3d at 400-401.

the right to engage in a consensual encounter if done in a manner that did not amount to a *Terry* stop, such as parking alongside the vehicle. *Id.* at 401.

The decision in *O'Malley v Flint*, 652 F3d 662 (CA 6, 2011), illustrates how slightly different facts can lead to the opposite conclusion.¹² In *O'Malley*, a police officer in the city of Flint “was driving an *unmarked police vehicle* and noticed a blue Chevrolet Tahoe that looked like a Michigan State Police vehicle.” *Id.* at 665 (emphasis added). The officer began following the vehicle because he suspected that it was being used to impersonate a law-enforcement officer. *Id.*

Eventually, the Tahoe was driven into a residential driveway and parked. After its driver, plaintiff O'Malley, exited the Tahoe and began walking toward the back of the house, [Officer] Hagler parked his police vehicle in the driveway behind the Tahoe. Thereafter, Hagler approached O'Malley, identified himself as a police officer, and said that he would like to speak with him. According to O'Malley, Hagler asked about the vehicle before identifying himself. [*Id.*]

The communications and interactions that followed led to O'Malley being detained at a nearby police station. *Id.* at 666. O'Malley was never charged, and he was eventually released. *Id.*

On the seizure question, the court distinguished *Gross* and *See*, holding that O'Malley was not seized for constitutional purposes at the time of the initial encounter and questioning. The panel emphasized several factual differences. First, O'Malley was out of his vehicle and walking toward the home when the officer parked behind the Tahoe. *Id.*

¹² *O'Malley* was a civil action filed under 42 USC 1983 seeking damages for the alleged unlawful search, seizure, and detention of O'Malley. Thus, rather than deciding whether evidence should be suppressed as in *See*, the *O'Malley* court was determining whether the officer was entitled to qualified immunity under federal law, which required an assessment of the constitutionality of the police encounter. *O'Malley*, 652 F3d at 665, 668-671.

at 669. The panel opined that “parking behind a vehicle in a driveway does not inherently send a message of seizure because it is how driveways are routinely used.” *Id.* Second, the officer’s tone, identification of himself as a police officer, and initial statement of “ ‘Hey! Whose truck is that?’ ” were not threatening and merely indicated a desire to “talk to O’Malley about the Tahoe.” *Id.* Third, that “O’Malley stopped walking to respond to [Officer] Hagler’s inquiry also does not, by itself, transform this encounter into a seizure for purposes of the Fourth Amendment.” *Id.*, citing 4 LaFave, Search & Seizure (4th ed), § 9.4, and *United States v Thomas*, 430 F3d 274, 277, 280 (CA 6, 2005).

Returning to the facts of this case, while Robinson did not activate his lights or siren, he parked a few feet behind defendant’s car in the single-lane driveway. Defendant described his vehicle as being blocked in, and the prosecution has not disputed this characterization. Robinson testified that his vehicle was not “offset very much because essentially it’s just a one lane driveway. I can’t say if it was offset or not, but it was behind his vehicle.” Our review of the body-camera footage also supports defendant’s characterization of being blocked in. The presence of several inches of snow on the ground and the apparent lack of an alternative path for exiting the driveway further supports this conclusion. The body-camera footage shows defendant standing next to the driver’s side door of the Cobalt facing Robinson the moment defendant came into view as Robinson emerged from his patrol car. At the preliminary examination, Robinson also described defendant as “standing out of the vehicle” when Robinson arrived.

Beyond the positioning of defendant and Robinson’s patrol car, other facts concerning the setting of this police–citizen encounter are also important. See *Chesternut*, 486 US at 573. The encounter at issue occurred on a cold January morning in rural

Michigan in one of a handful of residential driveways off a dirt road. Robinson testified that he followed defendant's car for a short period before following defendant onto the driveway. The body-camera footage shows that Robinson quickly began exiting his car before the car even came to a full stop.

What is not clear under the facts of this case, as in many seizure cases, is whether defendant had an independent desire to keep moving. The driveway and home belonged to his friend. The record is silent on whether defendant was planning to visit with his friend before Robinson began following defendant or if defendant was planning to keep driving. Under either of these hypothetical scenarios, we conclude that defendant was seized under the standards that the United States Supreme Court has set forth.

Under the totality of the circumstances, we hold that defendant was seized at the moment Robinson, in his marked police vehicle, blocked defendant's car, resulting in no means for defendant to exit the single-lane driveway. As aptly stated by Professor Wayne LaFave, "boxing the car in," among other things, "will likely convert the event into a Fourth Amendment seizure." 4 LaFave, *Search and Seizure* (6th ed), § 9.4(a), pp 596-599. 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, 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. This is consistent with the Sixth Circuit's holding that blocking someone's parked car to " 'determine the identity of the occupants and maintain the status quo while obtaining this information was a warrantless *Terry* seizure' " *Gross*, 662 F3d at 400, quoting *See*, 574 F3d at 313. *Gross* and *See* are not anomalous decisions. Many other courts have reached the same conclusion under a variety of similar factual circumstances.¹³

¹³ *See*, e.g., *State v Rosario*, 229 NJ 263, 273; 162 A3d 249 (2017) (holding that "[a] person sitting in a lawfully parked car outside her home who suddenly finds herself blocked in by a patrol car that shines a flood light into the vehicle, only to have the officer exit his marked car and approach the driver's side of the vehicle, would not reasonably feel free to leave"); *Robinson v State*, 407 SC 169, 177, 183; 754 SE2d 862 (2014) (holding that an investigatory stop occurred when an officer blocked a vehicle in a parking lot with the officer's patrol car); *United States v Jones*, 678 F3d 293, 297, 305 (CA 4, 2012) (holding that the defendant was seized when officers followed him from a public street onto private property, blocked his car from leaving without activating lights, and then quickly approached the defendant, who was near the car, to initiate questioning); *State v Garcia-Cantu*, 253 SW3d 236, 246 & n 44 (Tex Crim App, 2008) (holding that a seizure occurred when the officer "parked his patrol car" such that it " 'boxed in' [the defendant's] parked truck, preventing him from voluntarily leaving" and noting that "[m]ost courts have held that when an officer 'boxes in' a car to prevent its voluntary departure, this conduct constitutes a Fourth Amendment seizure"); *United States v Burton*, 441 F3d 509, 511 (CA 7, 2006) (holding that officers on bicycles seized a vehicle stopped in a roadway by placing their bicycles so that the driver could not drive away); *State v Jestice*, 177 Vt 513, 515; 2004 VT 65; 861 A2d 1060 (2004) (holding that "when a police cruiser completely blocks a motorist's car from leaving, courts generally find a seizure. . . . [T]he fact that it was possible for the couple to back up and maneuver their car past the patrol car and out of the trailhead parking lot does not convince us that this was a consensual encounter"); *State v Roberts*, 293 Mont 476, 483; 1999 MT 59; 977 P2d 974 (1999) (holding that a seizure occurred when an officer, "armed and in uniform," followed the defendant's car without activating lights or sirens, blocked the car from backing out of a driveway, and made an additional "show of authority in immediately exiting his patrol car and approaching" the defendant, who had exited his car simultaneously and was standing by the car door); *McChesney v State*, 988 P2d 1071, 1075 (Wy, 1999) (noting that an officer having "blocked in" a defendant's car was "sufficient to constitute a seizure"); *United States v Tuley*, 161 F3d 513, 515 (CA 8, 1998) (holding that "[b]locking a vehicle so its occupant is unable to

We also note that, unlike in *O'Malley*, Robinson was not driving an unmarked police vehicle and did not wait until after the civilian vehicle had parked and its occupant had already begun walking around the home before pulling into the driveway and blocking the path of egress. Rather, when Robinson emerged from his vehicle, defendant was by the side of his vehicle and facing the patrol car, as if either defendant had just exited and was waiting for the police officer who had followed him into the driveway or defendant was already walking toward the police officer who had just blocked his car into the driveway. This is precisely what one would expect of a reasonable person under the circumstances.¹⁴

If a reasonable person in defendant's place did not have an independent desire to leave, but nevertheless did not want to interact with Robinson, 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

leave during the course of an investigatory stop is reasonable to maintain the status quo while completing the purpose of the stop"); *Commonwealth v Helme*, 399 Mass 298, 300; 503 NE2d 1287 (1987) (holding that an investigatory stop occurred when an officer "parked the police cruiser so as to block the defendant's [parked] automobile and prevent it from leaving the parking lot"); *United States v Kerr*, 817 F2d 1384, 1386-1387 (CA 9, 1987) (holding that when a uniformed officer approached a car after blocking the one-lane driveway as the defendant was backing out, a seizure occurred, leaving the defendant with "no reasonable alternative except an encounter with the police"); *People v Wilkins*, 186 Cal App 3d 804, 809; 231 Cal Rptr 1 (1986) (holding that a seizure occurred when the officer "stopped his marked patrol vehicle behind the parked station wagon in such a way that the exit of the parked vehicle was prevented"); *People v Jennings*, 45 NY2d 998, 999; 385 NE2d 1045 (1978) (holding that a seizure occurred when officers blocked the defendant's vehicle in a parking lot with a patrol car).

¹⁴ While the dissent relies heavily on *O'Malley*, we find that decision to be distinguishable for the reasons previously explained, and thus it carries less persuasive value for purposes of determining when a seizure occurred under the facts of this case. See *Abela*, 469 Mich at 607 ("Although lower federal court decisions may be persuasive, they are not binding on state courts.").

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.

