

IN THE MICHIGAN SUPREME COURT  
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee

Docket No. 150132  
Court of Appeals Case No. 315870

-v-

KEYON LECEDRIC ROBERTSON,  
Defendant-Appellant.

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APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF  
APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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**STATEMENT OF QUESTION PRESENTED**

Whether the Court of Appeals erred in reversing the trial court's suppression of the narcotics evidence illegally seized by the sheriff during a prolonged investigatory stop where the sheriff had effectively placed Defendant under arrest without probable cause by handcuffing the Defendant, and where no particularized reasonable suspicion that a crime had been committed by Defendant existed other than Defendant's arrival at the bus station with a person who was the subject of an anonymous informant's tip about potential drug trafficking by the other individual, not the Defendant.

The Appellant answers, "yes".

The trial court answered, "yes".

The Prosecution answers, "no".

**APPELLANT'S STATEMENT OF APPELLATE JURISDICTION**

Appellant asserts that he filed, in pro per, a timely application for leave to appeal with this Court pursuant to MCR 7.302(C)(2); Appellant basically challenged the Court of Appeals' August 21, 2014 per curiam opinion by re-submitting the brief that he filed in the Court of Appeals, through the undersigned counsel, as the Appellee to the prosecutor's merits brief. Subsequent to this filing, this Court, through an administrative order, directed the parties to file supplemental briefs addressing the issue of whether the Court of Appeals through its opinion reversing the lower court's order granting Defendant's motion to suppress the physical evidence and dismissing the case.

## STATEMENT OF FACTS

Appellant, Keyon Lecedric Robertson, was charged in the Oakland County Circuit Court with one count of possession with intent to deliver 50-450 grams of heroin, in violation of MCL 333.7401(2)(a)(iii). This supplemental brief is filed pursuant to the directive set forth in this Court's June 10, 2015 administrative order. The Michigan Supreme Court Clerk's order was generated following Appellant Robertson's *pro se* filing of his own application for leave to appeal from the 08/21/2014 *per curiam* opinion of the Michigan Court of Appeals. The Court of Appeals opinion, attached hereto at **Exhibit A** of the Appendix, reversed the trial court's opinion and order suppressing all the physical evidence seized by the police. The trial court's opinion and order, attached hereto at **Exhibit B** of the Appendix, granted Robertson's motion to suppress the physical evidence seized as incident to his arrest. It was from this suppression order that the prosecutor filed an appeal of right from the resulting dismissal of the case.

Mindful that the Clerk of this Court, in directing the parties to file supplemental briefs, instructed the parties not to merely resubmit their respective application papers, Appellant nevertheless submits that the factual summary set forth therein accurately summarizes the facts and proceedings that have occurred in this matter and therefore borrows liberally from that portion of the filing, emphasizing and adding subsequent procedural details where and when necessary.

Mr. Robertson was arrested on July 12, 2012, at the bus station in Pontiac, MI, and subsequently charged with a single count of delivery of a controlled substance. He was bound over to the Oakland County Circuit Court after a preliminary exam was conducted at the 50<sup>th</sup> District Court on 07/31/2012.

At the trial court, Mr. Robertson moved to suppress the drugs found on his person by the Oakland County Sheriff Department's "Narcotics Enforcement Team" as well as statements he made to the NET Sergeant, Sean Jennings. The prosecutor stipulated to suppression of Mr. Robertson's statements to Sergeant Jennings during his detention and arrest at the bus stop. Defendant's motion thus was limited to suppression of the seized narcotics evidence and was based on his claim that the stop, search and seizure of the narcotics were unconstitutional.

