

MICHIGAN SUPREME COURT

People of the State of Michigan v. Yorel Rendell-Sivad Foster

928 N.W.2d 203 (Mich. 2019) · No. SC: 158673 · Decided June 7, 2019

SUMMARY

The Michigan Supreme Court denied the prosecution’s application for leave to appeal in a case involving suppression of a firearm discovered during a police encounter. Justice Markman dissented, concluding that the initial approach was consensual and that the officer had reasonable suspicion to conduct a Terry stop and frisk; Justice Zahra would have remanded for consideration as on leave granted.

CASE DETAILS

COURT	Michigan Supreme Court
WRITING FOR THE COURT	Bridget M. McCormack, Chief Justice; David F. Viviano, Chief Justice Pro Tem; Stephen J. Markman; Brian K. Zahra; Richard H. Bernstein; Elizabeth T. Clement; Megan K. Cavanagh
JURISDICTION	Michigan
DECIDED	June 7, 2019
DOCKET	SC: 158673
DISPOSITION	writ_denied
PROCEDURAL POSTURE	The Michigan Supreme Court denied the prosecutor's application for leave to appeal the Court of Appeals' order denying leave to appeal from the circuit court's affirmance of the district court's order suppressing a firearm and dismissing the criminal charges.
PRECEDENTIAL VALUE	Published order denying leave to appeal; no merits holding on the suppression issue
PARTIES	People of the State of Michigan v. Yorel Rendell-Sivad Foster

TOPICS

- suppression of evidence
- fourth amendment
- search and seizure
- criminal procedure
- appellate procedure

PRACTICE AREAS

- criminal procedure
- constitutional law
- appellate procedure

QUESTIONS PRESENTED

1. Whether the Michigan Supreme Court should review the lower courts' determination that police unlawfully seized defendant and that the firearm should be suppressed.
2. Whether, under the circumstances described by the dissent, the officer's approach and questioning constituted a seizure and whether the subsequent stop and frisk was supported by reasonable suspicion.

HOLDINGS

1. The Michigan Supreme Court denied the application for leave to appeal because it was not persuaded that the question presented should be reviewed.

KEY QUOTATIONS

“On order of the Court, the application for leave to appeal the October 4, 2018 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.”

FACTUAL BACKGROUND

Police approached defendant while he was walking in a public place and asked whether he possessed a weapon. According to the dissent, the officer observed a bulge in defendant's pocket; defendant became nervous, grabbed the bulging object, and turned away from the officer. The officer then ordered defendant to raise his hands, saw a handgun in defendant's jacket, and determined that defendant lacked a concealed-weapons permit.

PROCEDURAL HISTORY

Defendant was charged with carrying a concealed weapon, felon in possession of a firearm, and felony-firearm. The district court dismissed the case after suppressing the firearm on constitutional grounds, and the circuit court affirmed. The Court of Appeals denied leave to appeal, after which the prosecutor sought leave in the Michigan Supreme Court. The Supreme Court denied the application; Justice Markman dissented, and Justice Zahra would have remanded to the Court of Appeals for consideration as on leave granted.

DISPOSITION

writ_denied

CASES CITED

- People v. Shabaz, 424 Mich. 42, 56 (1985)
- United States v. Drayton, 536 U.S. 194, 200 (2002)
- People v. Champion, 452 Mich. 92, 98 (1996)
- People v. Anthony, ___ Mich. App. ___ (2019) (Docket No. 337793)
- Terry v. Ohio, 392 U.S. 1 (1968)

OPINION

PER CURIAM.

Order Michigan Supreme Court Lansing, Michigan June 7, 2019 Bridget M. McCormack, Chief Justice 158673 David F. Viviano, Chief Justice Pro Tem Stephen J. Markman PEOPLE OF THE STATE OF MICHIGAN, Brian K. Zahra Plaintiff-Appellant, Richard H. Bernstein Elizabeth T. Clement v SC: 158673 Megan K. Cavanagh, Justices COA: 343668 Wayne CC: 18-001283-AR YOREL RENDELL-SIVAD FOSTER, Defendant-Appellee.

_____/ On order of the Court, the application for leave to appeal the October 4, 2018 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

MARKMAN, J. (dissenting). I respectfully dissent from the Court's order denying leave to appeal and would instead reverse the circuit court's affirmance of the district court's order suppressing the firearm seized from defendant or, in the alternative, remand to the Court of Appeals for consideration as on leave granted. Defendant was charged with carrying a concealed weapon, felon in possession of a firearm, and felony-firearm.

At the preliminary examination, the district court dismissed the case, finding that the discovery of the firearm was unconstitutional, and the circuit court affirmed. The Court of Appeals then denied leave to appeal, but Chief Judge MURRAY would have granted leave to appeal.

The prosecutor argues that the lower courts (the district and circuit courts) erred in finding that the discovery of the firearm was unconstitutional. These courts determined that the police engaged in unconstitutional conduct by approaching defendant as he was walking in public and engaging him in conversation.

However, approaching a person walking in public and engaging him in conversation does not amount to a seizure of that person. *People v Shabaz*, 424 Mich. 42, 56 (1985) (“[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.”) (quotation marks and citation omitted); *United States v Drayton*, 536 U.S. 194, 200 (2002) (“Law enforcement officers do not violate the Fourth Amendment’s prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen.”).

Therefore, I agree with the prosecutor that the officer 2 did not seize defendant when he approached defendant and asked him if he possessed a weapon. Rather, defendant was not seized until the officer ordered him to place his hands in the air, at which point the officer could see the handgun in defendant’s jacket.

However, this seizure was justified because by that time the officer had already noticed a bulge in defendant's pocket and when asked about it, defendant became nervous, grabbed the bulging object, and turned sideways away from the officer. That is, at the point at which the officer asked defendant to place his hands in the air, he possessed a "reasonable suspicion that crime [was] afoot," which was sufficient to justify a Terry 1 "stop and frisk." *People v Champion*, 452 Mich. 92, 98 (1996) (quotation marks and citation omitted).

During this "stop and frisk," when the officer saw the handgun and determined that defendant lacked a concealed weapons permit, the officer possessed probable cause to arrest defendant. For these reasons, I agree with the prosecutor that the lower courts erred in finding a constitutional violation here, instead of recognizing an effective law enforcement effort.

Thus, I would reverse the circuit court's affirmance of the district court's order suppressing the firearm seized from the defendant or, in the alternative, remand to the Court of Appeals as on leave granted for consideration of *People v Anthony*, ___ Mich App ___ (2019) (Docket No. 337793), in which the Court of Appeals reversed a circuit court order suppressing evidence based in part on the same theory as both lower courts applied in the present case-- that the police engage in unconstitutional conduct by approaching a suspect in a public area.

ZAHRA, J., would remand this case to the Court of Appeals as on leave granted. 1 *Terry v Ohio*, 392 U.S. 1 (1968). 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. June 7, 2019 t0604 Clerk