B. MCL 257.676b(1) REQUIRES ACTUAL INTERFERENCE WITH THE NORMAL FLOW OF TRAFFIC

The warrantless seizure of a person generally must be supported by constitutionally sufficient suspicion that the individual has engaged in criminal conduct. As previously recognized in note 8 of this opinion, “ ‘[a] police officer who witnesses a person violating [the Michigan Vehicle Code, MCL 257.1 through MCL 257.923] . . . , which violation is a civil infraction, may stop [and temporarily] detain the person’ ” *People v Dunbar*, 499 Mich 60, 66; 879 NW2d 229 (2016), quoting MCL 257.742(1) (alterations in original). This aligns with United States Supreme Court precedent stating that “the Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has a particularized and objective basis for suspecting the particular person stopped of criminal activity,” *Kansas v Glover*, 589 US ___, ___; 140 S Ct 1183, 1187; 206 L Ed 2d 412 (2020) (quotation marks and citation omitted), and that a traffic stop is more similar to a temporary seizure under *Terry* than a formal arrest, *Rodriguez*, 575 US at 354. A brief seizure for investigative purposes does not violate the Fourth Amendment if the officer has a

reasonably articulable suspicion¹⁵ that criminal activity is afoot. *Terry*, 392 US at 22, 30-31; *Oliver*, 464 Mich at 192.

The stated justification for Robinson's encounter with defendant was an alleged violation of MCL 257.676b(1). The parties do not dispute that if Robinson observed defendant violate MCL 257.676b(1), then Robinson would have had constitutionally sufficient suspicion to temporarily seize defendant. The statute provides, in relevant part:

Subject to subsection (2), *a person*, without authority, *shall not block, obstruct, impede, or otherwise interfere with the normal flow of vehicular, streetcar, or pedestrian traffic upon a public street or highway in this state, by means of a barricade, object, or device*, or with his or her person. This section does not apply to persons maintaining, rearranging, or constructing public utility or streetcar facilities in or adjacent to a street or highway. [MCL 257.676b(1) (emphasis added).]

Our primary goal when interpreting a statute is to give effect to the Legislature's intent. *Magnant*, 508 Mich at 162. We begin with the plain and ordinary meaning of the statute, and if the text is clear and unambiguous, then it will be enforced as written. *People v Sharpe*, 502 Mich 313, 326-327; 918 NW2d 504 (2018).

Given that the parties do not dispute that defendant could be a "person" and his vehicle an "object" under MCL 257.676b(1), we will assume without deciding that the statute applies to a person operating a vehicle on a roadway.¹⁶ In light of that assumption,

¹⁵ "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996).

¹⁶ MCL 257.676b focuses on the conduct of a person in relationship to the "normal flow of vehicular, streetcar, or pedestrian traffic" MCL 257.676b(2) refers specifically to a person standing in a roadway and carves out exceptions for construction, maintenance, and utility work, as well as the solicitation of contributions for a charitable or civic organization under certain circumstances.

the focal issue is whether MCL 257.676b(1) requires evidence that the accused's conduct actually affected the normal flow of traffic or whether the mere possibility of it affecting traffic is sufficient.¹⁷

The prohibited conduct is to “block, obstruct, impede, or otherwise interfere with the normal flow of vehicular, streetcar, or pedestrian traffic upon a public street or highway” MCL 257.676b(1). The statute's clear terms thus require some evidence that the accused's conduct *actually affected* the usual smooth, uninterrupted movement or progress of the *normal flow* of traffic on the roadway, which requires an assessment of traffic at the time of the alleged offense. Interference with a police officer's ability to travel on a road could sustain a violation of MCL 257.676b(1) just as easily as interference with other vehicles traveling on a road. However, the statute is not violated if the normal flow of traffic was never impeded, blocked, or interfered with. In short, in order to interfere with the normal flow of traffic, some traffic must have actually been disrupted or blocked.

We reject the prosecution's argument that the potential interference with hypothetical or nonexistent traffic is sufficient. This argument ignores the phrase “normal flow of . . . traffic” as used in MCL 257.676b(1). Such an interpretation would also lead to the untenable situation in which every person crossing a street and every vehicle

¹⁷ The Court of Appeals has taken conflicting positions on this question in at least two unpublished opinions. Prior to the genesis of this case, the Court of Appeals had held without analysis that MCL 257.676b(1) does “not require a showing of an actual impediment to the smooth flow of traffic” *People v Salters*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2001 (Docket No. 215396), p 2. But after the Court of Appeals issued its opinion in this case, a different panel held that MCL 257.676b(1) was not violated when there was no evidence of any actual impediment of the flow of traffic. See *People v Estelle*, unpublished per curiam opinion of the Court of Appeals, issued September 16, 2021 (Docket No. 356656), p 3.

attempting to park along the side of a road would potentially be guilty of a civil infraction even if no other vehicles or pedestrians are present on the roadway.¹⁸

In this case, the prosecution has not introduced evidence sufficient to establish even reasonable suspicion to believe that defendant violated MCL 257.676b(1). Old State Road has been described as a rural stretch of unpaved road. While the record is silent as to typical traffic volume on Old State Road, it is undisputed that no vehicles other than Robinson's, defendant's, and a third unidentified driver's were on the road during the relevant time period. Robinson observed defendant's car and another car stopped side by side in the road from some distance away, but both cars began moving again when Robinson was still about 800 feet away. Robinson admitted that he did not have to slow his car down or go around either vehicle. Stated differently, the normal flow of vehicular traffic on the road was not impeded or disrupted. Under these facts, and in keeping with the district court's ruling, there is no evidence in the record to sustain the accusation that defendant violated MCL 257.676b(1).

C. ROBINSON'S MISTAKE OF LAW WAS NOT REASONABLE

In the absence of a warrant, constitutionally sufficient suspicion of a crime, or another recognized exception, the seizure of an individual is presumed unconstitutional. See *Gates*, 462 US at 236; *Hughes*, 506 Mich at 524-525. However, drawing on the notion

¹⁸ While "statutes must be construed to prevent absurd results, injustice, or prejudice to the public interest," *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999), we need not rely on this doctrine today because no reasonable reading of MCL 257.676b(1) supports the prosecution's argument. Moreover, MCL 257.672 appears to address the prosecution's concerns about people abandoning their vehicles in the middle of a road without fear of consequence or the effect on other drivers.

that the “touchstone of the Fourth Amendment is ‘reasonableness,’ ” the United States Supreme Court has held that “reasonable suspicion” or “probable cause” sufficient to seize an individual without a warrant can arise from a police officer’s “reasonable mistake” of fact or law. *Heien*, 574 US at 60-61 (quotation marks and citation omitted). Stated differently, the Fourth Amendment is not violated if a police officer’s suspicion that the defendant’s conduct was illegal is based on a “reasonable mistake” about what the law required. *Id.* at 66.

A review of the facts and analysis in *Heien* provides insight into what kinds of mistakes of law are “reasonable.” In *Heien*, a police officer saw the defendant driving down a highway with only one working brake light. *Id.* at 57. The officer pulled the defendant over, believing it was unlawful to have a single working brake light. *Id.* at 57-58. A subsequent search of the car revealed cocaine. *Id.* at 58.

Heien required the United States Supreme Court to decide whether the officer’s belief that it was a traffic violation to have only one working brake light was a reasonable mistake of law. Under the state’s vehicle code, a car needed to have “a stop lamp on the rear of the vehicle” that could be “incorporated into a unit with one or more other rear lamps.” *Id.* at 59 (quotation marks and citation omitted). In concluding that the mistake was reasonable, the Court noted the internal inconsistency in the vehicle code’s language. *Id.* at 67. While the code stated that a driver must have “a stop lamp,” suggesting that just one was enough, it later stated that the lamp “may be incorporated into a unit with one or more other rear lamps.” *Id.* at 67-68. The word “other” suggested that a “stop lamp” is a kind of “rear lamp,” and a different section of the vehicle code required “all originally equipped rear lamps” to be in “good working order.” *Id.* (quotation marks and citation

omitted). Put together, the code sections were unclear as to whether one faulty brake light alone would violate the law. Given the ambiguity in the code's language, which had also led to disagreement within the state courts, the Court concluded that the officer's mistaken belief was reasonable.

The Court's holding in *Heien* is not carte blanche authority to ignore or remain ignorant of the law, nor are reasonable mistakes easily established. "The Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable. We do not examine the subjective understanding of the particular officer involved." *Id.* *Heien* further held that this "inquiry is *not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity* for a constitutional or statutory violation. Thus, an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce." *Id.* at 67 (emphasis added).

We also find persuasive the guidance provided by Justice Kagan's concurring opinion in *Heien* about what constitutes an objectively reasonable mistake. As she noted, reasonable mistakes of law should be "exceedingly rare." *Id.* at 70 (Kagan, J., concurring) (quotation marks and citation omitted). "If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not." *Id.* Stated differently, the misunderstanding of an unambiguous statute is not an objectively reasonable mistake of law.

Taken together, *Heien* tells us that objectively reasonable mistakes of law occur in exceedingly rare circumstances in which an officer must interpret an ambiguous statute. Other courts have reached the same conclusion. See, e.g., *United States v Stanbridge*, 813

F3d 1032, 1037 (CA 7, 2016) (holding that statutory ambiguity is a prerequisite to a determination that an officer's mistake of law was objectively reasonable); *United States v Alvarado-Zarza*, 782 F3d 246, 250 (CA 5, 2015) (holding that an officer's mistaken reading of an unambiguous statute was not objectively reasonable). Under our precedent, "[a] statute is ambiguous if two provisions irreconcilably conflict or if the text is equally susceptible to more than one meaning." *People v Hall*, 499 Mich 446, 454; 884 NW2d 561 (2016). While qualified immunity applies to officers so long as they have not violated a clearly established statutory right, the mistake-of-law doctrine announced in *Heien* is "not as forgiving." *Heien*, 574 US at 67.