Appellant asserted in the trial court that suppression of the physical evidence was the appropriate remedy given the unconstitutional taint surrounding the manner in which the evidence was obtained. Accordingly, an evidentiary hearing was conducted on Appellant's suppression motion. At the hearing, evidence was adduced that on July 12, 2012, at approximately 11:00 am, Sergeant Jennings of the Oakland County Sheriff's Department received an anonymous tip that an individual by the name of *Leroy Jackson* would be at the Pontiac bus station traveling Up North via bus to the St. Ignace (EH p. 33) or the Iron River, MI (PE p. 6) area with cocaine (PE p. 6) and/or heroin. (EH p. 22)<sup>1</sup> The anonymous tip further advised that Jackson would be traveling at noon that day. Sergeant Jennings obtained a photo of Jackson from the Secretary of State database, gathered nine other NET officers and a K-9 unit, and headed out to the bus station in four Sheriff vehicles to conduct surveillance of the area. (PE pp. 7, 10-11, 14; EH p. 23)

Sergeant Jennings did not receive any information from the anonymous tipster about Mr. Robertson; all the information he received was about Leroy Jackson; the anonymous tipster did not place Robertson at the bus station; only Mr. Jackson. (EH pp. 23-24, 35)

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<sup>1</sup> Note on citations to the transcript: The 07/31/2012 Preliminary Examination transcript citations are noted with "PE"; the 12/20/2012 evidentiary hearing transcript citations are noted with "EH".

Upon arrival at the bus station, NET officers identified Mr. Jackson and placed under arrest due to outstanding warrants. (EH p 25) Mr. Jackson was immediately searched incident to arrest, however, no narcotics were found on his person. (EH p. 27) At the point of Jackson's search, no further information obtained from the anonymous informant panned out; the police at no point in time had any information about Robertson, or that Jackson would be traveling with others.

When Sergeant Jennings first accosted and identified Jackson, he separated him from Robertson, handcuffing Robertson almost immediately [i.e. within a minute] and walking him around the corner. The handcuffs were double locked, with Robertson's hands behind his back. (PE p. 16) At that point, Robertson was detained, secured and under Sgt. Jennings' direct control. (PE pp. 16, 17; EH pp. 27, 28) It is at this precise point in time that this Court's analysis of whether reasonable suspicion was present begins: when the sheriff, following-up with an anonymous tip that was not panning out, detained Mr. Robertson.

Apparently, Sgt. Jennings first spoke with Jackson prior to talking with Robertson; at no time was Robertson provided his Miranda rights, including his right to remain silent. (PE p. 17) Both Jackson and Robertson identified their bags for the officers. The Sheriff's K-9 unit hit on both Robertson's and Jackson's bags, indicating the possible presence of drugs; the bags were searched, but no drugs were found. (EH pp. 13-15, 18, 27)

At Robertson's preliminary examination, the following exchange occurred during Sgt. Jennings' cross-examination:

Q. [By defense counsel Jerome Sabbota] And while you have him handcuffed under your control, you asked him why the dog had a positive hit on his bag?

A: Yes, I did.

Q: And you're doing that in order to find out whether or not he's got narcotics, aren't you?

A: I did that just to find out why there was a positive hit on his bag. (PE p. 18)

At the time Sgt. Jennings asked Robertson about the positive hit on his bags, Jennings had no evidence that Robertson committed any crime; Jennings had no evidence that any warrants existed for Robertson's arrest; Jennings lacked probable cause to believe that Robertson had committed any offense. (PE pp. 18, 19; EH p. 39, 44)

Sgt. Jennings was next asked whether Robertson had any contraband on his person. When Robertson answered "no", Sgt. Jennings told him he was going to check; he did not ask Robertson; he told Robertson; it was not a request but rather, it was a statement; Robertson said, "okay". (PE p. 19; EH p. 31) Robertson was handcuffed at the time and not free to leave Sgt. Jennings' presence. (EH p. 40)

At some point during his detention, Mr. Robertson provided the arresting officers with an identification card bearing the name Kamone Dwayne Robertson. (EH p. 26) When officers ran the card through the Michigan Law Enforcement Information Network (LEIN), no record was found; Sgt. Jennings did not know at the time that the name on the identification card was false. (EH pp. 6, 26)