We hold that to the extent Robinson's seizure of defendant was based on a belief that MCL 257.676b(1) was violated, his mistake of law was not objectively reasonable. Of critical importance is our prior conclusion that MCL 257.676b(1) is not ambiguous. One cannot be guilty of violating MCL 257.676b(1) without evidence that the "normal flow" of actual traffic was disrupted, and Robinson admitted that no disruption occurred. Unlike the convoluted statute at issue in *Heien*, discerning the meaning of MCL 257.676b(1) does not require "hard interpretive work." *Heien*, 574 US at 70 (Kagan, J., concurring). See also *People v Maggit*, 319 Mich App 675, 690-691; 903 NW2d 868 (2017) (holding that a mistaken reading of an unambiguous ordinance was not a reasonable mistake of law); *United States v Stanbridge*, 813 F3d 1032, 1037 (CA 7, 2016) ("The statute isn't ambiguous, and *Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an *unambiguous* statute.").

We do not find the prosecution's or the Court of Appeals' reliance on the *Salters* decision to be persuasive. *Salters* was an unpublished decision; therefore, it is not a

precedential statement of law. MCR 7.215(C)(1); *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 492 Mich 40, 51; 821 NW2d 1 (2012).¹⁹ The more critical flaw with *Salters*, however, was the Court's decision to base its holding entirely on the perceived purpose of the statute instead of also engaging with the text of MCL 257.676b(1).²⁰ The Court of Appeals in this case committed the same error by failing to independently analyze MCL 257.676b(1). Additionally, the 2001 *Salters* decision does not appear to have been cited or relied on for its conclusory interpretation of MCL 257.676b in any appellate decision in Michigan until the Court of Appeals' decision in this case. Moreover, in *People v Estelle*, unpublished per curiam opinion of the Court of Appeals, issued September 16, 2021 (Docket No. 356656), p 3, the Court of Appeals engaged with the text of MCL 257.676b(1) for the first time in 20 years and concluded, like we do today, that some evidence of actual interference with the normal flow of traffic is required. While *Estelle* was decided after the Court of Appeals issued its opinion in this case, the Court held that MCL 257.676b(1) was clear on its face as to requiring actual disruption or interference with the normal flow of traffic.

¹⁹ See *Davis v United States*, 564 US 229, 241; 131 S Ct 2419; 180 L Ed 2d 285 (2011) (“[W]hen *binding* appellate precedent specifically authorizes a particular police practice, well-trained officers will and should use that tool to fulfill their . . . responsibilities.”) (emphasis altered).

²⁰ The entirety of the statutory analysis in *Salters* encompassed three conclusory sentences:

The intent of the statute was clearly to prohibit a vehicle from impeding vehicular or pedestrian traffic in order to promote public safety. Consistent with this purpose, we conclude that the statute did not require a showing of an actual impediment to the smooth flow of traffic in order to establish a violation of the statute. The trial court did not err in finding that the stop was proper. [*Salters*, unpub op at 2.]

Simply put, a single unpublished decision coming out the other way does not transform an unambiguous statute into an ambiguous one. Nothing in the *Heien* majority opinion suggests that a single appellate decision incorrectly interpreting an unambiguous statute makes a mistaken understanding of such a statute automatically reasonable. This is not to say that favorable caselaw is irrelevant to whether a mistaken interpretation is reasonable. Nonprecedential, unpublished authority that has not been relied on in subsequent appellate decisions, like the *Salters* opinion, is simply less persuasive and less likely to be dispositive than published precedent. Objectively reasonable mistakes should be confined to the exceedingly rare instances of truly ambiguous statutes.²¹

The dissent's reliance on *Michigan v DeFillippo*, 443 US 31; 99 S Ct 2627; 61 L Ed 2d 343 (1979), is not persuasive. That case concerned the validity of an arrest made under an ordinance requiring individuals to identify themselves to a police officer upon request, and the statute was declared unconstitutional after the arrest. *Id.* at 33. The United States Supreme Court upheld the arrest as valid at the time because there was “no controlling precedent that [the] ordinance was or was not constitutional, and hence the *conduct observed violated a presumptively valid ordinance*,” *id.* at 37 (emphasis added), although the “outcome might have been different had the ordinance been ‘grossly and flagrantly unconstitutional,’ ” *Heien*, 574 US at 64, quoting *DeFillippo*, 443 US at 38. The presumption that an ordinance or statute is valid until declared otherwise is very different

²¹ While at least one federal court has held, in the qualified-immunity context, that “[f]avorable case law goes a long way to showing that an interpretation is reasonable,” *Barrera v Mount Pleasant*, 12 F4th 617, 621 (CA 6, 2021), that principle is not controlling here. We do not find the principle articulated in *Barrera*, a decision about qualified immunity, to be applicable to the situation before this Court.

from determining what the text of a statute or ordinance allows or requires. *Heien* recognized this point by emphasizing that despite the subsequent ruling that the statute was unconstitutional, this ruling did “not change the fact that DeFillippo’s conduct was lawful [sic] when the officers observed it.” *Heien*, 574 US at 64. No one disputed whether the facts supported a violation of the ordinance, and because the ordinance was considered lawful at the time of the arrest, the officers had ample probable cause to arrest DeFillippo. *Id.* at 64-65.

The same is not true in this case because the text of MCL 257.676b(1) is unambiguous and defendant’s conduct, as observed by Robinson, did not violate the statute. This is contrary to *DeFillippo*, which involved conduct falling under an unambiguous ordinance that was later declared unconstitutional. Accordingly, Robinson’s mistaken understanding of MCL 257.676b(1) was not a reasonable mistake of law under *Heien*, and we reverse the Court of Appeals’ holding to the contrary.²²

D. SUMMARY AND UNRESOLVED QUESTIONS

Given our conclusion that defendant was seized the moment Robinson blocked the driveway and prevented egress, defendant’s incriminating statements and the officer’s visual and olfactory observations that the Court of Appeals relied upon to justify further

²² While *Heien* instructs us not to “examine the subjective understanding of the particular officer involved,” *Heien*, 574 US at 66, it is noteworthy that Robinson did not mention impeding or interfering with traffic during his recorded interactions with defendant. This is contrary to the facts in *Heien*, in which the officer clearly informed the occupants that he stopped their vehicle because of a faulty rear brake light. *Id.* at 57-58. While we need not decide the issue today, we question whether an explanation for a warrantless stop or seizure of an individual that was never conveyed to the individual and was not raised until after prosecution of the individual commenced is entitled to deference as a reasonable mistake of law.

inquiry and an eventual arrest were obtained in violation of defendant's Fourth Amendment rights. Prior to Robinson blocking defendant in, defendant had not made any incriminating statements, and thus such statements could not have justified a seizure. A seizure could have been justified if Robinson had reasonable suspicion to believe that defendant had violated the law, but as the district court previously held, there was no evidence to support Robinson's hunch that an illegal drug transaction had taken place on the road, and that ruling was not appealed. A suspected violation of MCL 257.676b(1) also could not serve as reasonable suspicion given our previous conclusions. Accordingly, we have not been presented with any lawful justification for the seizure, and the district court did not err by holding that the seizure violated defendant's constitutional rights.

We reverse the Court of Appeals' holding that defendant's initial interactions with Robinson were consensual and that the earliest defendant was seized was when he admitted that he lacked a valid driver's license. Instead, we hold that defendant was seized when his egress was blocked by a marked police vehicle, and this seizure violated defendant's Fourth Amendment rights. However, the existence of a Fourth Amendment violation does not always mandate application of the exclusionary rule to evidence gathered as a result of the unlawful seizure. See *Gates*, 462 US at 223; *People v Hawkins*, 468 Mich 488, 499; 668 NW2d 602 (2003). The Court of Appeals did not determine whether exclusion of the evidence was the appropriate remedy because of its holding that no Fourth Amendment violation occurred. We leave the resolution of this question to the Court of Appeals on remand.

III. CONCLUSION

For the reasons previously discussed, we hold that defendant was seized at the moment his car was blocked in the driveway by a marked police vehicle, MCL 257.676b(1) is not violated unless the normal flow of traffic has actually been disrupted, and the officer's misunderstanding of the statute was not a reasonable mistake of law under *Heien*. We reverse the judgment of the Court of Appeals and remand this case to that Court to determine whether application of the exclusionary rule was the appropriate remedy.

Elizabeth M. Welch
Bridget M. McCormack
Richard H. Bernstein
Elizabeth T. Clement (as to Parts I,
II(A), and II(B))
Megan K. Cavanagh

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 162833

DAVID ALLAN LUCYNSKI,

Defendant-Appellant.

CLEMENT, J. (*concurring in part and dissenting in part*).

I join the majority opinion as to Parts I, II(A), and II(B) because I agree that the stop in question constituted a seizure under the Fourth Amendment and that this seizure was not justified by reasonable suspicion of criminal wrongdoing. However, I join the dissent as to its Part II because I believe that, pursuant to *Heien v North Carolina*, 574 US 54; 135 S Ct 530; 190 L Ed 2d 475 (2014), the evidence should not have been excluded given that the unconstitutional seizure was a result of a police officer's reasonable mistake of law.

Elizabeth T. Clement

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 162833

DAVID ALLAN LUCYNSKI,

Defendant-Appellant.

ZAHRA, J. (*dissenting*).

Deputy Robinson did not stop or in any way seize defendant when he pulled his patrol car into the driveway behind defendant's parked car. As expressed in *O'Malley v Flint*,¹ parking cars one after another is typically the way a driveway functions; there is nothing inherently coercive about a police officer parking behind another car in a driveway. Further, Deputy Robinson approached defendant in a courteous, nonthreatening fashion and engaged defendant in conversation. On these undisputed facts, no seizure occurred as a matter of law until after defendant incriminated himself.²

Because there was no seizure, this case does not require interpretation of MCL 257.676b(1), the impeding-traffic statute. Nonetheless, a majority of this Court reaches the opposite conclusion. Accordingly, I further conclude that the Fourth Amendment was

¹ *O'Malley v Flint*, 652 F3d 662, 669 (CA 6, 2011).