While he had detained and was questioning Robertson, Sgt. Jennings explained that the Defendant, "appeared to be real nervous, sweating, just -that- that feeling that an officer gets that, you know, something was wrong and he's kind of good-sized person so for my safety I decided to put him - to restrain him and put him in handcuffs." (EH pp. 28, 35) When the sergeant asked Defendant why he was sweating, Robertson replied that, "it was hot outside." (EH p. 29)

When the search of the bags did not yield narcotics, Sergeant Jennings asked Robertson why the dog made a positive hit on his bags. (EH p. 29) Robertson responded that it is likely because he had smoked marijuana earlier in the day. (EH pp. 29, 30) This is when Jennings told Robertson he was going to search him. Sgt. Jennings testified at Defendant's preliminary examination and at the evidentiary hearing on Defendant's motion to suppress that when he told Robertson that he was going to search his person, "[Robertson] could have said no", and if he had said, "no" to the search, Jennings said he would not have conducted the search. (PE p. 19; EH p. 40)

To execute his search, Sergeant Jennings first lifted Defendant's shirt and observed what he believed to be a baggie in the fly area of Defendant's boxer shorts. (EH pp. 31, 32) There was nothing visible, however, on Robertson's person; Jennings had to raise his shirt in order to see the baggie. The baggie was confiscated and the powder within the baggie field-tested positive for heroin. (PE pp. 12, 13) According to Sergeant Jennings, Robertson was detained for approximately 10-minutes before the narcotics were discovered on his person. (PE p. 20)

Based on the positive field-test for narcotics, Sgt. Jennings made the decision to arrest Defendant and he was transported to the Oakland County Jail. (EH pp. 34, 35, 41) At the time of his actual arrest, Sgt. Jennings was unaware that Robertson had provided a false name; he was unaware that Robertson had an outstanding parole warrant. (EH p. 41)

Summary of the lower court's suppression order.

The lower court drew legal conclusions in its 10-page opinion and order based on several findings that it pointed to from the evidence adduced during the prosecutor's evidentiary hearing on Appellant's motion to suppress the physical evidence. One of the more significant factual findings of the trial court was that prior to the discovery of the ultimately excluded heroin on

Robertson's person, the drug sniffing dog's positive hit had been proven to be a false lead as a follow-up search of the Defendant's back pack did not turn up any contraband.

First, because the anonymous tip from the informant did not involve Mr. Robertson but rather his traveling companion, [Jackson] the informant did not provide the officers with specific particularized information about Robertson thus, the trial court concluded that the investigating officer lacked probable cause to conduct a search. Also, the trial court found that the officer's treatment of Robertson went beyond a brief pat-down style search authorized by *Terry* and its progeny.<sup>2</sup>

Second, the trial court also concluded that because Robertson was not the initial person of interest named by the informant, the drug sniffing dog's "alert" on Robertson's backpack did not provide the officers with probable cause to search the Defendant, distinguishing *Florida v Royer*<sup>3</sup> relied on by the prosecutor.

Third, the trial court found that Robertson's admission that he had smoked marijuana earlier on the day of his arrest occurred subsequent to his initial improper detention thus, the trial court ruled that the prosecutor could not remove the taint of Robertson's improper detention through reliance on subsequent events that would have led to his arrest such as his admission that he smoked marijuana.

Fourth, the trial court utilized this same analysis relative to the officer's discovery that he provided them a false identification. Because the officers did not discover that Robertson

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<sup>2</sup> The lower court distinguished a series of cases cited by the prosecutor on the basis that the anonymous informants in those cases provided information to the police about the defendant in those cases whereas here, the lower court emphasized that the tipster only provided information about another individual, not the accused. The lower court noted that no information whatsoever was provided by the tipster about Robertson.