² Defendant admitted to driving without a license and to drinking and smoking marijuana before driving; in addition, marijuana and an open container of alcohol were found in defendant's car.

not violated because the actions of Deputy Robinson were the product of a reasonable mistake of law. Simply put, we should not hold a law enforcement officer to a higher standard of legal interpretation than judges. Because a prior panel of the Michigan Court of Appeals determined in 2001 that the impeding-traffic statute is violated when cars stop in a roadway—regardless of whether traffic is, in fact, impeded—and that determination has stood unchallenged for more than 20 years, it was reasonable for Deputy Robinson to interpret the statute in a like manner. For these independent reasons, I dissent. The evidence produced as a result of Deputy Robinson’s encounter with defendant should not be suppressed.

I

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”³ A seizure of a person is “meaningful interference, however brief, with an individual’s freedom of movement.”⁴ Put another way, a seizure occurs when “a police officer accosts an individual and restrains his freedom to walk away”⁵ This can be accomplished either “by means of force or show of authority”⁶ But “not all personal intercourse between [law enforcement] and citizens involves ‘seizures’ of persons.”⁷ “When an officer

³ US Const, Am IV.

⁴ *United States v Jacobsen*, 466 US 109, 113 n 5; 104 S Ct 1652; 80 L Ed 2d 85 (1984).

⁵ *Terry v Ohio*, 392 US 1, 16; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

⁶ *Id.* at 19 n 16.

⁷ *Id.*

approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized."⁸

The United States Court of Appeals for the Sixth Circuit found such an instance of voluntary cooperation in *O'Malley v Flint*.⁹ *O'Malley* is instructive here given that the pertinent facts are virtually identical. In *O'Malley*, a police officer observed and followed a blue Chevrolet Tahoe that he suspected was being used to impersonate a police officer. The Tahoe was driven into a residential driveway and parked. After its driver, Sean O'Malley, exited the Tahoe and began walking toward the back of the house, the officer parked his police vehicle in the driveway behind the Tahoe. The officer approached O'Malley and said that he would like to speak with him. O'Malley stopped and answered the officer's questions.

Given these facts, the court held that no seizure occurred because "a reasonable person would feel free to continue walking even after [the officer's] vehicle was parked behind the unoccupied Tahoe."¹⁰ The panel explained that O'Malley not only reasonably thought that he was free to leave his vehicle at the time of the alleged seizure but, in fact, had left it and was walking away from it. "[P]arking behind a vehicle in a driveway does

⁸ *People v Jenkins*, 472 Mich 26, 33; 691 NW2d 759 (2005). The majority opinion curiously states that "[w]hen exactly an interaction crosses the line and becomes a seizure" is a "difficult question." This is not a difficult question at all. If an officer, through the use of force or a show of authority, prevents a pedestrian from walking away, it is a seizure. If an officer talks to a pedestrian without the use of force or a show of authority, it is not a seizure.

⁹ *O'Malley*, 652 F3d at 665.

¹⁰ *Id.* at 669.

not inherently send a message of seizure because it is how driveways are routinely used.”¹¹ The court found the following facts probative: (1) the officer “was not accompanied by the threatening presence of several officers”; (2) the officer “neither displayed a weapon, nor touched O’Malley”; and (3) the officer “did not use language or a tone of voice compelling compliance. Rather, he merely stated that he was a police officer . . . and said he wanted to talk to O’Malley about the Tahoe.”¹² The court explained that the mere fact that O’Malley stopped walking to respond to the officer’s questions did not transform the encounter into a seizure, and it held that in view of the totality of the circumstances, “O’Malley was not ‘seized’ for purposes of the Fourth Amendment at the time of the initial encounter and questioning.”¹³

Similarly, defendant in this case was not seized at the time of the initial encounter and questioning. Deputy Robinson observed and followed defendant from his police car. After defendant pulled into a driveway, Deputy Robinson pulled into the driveway behind him like any private citizen who wished to speak with him would do. By the time Deputy Robinson pulled into the driveway and exited his vehicle, defendant was out of his parked

¹¹ *Id.*

¹² *Id.* (cleaned up). See also *United States v Matthews*, 278 F3d 560, 561-562 (CA 6, 2002) (holding that a person walking down the street was not detained when an officer driving in a marked police car yelled, “Hey, buddy, come here,” because the statement was a request rather than an order) (quotation marks omitted); *United States v Caicedo*, 85 F3d 1184, 1191 (CA 6, 1996) (holding that no seizure occurred when, as the car in question moved slowly through a bus terminal’s parking lot, the officer “asked for permission to speak to either [the driver] or his passenger as [the driver] drove toward the exit, and . . . [the driver] voluntarily stopped the car”).

¹³ *O’Malley*, 652 F3d at 669.

vehicle and appeared to be approaching the adjacent house. Deputy Robinson asked defendant if he lived there, and defendant stated that a friend lived there. Defendant then approached Deputy Robinson and began voluntarily answering questions. During the conversation, defendant admitted that he did not have a driver's license, admitted that he had been drinking and smoking marijuana earlier, and performed poorly on a field-sobriety test, all of which gave Deputy Robinson sufficient cause to place defendant under arrest.

These undisputed facts simply do not form a basis on which to conclude that Deputy Robinson seized defendant. An objectively reasonable person would not feel obligated to talk to Deputy Robinson simply because he was a law enforcement officer who parked his police car in the driveway behind that person's car. A critical component of a seizure is police coercion. Coercion is established by an affirmative use of force or show of authority that sends a message to someone that they are not free to go about their business. No coercive use of force or show of authority was present in this case.

We are materially aided in this case by video evidence obtained from Deputy Robinson's body camera. As in *O'Malley*, the encounter here involved a lone officer; Deputy Robinson "was not accompanied by the threatening presence of several officers."¹⁴ Deputy Robinson "neither displayed a weapon, nor touched [defendant]."¹⁵ Further, Deputy Robinson "did not use language or a tone of voice compelling compliance."¹⁶

¹⁴ *Id.* (quotation marks and citation omitted).

¹⁵ *Id.*

¹⁶ *Id.* Deputy Robinson also did not touch defendant or display a weapon. See *United States v Mendenhall*, 446 US 544, 554; 100 S Ct 1870; 64 L Ed 2d 497 (1980) (opinion of Stewart, J.) ("Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the

Much like the officer in *O'Malley*, Deputy Robinson merely approached defendant and asked questions about what defendant was doing. Defendant could have declined to answer the questions and then continued to his friend's home. "The fact that [defendant] stopped walking to respond to [Deputy Robinson's] inquiry also does not, by itself, transform this encounter into a seizure for purposes of the Fourth Amendment."¹⁷ Curiosity and the basic human instinct to engage with people who approach you in a nonthreatening manner are simply not enough to turn noncoercive police activity into a seizure. The majority opinion in essence concludes that Deputy Robinson's activity was coercive and amounted to an unconstitutional seizure merely because he was a uniformed deputy sheriff functioning out of a marked sheriff's vehicle. Caselaw is clear, however, that the Fourth Amendment is not violated under these circumstances. No action by Deputy Robinson amounted to a use of force or show of authority that would cause defendant to conclude that he was not free to decline to engage with Deputy Robinson and simply walk away.

The majority opinion acknowledges *O'Malley*, but it fails to articulate a genuine difference between the facts at issue in that case and the facts in the present case. It merely observes two mundane factual differences, neither of which is of consequence under Fourth

display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." The majority opinion cites Justice Stewart's list of circumstances indicating a seizure, but none of those circumstances is present here.

¹⁷ *O'Malley*, 652 F3d at 669. See also *Immigration & Naturalization Serv v Delgado*, 466 US 210, 216; 104 S Ct 1758; 80 L Ed 2d 247 (1984) ("While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.").

Amendment seizure analysis. First, the majority opinion emphasizes that the police car in *O'Malley* was unmarked, whereas the police car here was marked. But the officer in *O'Malley* identified himself as a police officer before asking the driver questions;¹⁸ *O'Malley* was under no illusion that he was talking to a private citizen. Moreover, the majority opinion offers no reason why an interaction between a law enforcement officer operating out of an unmarked police vehicle is less coercive than an interaction with a law enforcement officer operating out of a marked police vehicle. Caselaw is clear that the simple indication that one is a police officer is not a “show of authority” sufficient to initiate a seizure. Indeed, it is common sense that people are free to go about their business when they encounter police vehicles without their lights on. Regardless, given that the officer in *O'Malley* immediately identified himself, the difference between the markings on the police vehicles in each case is no more probative than the difference between defendant driving a red Chevrolet Cobalt and *O'Malley* driving a blue Chevrolet Tahoe.

The other purported factual difference emphasized in the majority opinion is that when Deputy Robinson exited his vehicle, “defendant was by the side of his vehicle and facing the patrol car, as if either defendant had just exited and was waiting for the police officer who had followed him into the driveway or defendant was already walking toward the police officer who had just blocked his car into the driveway.” The majority contrasts this with *O'Malley* because Deputy Robinson “did not wait until after the civilian vehicle had parked and its occupant had already begun walking around the home before pulling into the driveway and blocking the path of egress.” As a preliminary note, this is a dubious

¹⁸ *O'Malley*, 652 F3d at 665.

summary of the facts of this case.¹⁹ But even if defendant were standing idle outside his car, it is a distinction without a difference. The fact remains that defendant was outside his parked car and could have chosen to walk into his friend's home instead of talking to the officer. A reasonable person would feel free to walk to the house even after the officer's vehicle was parked in the driveway behind their unoccupied car.²⁰ Further, as was the case in *O'Malley*, not only would a reasonable person conclude that they were free to leave their vehicle at the time of the alleged seizure, but defendant, in fact, had left it and appeared to be walking away. Finally, the majority suggests that a reasonable person would not walk toward the house because defendant was not the homeowner, but defendant stated that he had stopped at this house to visit a friend.²¹ It makes no difference that defendant himself was not the homeowner.

¹⁹ Defendant is not visible on the available body-camera footage until Deputy Robinson has stepped out of his vehicle and has taken a couple strides toward defendant. At that point, defendant appears to be around the front bumper of his car and is in midstride as he walks toward Deputy Robinson. This suggests that defendant had been between the house and the car moments before he appears in the video, not standing around waiting for the officer, as the majority suggests.

²⁰ See *O'Malley*, 652 F3d at 669.

²¹ The majority opinion also attempts to inject doubt into a record that is otherwise clear when it muses about "whether defendant was planning to visit with his friend before Robinson began following defendant or if defendant was planning to keep driving" and when it states that the record is not clear "whether defendant had an independent desire to keep moving" after he got out of his vehicle. But the record supports only one conclusion: defendant was there to visit his friend. There is nothing in the record that suggests defendant wanted to leave but could not do so because his car was blocked. If he wanted to leave, he could have said so; if, at that point, the officer prevented defendant from leaving, it would be a seizure, but those are not the facts of this case.

The majority opinion's characterization of parking in a residential driveway—something any social guest would do—as “a show of force” is risible. Defendant was not in his vehicle when the officer arrived, and defendant indicated that he was visiting his friend, not planning to leave. Only one officer was present, and he did not physically touch defendant. The officer did not turn on his emergency lights or siren, he did not draw his gun, and he did not give any orders or commands. The officer's tone was conversational and not harassing or overbearing. Under these circumstances, there is no seizure. The majority opinion's contrary holding will make it nearly impossible for an officer to seek cooperation from a citizen unless the officer can articulate reasonable suspicion of a crime.

II

Assuming for the sake of argument that there was a seizure, the next question would be whether there was “ ‘a particularized and objective basis for suspecting the particular person stopped’ of breaking the law.”²² In numerous cases, the United States Supreme Court has made clear that “[t]he reasonable suspicion inquiry falls considerably short of 51% accuracy, for, as [it] has explained, to be reasonable is not to be perfect.”²³ As the majority recognizes, reasonable suspicion sufficient to justify a vehicle stop under the Fourth Amendment may exist even when it “rest[s] on a mistaken understanding of the scope of a legal prohibition” so long as that mistaken understanding is objectively

²² See *Heien v North Carolina*, 574 US 54, 60; 135 S Ct 530; 190 L Ed 2d 475 (2014) (citation omitted).

²³ *Kansas v Glover*, 589 US ___, ___; 140 S Ct 1183, 1188; 206 L Ed 2d 412 (2020) (quotation marks, citations, and brackets omitted).

reasonable.²⁴ Thus, any seizure of defendant by Deputy Robinson may have been constitutionally permissible even if defendant did not violate the impeding-traffic statute.

In explaining the “reasonable mistake of law” standard in *Heien*, the United States Supreme Court discussed another case that arose out of this state, *Michigan v DeFillippo*.²⁵ There, Detroit police officers arrested the defendant under an ordinance that made it illegal for a person suspected of criminal activity “to refuse to identify himself and produce evidence of his identity.”²⁶ Our Court of Appeals determined that the ordinance was unconstitutional and that the arrest was therefore invalid.²⁷ Accordingly, it ordered the suppression of drug evidence that had been discovered incident to the arrest. The United States Supreme Court accepted the unconstitutionality of the ordinance but reversed the suppression of the drug evidence, holding that the arrest was valid and that the evidence should not have been suppressed.²⁸ The Court explained that “there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance.”²⁹ *Heien* then explained that *DeFillippo* is an example of a valid seizure under the Fourth Amendment based on a reasonable mistake of law. “That a court only *later* declared the ordinance unconstitutional does not change the

²⁴ *Heien*, 574 US at 60.

²⁵ *Michigan v DeFillippo*, 443 US 31; 99 S Ct 2627; 61 L Ed 2d 343 (1979).

²⁶ *Id.* at 33.

²⁷ *Id.* at 34.

²⁸ *Id.* at 40.

²⁹ *Id.* at 37.

fact that DeFillippo's conduct was lawful when the officers observed it. But the officers' assumption that the law was valid was reasonable, and their observations gave them 'abundant probable cause' to arrest DeFillippo."³⁰

Although this case presents slightly different circumstances, *Heien*'s discussion of *DeFillippo* is instructive. Deputy Robinson observed two cars stopped next to each other in the middle of Old State Road. Deputy Robinson believed this to be a violation of MCL 257.676b(1), which states, in relevant part, that "a person, without authority, shall not block, obstruct, impede, or otherwise interfere with the normal flow of vehicular . . . or pedestrian traffic upon a public street or highway" The majority concludes that defendant did not violate this statute because he did not actually interfere with the movement of any other vehicles or pedestrians. But the officer did not have the benefit of this Court's guidance at the time of the alleged offense. In fact, the only opinion at the time of these events that had interpreted the impeding-traffic statute reached the exact opposite conclusion.³¹ In the unpublished *Salters* opinion, a unanimous Court of Appeals panel held that MCL 257.676b(1) "did not require a showing of an actual impediment to the smooth flow of traffic in order to establish a violation of the statute."³² Thus, the circumstances here are similar to *DeFillippo*; in both cases, there was a law that appeared to be grounds for a valid seizure until those grounds were deemed inapplicable by a subsequent judicial ruling. Here, a statute appeared to apply to defendant's conduct based

³⁰ *Heien*, 574 US at 64 (citations omitted).

³¹ *People v Salters*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2001 (Docket No. 215396).

³² *Id.* at 2.

on the only available judicial guidance until this Court repudiated the decision. In *DeFillippo*, an ordinance appeared to apply to the defendant's conduct until the Court of Appeals determined that it was unconstitutional. In both cases, the defendant's conduct was lawful, but the officer's assumption that the defendant's conduct was unlawful was reasonable. Thus, any seizure that occurred in this case was the result of a reasonable mistake of law.

The majority concludes that Justice Kagan's concurring opinion in *Heien* provides persuasive guidance about what constitutes an objectively reasonable mistake.³³ But conspicuously absent from the majority's discussion of Justice Kagan's concurrence is her instruction that "the test [for whether police action is a reasonable mistake of law] is satisfied when the law at issue is so doubtful in construction that a reasonable judge could agree with the officer's view."³⁴ In this case, not only *could* a reasonable judge agree with the officer's view, but three seasoned judges of the Court of Appeals, all of whom served as trial judges prior to their service as appellate judges, unanimously agreed with the officer's view.³⁵ Judges TALBOT, O'CONNELL, and COOPER³⁶ all concluded that MCL 257.676b(1) did not require a showing of an actual impediment to the smooth flow of

³³ It goes without saying that while Justice Kagan's opinion is interesting, a concurring opinion is not binding precedent. As explained earlier, the facts of the instant case support a finding of a reasonable mistake of law pursuant to the majority opinion in *Heien*.

³⁴ *Heien*, 574 US at 70 (Kagan, J., concurring) (quotation marks and citation omitted).

³⁵ See *People v Salters*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2001 (Docket No. 215396).

³⁶ Indeed, at the time *Salters* was decided, these three judges of the Court of Appeals possessed a combined 74 years of judicial experience.

traffic.³⁷ Although the decision is unpublished and not binding precedent, it is objective proof that three reasonable judges could—and, in fact, did—agree with Deputy Robinson’s understanding of the statute at issue. It is also worth noting that this Court denied the defendant’s application for leave to appeal in *Salters*.³⁸ The Court of Appeals’ interpretation set out in *Salters* remained unchallenged in Michigan’s court system until the present case, more than 20 years after *Salters* was decided.³⁹

The majority’s implicit holding that *Salters* was so erroneous that no reasonable judge could reach its conclusion sets far too high a bar for the reasonable-mistake-of-law test. The *Heien* majority explained that “[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them fair leeway for enforcing the law in the community’s protection.”⁴⁰ A proper

³⁷ *Salters*, unpub op at 2.

³⁸ *People v Salters*, 465 Mich 920 (2001).

³⁹ The majority opinion misses the point in its discussion of *Salters* being unpublished and not relied on by another appellate decision in Michigan prior to this case. So what? This only suggests that no litigant who was issued a citation under MCL 257.676b(1) thought *Salters* was wrong. The fact that a recent panel of the Court of Appeals disagreed with *Salters* only further undermines the majority’s position. We now have two unpublished Court of Appeals opinions that have interpreted the same statute differently. This is prima facie proof that reasonable judicial minds can—and, in fact, did—differ over the interpretation of the impeding-traffic statute. See *Heien*, 574 US at 68 (holding that it was objectively reasonable for the officer to think that the defendant’s faulty right brake light violated North Carolina law because there was a disagreement within the state courts on that very issue). Because Deputy Robinson’s interpretation was consistent with that of the only panel of the Court of Appeals to have addressed the question at the time of defendant’s arrest, *Heien* dictates that Deputy Robinson’s error was a reasonable mistake of law.

⁴⁰ *Heien*, 574 US at 60-61 (quotation marks and citation omitted).

reasonableness analysis under the Fourth Amendment “must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are [often] tense, uncertain, and rapidly evolving[.]”⁴¹ In finding that this mistake was unreasonable, the majority holds police officers to an impossibly high standard: a standard of perfection. Under the majority’s ruling, to be reasonable, police officers must be so adept and assured in their own statutory interpretation that they would reject longstanding conclusions by Court of Appeals judges if they anticipate that this Court will one day disagree. This ruling flies in the face of *Heien* and requires perfection—if not omniscience—instead of reasonableness. While the standard of perfection is ideal, it is neither required by our Constitution nor realistic. Deputy Robinson’s conduct in this case was not only reasonable, it was exemplary, good police work. He should not be criticized for his conduct; instead, he should be congratulated.