<sup>3</sup> 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983).

provided a false identification until well after they had him housed in the Sheriff's station, the taint of their initially flawed detention was not removed. For both the marijuana confession and the discovery of Appellant's false identification, these facts, which by themselves each would have independently led to probable cause in support of Defendant's arrest, could not correct the taint of their initially, and Defendant asserts, fatally flawed initial detention of Robertson.

Summary of the opinion of the Court of Appeals.

The intermediate appellate court concluded that the officer's initial stop of Robertson bore all the hallmarks of a valid investigatory stop. The Court of Appeals did so through deployment of a novel theory discussed in detail below that, because the anonymous tipster's information was panning out [i.e. at least to the extent that LeRoy Jackson showed-up at the bus station], the officers could reasonably deduce that, since the heroin the tipster said Jackson would possess, must be in the physical possession of his companion. To put meat on the bones of this theory, the Court of Appeals focused on the officer's testimony at the suppression hearing that, in his experience, narcotic traffickers frequently traveled in pairs.

Second, the Court of Appeals built on its conclusion that the officer's initial stop of Robertson was valid thus, it was an easy step to transform what it characterized as reasonable suspicion into full-blown probable cause. According to the Court of Appeals, once Robertson was properly detained, the police continued to build their case against him, not the target of the anonymous tipster [Jackson], through deployment of the canine unit. To do so, the Court relied on one of its recent decisions, *People v Nguyen*<sup>4</sup>, claiming the facts in *Nguyen* were similar to the case at bar with respect to the use of an anonymous informant. That case, however, is easily

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<sup>4</sup> 305 Mich App 740 (2014).

distinguished for purposes of this case, as addressed in the legal analysis portion of this supplemental brief.

## LEGAL ARGUMENT

The Court of Appeals erred in reversing the trial court's suppression of the narcotics evidence illegally seized by the sheriff during a prolonged investigatory stop where the sheriff had effectively placed Defendant under arrest without probable cause by handcuffing the Defendant, and where no particularized reasonable suspicion that a crime had been committed by Defendant existed other than Defendant's arrival at the bus station with a person who was the subject of an anonymous informant's tip about potential drug trafficking by the other individual, not the Defendant.

### Standard of Review.

This Court directed the parties to submit supplemental briefs to address the issue of whether the Court of Appeals erred in reversing the trial court's order suppressing the physical evidence obtained against Robertson. A hybrid appellate review applies to this case. The Court's review of the factual findings made by Judge Anderson at the evidentiary hearing on Defendant's request for the suppression of evidence is limited to "clear error". Pursuant to the "clear error" standard, the lower court's factual findings are entitled to deference and cannot be disturbed on appeal unless, upon review of the entire lower court record, this Court is left with a definite and firm conviction that the lower court made a mistake.<sup>5</sup> In this case, the record includes both the preliminary examination and the evidentiary hearing conducted pursuant to Mr. Robertson's motion to suppress the narcotic evidence.

The Court of Appeals' reversal of the lower court order suppressing the physical evidence is a question of law reviewed by this Court *de novo*.<sup>6</sup> Similarly, the intermediate

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<sup>5</sup> *People v Burrell*, 417 Mich 439, 448 (1983).

<sup>6</sup> *People v Davis*, 250 Mich App 357, 362 (2002)

appellate court's rulings on the constitutional issues involved in this case are reviewed *de novo*.<sup>7</sup>

Thus, this Court is guided, but not controlled, by the lower court's factual findings.<sup>8</sup>

Legal Analysis.