III

Deputy Robinson did not seize defendant when he pulled his patrol vehicle into the driveway, and even if he had seized defendant, the seizure would be valid under the Fourth Amendment because Deputy Robinson made a reasonable mistake of law. For these reasons, I dissent.

Brian K. Zahra
David F. Viviano

⁴¹ *Graham v Connor*, 490 US 386, 396-397; 109 S Ct 1865; 104 L Ed 2d 443 (1989) (considering whether an officer’s use of force was “reasonable” under the Fourth Amendment). Thus, “[c]ommon sense and everyday life experiences predominate over uncompromising standards.” *People v Nelson*, 443 Mich 626, 635-636; 505 NW2d 266 (1993).

EXHIBIT #9: COPY OF CORRESPONDENCE FROM COA DATED AUGUST 19, 2022

ELIZABETH L. GLEICHER
CHIEF JUDGE
MICHAEL F. GADOLA
CHIEF JUDGE PRO TEM

DAVID H. SAWYER
MARK J. CAVANAGH
KATHLEEN JANSEN
JANE E. MARKEY
KIRSTEN FRANK KELLY
CHRISTOPHER M. MURRAY
STEPHEN L. BORRELLO
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State of Michigan
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SIMA G. PATEL
NOAH P. HOOD
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CHIEF CLERK

August 19, 2022

Eric Foster Wanink
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Bernard A. Jocuns
385 W. Nepessing St.
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Re: People of Michigan v David Allan Lucynski
Court of Appeals No. 353646
Lower Court No. 20-015154-AR

Dear Counsel:

In accordance with the Supreme Court's opinion issued July 26, 2022, the Court of Appeals file in the above matter has been reopened. This case is now resubmitted to the panel of: Judge Anica Letica, Judge Michael J. Riordan and Judge Thomas C. Cameron.

If you have any questions, please contact the Clerk's Office

Sincerely,

Jerome W. Zimmer Jr.
Chief Clerk

JWZ/las

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EXHIBIT #10: COPY OF *PEOPLE V. ALWAILY*, NO. 358258, 2022 WL 1194931
(MICH CT. APP. APRIL 21, 2022)

2022 WL 1194931

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.
Hassan Assad ALWAILY,
Defendant-Appellee.

No. 358258

I

April 21, 2022

Wayne Circuit Court, LC No. 20-002369-01-FC

Before: Jansen, P.J., and Sawyer and Riordan, JJ.

Opinion

Per Curiam.

*1 While investigating defendant for the murder of Balkees Sadek, police officers seized defendant's cell phone without a warrant during a traffic stop. A forensic examination of defendant's cell phone uncovered incriminating evidence against defendant, resulting in the prosecution charging defendant, as a fourth-offense habitual offender, MCL 769.12, with four felony counts: felony murder, MCL 750.316(1)(b); first-degree premeditated murder, MCL 750.316(1)(a); tampering with evidence in a criminal case punishable by more than 10 years' imprisonment, MCL 750.483a(5)(a) and (6)(b); and lying to a police officer in a violent crime investigation, MCL 750.479c(1)(b) and (2)(d). The trial court subsequently granted in part defendant's motion to suppress the evidence obtained from the forensic examination of his cell phone, but denied defendant's motion to suppress the statements he made during the traffic stop. The prosecution now appeals the trial court's order by leave granted.¹ We reverse.

I. FACTUAL BACKGROUND

In the late afternoon of April 6, 2020, Sadek's sisters discovered Sadek strangled to death in her bathtub. Sadek is presumed to have died earlier that day. Sadek's sisters named defendant as a potential suspect because he and Sadek had a tumultuous on-and-off dating relationship, defendant had previously harassed Sadek by sending her father inappropriate pictures of her, and defendant had recently threatened to make Sadek's life hell. When officers first began looking into defendant as a person of interest in Sadek's murder, they discovered a patrol officer had briefly followed defendant's vehicle around 1:39 a.m. the morning of the murder in an area roughly five minutes away from Sadek's home. Consequently, officers began surveilling defendant at his home, and were in the process of obtaining a warrant for his cell phone when defendant left his home for work on April 8, 2020. Hoping to speak with defendant about his relationship with Sadek and to see if he had his cell phone, officers pulled over defendant for having illegally tinted windows. During the traffic stop, officers informed defendant that they wanted to speak to him about his relationship with Sadek and they were going to obtain a warrant to search his cell phone. Defendant complied when officers asked to take the cell phone. Officers did not search the cell phone, however, until they received a search warrant for it less than an hour later.

Although defendant told officers he had not spoken to Sadek in about a week, a forensic examination of his cell phone revealed that defendant deleted a text message to Sadek indicating he was "on the way" to see her at about 2:00 a.m. the morning of the murder. The forensic examination also revealed that defendant's cell phone was turned off just after 2:00 a.m. and turned on just before 7:00 a.m. the morning of the murder, defendant searched how to delete Google location history from his cell phone the afternoon of the murder, and defendant drank a unique brand of bottled water that was found at Sadek's home after the murder, despite Sadek not drinking bottled water. Surveillance footage from near Sadek's home showed defendant's vehicle entering Sadek's neighborhood around 2:15 a.m. the morning of the murder and leaving the neighborhood around 5:25 a.m. Sadek's home-security system indicated the alarm was deactivated around 2:15 a.m. that morning, at which time a side door was opened, and the side door did not open again until around 5:20 a.m. Based on cell phone provider GPS data obtained with a warrant, officers determined that Sadek's cell phone

was in her home between 11:30 p.m. on April 5, 2020, and 4:35 a.m. on April 6, 2020, defendant was in the area where officers observed his vehicle around 1:39 a.m. on April 6, 2020, and defendant was at his home around 2:00 a.m. when he sent the text informing Sadek he was on his way. Although Sadek's cell phone was never recovered, officers were able to determine that the cell phone was turned off between about 4:30 a.m. and 5:50 a.m. that morning, at which time GPS information placed the cell phone at a park about six miles away from Sadek's home. Based on this evidence, the prosecution charged defendant with the aforementioned offenses.

*2 Defendant subsequently moved to suppress the evidence obtained from the forensic examination of his cell phone because the police officers seized the cell phone without a warrant or valid consent. After an evidentiary hearing on the validity of defendant's consent, defendant filed a supplemental brief in support of his motion to suppress the forensic examination, to which the prosecution responded arguing both the consent and exigent-circumstances exceptions to the general warrant requirement applied. The trial court held a hearing on defendant's motion to suppress, at which the parties argued consistently with their briefs, except the prosecution did not further emphasize the exigent-circumstances issue. The trial court determined that the officers performed a valid traffic stop, but did not have valid consent to seize defendant's cell phone. The trial court stated that exclusion of the evidence was the applicable remedy when evidence is obtained as a result of a Fourth Amendment violation and, consequently, it suppressed any evidence obtained from the forensic examination of defendant's cell phone. The prosecution now appeals.

II. ANALYSIS

The prosecution argues that the trial court improperly suppressed the evidence obtained from defendant's cell phone because the seizure of defendant's cell phone was reasonable under the exigent-circumstances exception to the Fourth Amendment's warrant requirement. The prosecution argues that the police officers had reason to believe defendant's cell phone contained evidence regarding Sadek's murder that defendant would destroy if the cell phone was not seized during the traffic stop. Notwithstanding its belief that the seizure of the cell phone was reasonable, the prosecution also argues suppression of the evidence under the exclusionary rule was an improper remedy given the circumstances of the

case. We agree that the trial court improperly suppressed the evidence.

A. STANDARDS OF REVIEW AND BACKGROUND LAW

This Court reviews “de novo a trial court’s ultimate decision on a motion to suppress on the basis of an alleged constitutional violation.” *People v Mahdi*, 317 Mich App 446, 457; 894 NW2d 732 (2016) (quotation marks and citation omitted). This Court reviews for clear error “any findings of fact made during the suppression hearing” and it reviews de novo “whether the Fourth Amendment was violated and ... whether an exclusionary rule applies.” *Id.* A factual finding is clearly erroneous if this Court is left with “a definite and firm conviction that a mistake has been made.” *Id.* (quotation marks and citation omitted).

Both the United States Constitution and the Michigan Constitution “protect against unreasonable searches and seizures.”² *Id.*, citing U.S. Const., Am. IV; Const. 1963, art. 1, § 11. The legality of a search or seizure depends on its reasonableness, which “requires a fact-specific inquiry that is measured by examining the totality of the circumstances.” *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). Because warrantless searches or seizures generally are per se unreasonable, a search or seizure complies with the Fourth Amendment if police officers had a warrant or “their conduct fell within one of the narrow, specific exceptions to the warrant requirement.” *People v Moorman*, 331 Mich App 481, 485; 952 NW2d 597 (2020) (quotation marks and citation omitted). Under the exigent-circumstances exception to the Fourth Amendment’s warrant requirement, police may seize property they have probable cause to believe contains contraband or evidence of a crime so long as they can “articulate specific and objective facts” that “reveal a necessity for immediate action” to prevent the immediate removal or destruction of the evidence. *People v Blasius*, 435 Mich 573, 593-594; 459 NW2d 906 (1990). The exigent-circumstances exception to the general warrant requirement, however, applies only if the police did not create the exigent circumstances by engaging in or threatening to engage in conduct violative of the Fourth Amendment. *Kentucky v King*, 563 US 452, 462-463, 469; 131 S Ct 1849; 179 L Ed 2d 865 (2011).

*3 Generally, under the judicially created exclusionary rule, “evidence that is obtained in violation of the Fourth

Amendment is inadmissible as substantive evidence in criminal proceedings." *Moorman*, 331 Mich App at 485 (quotation marks and citation omitted). The exclusionary rule, however, is designed to proactively safeguard Fourth Amendment rights through its deterrent effect on police misconduct, not to retroactively cure a violation of an individual's Fourth Amendment rights. *People v Frazier*, 478 Mich 231, 247-248; 733 NW2d 713 (2007). Accordingly, there is no constitutional right to suppression of evidence; rather, "suppression of evidence should be used only as a last resort" when police officers engaged in flagrant misconduct and the exclusionary rule's "remedial objectives" outweigh its "substantial social costs." *Id.* at 247, 249 (quotation marks and citations omitted).

B. THE TRIAL COURT IMPROPERLY SUPPRESSED THE EVIDENCE OBTAINED FROM DEFENDANT'S CELL PHONE

The trial court incorrectly concluded that the police officers violated the Fourth Amendment when they seized defendant's cell phone and, consequently, the trial court improperly suppressed the evidence obtained from the cell phone.

As an initial matter, neither party contests the validity of the traffic stop on appeal, and it is clear that the police officers validly stopped defendant because the officers' direct observations supplied them reasonable suspicion that defendant was driving with illegally tinted windows. See *Hyde*, 285 Mich App at 436-437 (explaining a traffic stop is valid so long as the officer has an articulable and reasonable suspicion that the vehicle or its occupant is subject to seizure for a violation of law). Thus, the question is whether the police officers' seizure of defendant's cell phone at the valid traffic stop was reasonable, notwithstanding their failure to obtain a warrant prior to the seizure. On appeal, the prosecution abandoned the issue of the consent exception to the Fourth Amendment's warrant requirement and instead raised only the issue of the exigent-circumstances exception. This Court need not defer to any factual findings on the matter because the trial court did not address the prosecution's exigent-circumstances argument. See *People v White*, 294 Mich App 622, 627; 823 NW2d 118 (2011) ("if factual findings are made by the trial court in relation to the motion to suppress, we defer to those findings"). Defendant argues that the prosecution is now providing a post hoc explanation for the warrantless seizure of the cell phone only because its consent argument failed in the lower court. Because the prosecution preserved the issue

by raising the argument before the lower court, however, the prosecution may provide a more detailed argument before this Court. *Glasker-Davis v Auvenshine*, 333 Mich App 222, 228; 964 NW2d 809 (2020) ("a party is generally free to make a more sophisticated or fully developed argument on appeal than was made in the trial court.").

If police officers have probable cause to believe a container holds evidence of a crime and the "exigencies of the circumstances demand it," officers may warrantlessly seize the property "pending issuance of a warrant to examine [the property's] contents." *US v Place*, 462 US 696, 701; 103 S Ct 2637; 77 L Ed 2d 110 (1983). Similarly, police may briefly prevent an individual from entering his or her own home to preclude destruction of evidence while awaiting a warrant to search the home. *Illinois v McArthur*, 531 US 326, 335-336; 121 S Ct 946; 148 L Ed 2d 838 (2001). In *McArthur*, the United States Supreme Court held that the officers' prevention of the defendant from entering his home was reasonable because: (1) the police had probable cause to believe the home contained unlawful drugs because the defendant's wife indicated so; (2) the police had "good reason to fear that, unless restrained, [the defendant] would destroy the drugs before they could return with a warrant"; (3) the police "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy" because they waited to receive a search warrant before searching the home; and (4) the police "imposed the restraint for a limited period of time, namely, two hours." *Id.* at 332. Under these lines of reasoning, the United States Supreme Court has indicated that "it is reasonable to expect that incriminating evidence will be found on a [cell] phone regardless of when the crime occurred," *Riley v California*, 573 US 373, 399; 134 S Ct 2473; 189 L Ed 2d 430 (2014), and it is not per se unreasonable to seize a cell phone to prevent destruction of evidence while seeking a warrant, see *id.* at 388 (explaining it was a "sensible concession" for the defendants to "concede that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant.").

*4 Similar to the reasoning in *McArthur*, the police officers here had reason to believe that seizing defendant's cell phone was necessary to prevent the imminent destruction of evidence. First, officers had probable cause to believe defendant's cell phone contained evidence of a crime because Sadek's sisters informed police that defendant and Sadek had an unstable relationship, and he had previously used his cell phone to harass Sadek by sending inappropriate pictures

of her to Sadek's father. Additionally, officers observed defendant's vehicle near Sadek's home the morning of the murder, so the cell phone could have also shed light on defendant's movement and conduct that morning. Second, the police had good reason to fear defendant would destroy evidence on his cell phone because they had informed him at the traffic stop that they were seeking a warrant for the cell phone and they wanted to speak with him about his relationship with Sadek. The officers could reasonably assume defendant, after becoming aware that he was a person of interest in the murder investigation, may immediately thereafter delete any evidence if the cell phone was not seized. Moreover, it appeared the murderer took Sadek's cell phone away from the scene, leading to a reasonable inference that defendant would also seek to hide his cell phone or evidence contained therein. These amounted to "specific fact[s]" beyond "a mere possibility" supporting a reasonable and objective belief that defendant might destroy evidence on the cell phone. *Blasius*, 435 Mich at 595. Third, the police officers made reasonable efforts to reconcile their need to preserve the evidence with defendant's rights because they only *seized* the cell phone at the traffic stop; officers did not *search* the cell phone until they obtained a search warrant less than an hour later. Fourth, for a similar reason, the warrantless seizure lasted only a limited period of time before officers shortly thereafter obtained a search warrant.

Contrary to defendant's argument, the police officers did not impermissibly create the exigent circumstances merely by informing defendant at the traffic stop that they were going to obtain a warrant for his cell phone. The officers were in the process of obtaining a warrant for defendant's cell phone when he unexpectedly left his home that officers were surveilling. Acting quickly to preserve the evidence on the cell phone, the officers decided to pull over defendant

to see if he had the cell phone with him. As explained earlier, the officers performed a valid traffic stop on the basis of the illegal window tint on defendant's vehicle. *Hyde*, 285 Mich App at 436-437. Because the police officers did not engage in unconstitutional conduct by pulling over defendant, they did not impermissibly create the exigent circumstances supporting the warrantless seizure of defendant's cell phone. See *King*, 563 US at 471-472 (holding the exigent-circumstances exception applied when officers lawfully knocked on the defendant's door and the defendant began destroying evidence inside his home).

Therefore, the police officers' seizure of defendant's cell phone was reasonable under the exigent-circumstances exception to the Fourth Amendment's warrant requirement. *Blasius*, 435 Mich at 593-594. Because the police officers did not violate the Fourth Amendment when they seized defendant's cell phone, the trial court erred by suppressing the evidence resulting from the forensic examination of the cell phone. See *Frazier*, 478 Mich at 247-249 (explaining suppression of evidence is appropriate only when there is flagrant police misconduct).

III. CONCLUSION

The trial court order granting defendant's motion to suppress evidence is reversed in part as it pertains to the forensic evidence obtained from defendant's cell phone, and this matter is remanded for further proceedings. We do not retain jurisdiction.

All Citations

Not Reported in N.W. Rptr., 2022 WL 1194931

Footnotes

- 1 *People v Alwaily*, unpublished order of the Court of Appeals, entered October 15, 2021 (Docket No. 358258).
- 2 The protection against unreasonable searches and seizures in the Michigan Constitution is "construed as providing the same protection as that of its federal counterpart." *People v Stevens*, 460 Mich 626, 634-635; 597 NW2d 53 (1999).

**EXHIBIT #11: COPY OF OPINION AND ORDER OF THE MICHIGAN
COURT OF APPEALS ON REMAND, DATED APRIL 27, 2023**

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAVID ALLAN LUCYNSKI,

Defendant-Appellee.

UNPUBLISHED

April 27, 2023

No. 353646

Tuscola Circuit Court

LC No. 20-015154-AR

ON REMAND

Before: LETICA, P.J., and RIORDAN and CAMERON, JJ.

PER CURIAM.

This case returns to this Court on remand from our Supreme Court. Once more, we reverse the district court's order denying the motion for bindover and suppressing the evidence against defendant, David Allan Lucynski.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Lucynski was charged with operating a vehicle while intoxicated ("OWI"), third offense, MCL 257.625(9)(c); operating a motor vehicle while license suspended or revoked ("DWLS"), second offense, MCL 257.904(3)(b); and possession or transportation of an open alcoholic container in a vehicle, MCL 257.624a(1). In *People v Lucynski*, unpublished per curiam opinion of the Court of Appeals, issued December 17, 2020 (Docket No. 353646) (*Lucynski I*), we described the relevant case history:

On January 20, 2020, Tuscola County Sheriff Deputy Ryan Robinson was on duty when he observed "two vehicles stopped in the middle of the roadway, facing opposite directions[.]" Deputy Robinson noted that the vehicles were positioned so that the driver's side windows were facing each other. According to Deputy Robinson, the vehicles were impeding traffic even though there was no other traffic in the area at that time. As Deputy Robinson approached the vehicles,

one of the vehicles traveled westbound and the other vehicle traveled eastbound. Lucynski was driving the vehicle that traveled westbound. Deputy Robinson followed Lucynski for 300 to 400 feet before Lucynski pulled into a driveway. Thereafter, Deputy Robinson parked his police cruiser behind Lucynski's vehicle and exited the cruiser. Lucynski was already out of his vehicle.

Deputy Robinson approached Lucynski, who smelled like marijuana and "intoxicating beverages[.]" Deputy Robinson noted that Lucynski had bloodshot eyes and that his demeanor was "pretty laid back." Lucynski admitted that he had consumed alcohol about 20 minutes before. Lucynski also admitted that he had marijuana in his vehicle and that he did not have a driver's license because it was suspended. Lucynski submitted to field sobriety tests, which supported Deputy Robinson's suspicion that Lucynski was intoxicated. After Lucynski refused to submit to a preliminary breath test, Deputy Robinson placed Lucynski under arrest. Thereafter, Lucynski submitted to a preliminary breath test, which revealed that Lucynski had a blood alcohol content of .035. Later, Lucynski's blood was drawn to test for intoxicants, and the sample reflected the presence of THC.

Lucynski was charged with OWI, third offense; DWLS, second offense; and possession or transportation of an open alcoholic container in a vehicle.[¶] The preliminary examination was held on March 4, 2020. In relevant part, the People presented the testimony of Deputy Robinson, and Deputy Robinson's body camera footage was admitted into evidence. At the close of proofs, the People argued that bindover of the OWI charge was appropriate because there was sufficient cause for Deputy Robinson to conduct the traffic stop under MCL 257.676b(1).[¶] Lucynski opposed bindover on the OWI charge, arguing that there was "an issue in regards to the actual stop." The district court took the matter under advisement and permitted the parties to file written briefs on the issue of whether Lucynski's Fourth Amendment rights were violated.

In a March 27, 2020 opinion and order, the district court concluded that Deputy Robinson lacked both probable cause and the requisite articulable, reasonable suspicion to conduct a traffic stop. In relevant part, the district court analyzed the plain language of MCL 257.626b(1) and concluded that Deputy Robinson could not have had an articulable, reasonable suspicion that Lucynski was "actually impeding or obstructing actual traffic" because Deputy Robinson testified that "Lucynski's vehicle was not actually impeding or obstructing any actual traffic[.]" Based on the district court's conclusion that the stop was unconstitutional, the district court held that "the evidence obtained after the Traffic stop [w]ould be excluded from evidence" for purposes of the preliminary examination. The district court then found that probable cause did not exist to bind Lucynski over on the OWI charge and dismissed it. The district court indicated that it would set the remaining misdemeanor counts for trial. In doing so, the district court held that "the evidence found as a result of th[e] stop is not admissible in any subsequent hearing o[r] trial on those two misdemeanor counts." [*Id.* at 1-2 (footnotes omitted).]

As noted, this Court concluded that a Fourth Amendment violation did not occur and therefore “the district court erred by excluding evidence from the preliminary examination proceeding and by holding that the evidence produced by investigatory stop and arrest would be excluded from future proceedings concerning Lucynski’s DWLS and open intoxicant charges.” *Id.* at 7. We also determined “the district court abused its discretion by denying the People’s motion for bindover on the OWI charge and by dismissing the OWI charge.” *Id.* We therefore reversed the district court’s denial of the motion for bindover, and its decision to suppress the evidence against Lucynski. *Id.*

Lucynski appealed to our Supreme Court. The Court granted leave to appeal as to three limited questions:

(1) whether [Lucynski] impeded traffic, in violation of MCL 257.676b(1), where there was no actual traffic to impede at that time; (2) if not, whether [Deputy Robinson] made a reasonable mistake of law by effectuating a traffic stop of [Lucynski] for violating MCL 257.676b(1), see *Heien v. North Carolina*, 574 U.S. 54, 135 S Ct 530, 190 L Ed 2d 475 (2014); and (3) whether [Deputy Robinson] seized [Lucynski] when he pulled his patrol vehicle behind [Lucynski’s] vehicle in a driveway. [*People v Lucynski*, 508 Mich 947 (2021) (*Lucynski II*).]

Our Supreme Court answered the first question in the negative, concluding “there is no evidence in the record to sustain the accusation that defendant” impeded traffic in violation of MCL 257.676b(1). *People v Lucynski*, 509 Mich 618, 650; ___ NW2d ___ (2022) (*Lucynski III*). Similarly, the Court determined Deputy Robinson did not make a reasonable mistake of law in effectuating the traffic stop because “one cannot be guilty of violating MCL 257.676b(1) without evidence that the ‘normal flow’ of actual traffic was disrupted, and [Deputy] Robinson admitted that no disruption occurred.” *Id.* at 652-653. As to the third question, the Court decided Lucynski was seized for purposes of the Fourth Amendment because a reasonable person in Lucynski’s place would not feel free to terminate the encounter and leave—indeed, his only options “would have been to attempt to enter a home that [he] 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.” *Id.* at 645-646.

On the basis of these conclusions, our Supreme Court resolved:

[T]hat [Lucynski] was seized the moment [Deputy] Robinson blocked the driveway and prevented egress, [Lucynski’s] incriminating statements and [Deputy Robinson’s] visual and olfactory observations that the Court of Appeals relied upon to justify further inquiry and an eventual arrest were obtained in violation of [Lucynski’s] Fourth Amendment rights. Prior to [Deputy] Robinson blocking [Lucynski] in, [Lucynski] had not made any incriminating statements, and thus such statements could not have justified a seizure. A seizure could have been justified if [Deputy] Robinson had reasonable suspicion to believe that [Lucynski] had violated the law, but as the district court previously held, there was no evidence to support [Deputy] Robinson’s hunch that an illegal drug transaction had taken place on the road, and that ruling was not appealed. A suspected violation of MCL 257.676b(1) also could not serve as reasonable suspicion given our previous

conclusions. Accordingly, we have not been presented with any lawful justification for the seizure, and the district court did not err by holding that the seizure violated [Lucynski's] constitutional rights. [*Id.* at 656-657.]

Therefore, the question for this Court is whether, in light of the Fourth Amendment violations against Lucynski, "application of the exclusionary rule was the appropriate remedy." *Id.* at 658.

II. STANDARD OF REVIEW

This Court reviews a trial court's factual findings for clear error. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). Clear error exists where "we are left with a definite and firm conviction that a mistake has been made." *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993). "But the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference; for this reason, we review de novo the trial court's ultimate ruling on the motion to suppress." *Williams*, 472 Mich at 313.

III. LAW AND ANALYSIS

The Fourth Amendment to the United States constitution states, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." US Const, Am IV; see also Const 1963, art 1, § 11. In line with these principles, the exclusionary rule prohibits "[t]he introduction into evidence of materials seized and observations made during an unlawful search." *People v Stevens*, 460 Mich 626, 633; 597 NW2d 53 (1999). The exclusionary rule also bars "the introduction into evidence of materials and testimony that are the products or indirect results of an illegal search, the so-called 'fruit of the poisonous tree' doctrine." *Id.* at 633-634, citing *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963).

However, the exclusionary rule is a remedy of last resort. *Herring v United States*, 555 US 135, 140; 129 S Ct 695; 172 L Ed 2d 496 (2009). Even when evidence is the product of an illegal search, it does not follow that the evidence is necessarily subject to the exclusionary rule. *Stevens*, 460 Mich at 635; see also *United States v Calandra*, 414 US 338, 348; 94 S Ct 613; 38 L Ed 2d 561 (1974) ("Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons."). In determining whether the exclusionary rule applies, a court must "evaluate the circumstances of th[e] case in the light of the policy served by the exclusionary rule." *Brown v Illinois*, 422 US 590, 604; 95 S Ct 2254; 45 L Ed 2d 416 (1975). "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* at 599-600.

In *Herring*, 555 US 144-145, the United States Supreme Court considered a circumstance where evidence was discovered as the result of a faulty warrant. In determining whether the exclusionary rule provided a sufficient deterrent effect, the Supreme Court stated:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our

cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.

* * *

If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation

* * *

Petitioner's claim that police negligence automatically triggers suppression cannot be squared with the principles underlying the exclusionary rule, as they have been explained in our cases. In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way." In such a case, the criminal should not "go free because the constable has blundered." [*Id.* at 144-148 (footnote and citations omitted).]

Here, Deputy Robinson testified that he initiated a traffic stop of Lucynski's vehicle because he thought Lucynski was impeding traffic in contravention of MCL 257.626b(1). *Lucynski I*, unpub op at 1. Although our Supreme Court later concluded that this belief was not objectively reasonable because there was no traffic on the road, *Lucynski III*, 509 Mich at 652, it is also true that Deputy Robinson did not demonstrate any deliberate, reckless, or grossly negligent conduct. There is no evidence in the record showing that Deputy Robinson acted in bad faith when he effectuated a traffic stop of Lucynski. Nor was there any evidence this stop was part of a systemic effort to subvert Lucynski's constitutional rights.

Moreover, Deputy Robinson's decision to stop the vehicle aligned with this Court's reasoning in *People v Salters*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2001 (Docket No. 215396), p 2. Although *Lucynski III* clarifies *Salters* to the extent that "some evidence of actual interference with the normal flow of traffic is required," *Lucynski III*, 509 Mich at 654, that does not mean suppression is mandated in this case. Deputy Robinson could not have predicted the outcome in *Lucynski III* and to suppress the evidence would impermissibly hold law enforcement officers to a higher standard than the judiciary. Therefore, there is simply not enough evidence in this case showing how suppression of the evidence would deter any future misconduct by police officers. Thus, application of the exclusionary rule was not the appropriate remedy and the district court erred when it concluded otherwise.

Reversed and remanded to the district court for an opinion consistent with this analysis.
We do not retain jurisdiction.

/s/ Anica Letica
/s/ Michael J. Riordan
/s/ Thomas C. Cameron

EXHIBIT #12: COPY OF ORDER OF THE MSC OF SEPTEMBER 20, 2023

Order

Michigan Supreme Court
Lansing, Michigan

September 20, 2023

165806

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 165806
COA: 353646
Tuscola CC: 20-015154-AR

DAVID ALLAN LUCYNSKI,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the April 27, 2023 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing whether application of the exclusionary rule is proper where the deputy sheriff had no reasonable suspicion to believe that the defendant violated the law, given that there was no evidence to support the deputy's hunch that an illegal drug transaction had taken place and the deputy did not make a reasonable mistake of law to the extent that he stopped the defendant for a suspected violation of MCL 257.676b(1).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.



10913

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 20, 2023


Plaintiff-Appellee's Appendix 144
Clerk

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**EXHIBIT #13: BODY CAM RECORDING FROM DEPUTY RYAN
ROBINSON EXHIBIT #1, PRELIMINARY EXAMINATION,
3/4/20, FILE 20-0045-FD [ATTACHED DIGITALLY]**