Both the Michigan and United States Constitutions guarantee persons to be free from unreasonable searches and seizures.<sup>9</sup> To be reasonable, a search requires a warrant unless law enforcement can point to certain circumstances that support a group of well-recognized long-standing exceptions to the warrant requirement. This case involves the scope of law enforcement's investigatory powers under the United States Supreme Court's decision in *Terry v Ohio*.<sup>10</sup> In order to avoid the warrant requirement of a search, the investigative stop authorized in the Supreme Court's *Terry* decision must be, "justified at its inception and reasonably related in scope to the circumstances that justified police interference with a person's security."<sup>11</sup> The investigation is limited to a "pat-down" of the individual's outer clothing to ensure the officer's safety and cannot be a search for evidence of crime.<sup>12</sup>

In reversing the lower court in the instant matter, the Court of Appeals began its legal analysis with an acknowledgment that law enforcement officers were permitted to conduct a brief investigative stop of an individual suspected to be involved with imminent criminal activity. In so noting, the Court of Appeals emphasized the requirement of a particularized articulable suspicion, from a peace officer's perspective, with deference afforded to the officer's

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<sup>7</sup> *People v Rizzo*, 253 Mich App 151, 156 (2000)

<sup>8</sup> *People v Smith*, 19 Mich App 359, 367-68 (1969)

<sup>9</sup> US Cons, Am IV; Const 1963, art 1, §11.

<sup>10</sup> *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968); cited and applied by this Court in *People v Champion*, 452 Mich 92, 98 (1996).

<sup>11</sup> Lower Court opinion and order, Exhibit A, at pp. 4, 5, citing *Champion, supra*.

<sup>12</sup> *Champion, supra*.

observations. Relying on this Court's *Nelson* decision<sup>13</sup>, the intermediate appellate court further noted that officers were permitted -even required- to consider, "the modes or patterns of operation of certain kinds of lawbreakers." Michigan Court of Appeals Slip Opinion, p. 4. The *Nelson* Court relied on the U. S. Supreme Court's decision in *United States v Sokolow* in framing the issue as: "Thus, the focus is on the 'degree of suspicion that attaches to particular types of noncriminal acts.'" <sup>14</sup> Whether the brief detention authorized under *Terry* is justified depends on the circumstances of a particular case. This Court has determined that the presence of adequate reasonable suspicion, "must be based on commonsense judgments and inferences about human behavior." <sup>15</sup> The *Nelson* Court recognized that, "no bright line rule to test whether the suspicion giving rise to an investigatory stop was reasonable, articulable, and particular."<sup>16</sup>

This Court has summarized the legitimate law enforcement tool known as an investigatory stop:

The brief detention of a person following an investigatory stop is considered a reasonable seizure if the officer has a "reasonably articulable suspicion" that the person is engaging in criminal activity. The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances. "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."

Although this Court has indicated that fewer facts are needed to establish reasonable suspicion when a person is in a moving vehicle than in a house, some minimum threshold of reasonable suspicion must be established to justify an investigatory stop whether a person is in a vehicle or on the street. [Citations omitted.] <sup>17</sup>

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<sup>13</sup> *People v Nelson*, 443 Mich 626, 632 (1993).

<sup>14</sup> *United States v Sokolow*, 490 US 1, 9; 109 S Ct 1581, 1586; 104 L Ed 2d 1 (1989).

<sup>15</sup> *Nelson*, *supra*, at p. 632, and *People v Oliver*, 464 Mich 184, 197 (2001).

<sup>16</sup> *Nelson*, *supra*.

<sup>17</sup> *People v LoCicero* (Aft Rem), 453 Mich 496, 501-502 (1996).

The *LoCicero* Court listed several facts that were lacking in its conclusion that the officers lacked reasonable suspicion to that the defendants were involved in criminal activity: no presence by the individuals at a known drug location; no brief meetings with others in the manner of drug deals; no extended surveillance of the defendant; no tip from an informant concerning the defendant; and no viable explanation of the type of surveillance conducted on the defendant.<sup>18</sup> In the instant matter, this Court should also conclude that no reasonable suspicion existed based on a similar analysis of the facts as conducted by the *LoCicero* Court. The trial court properly noted that the anonymous tip did not supply anything specific as to Mr. Robertson. The Court of Appeals, however, cited to *Nelson, Oliver and Jenkins*<sup>19</sup>, distinguished above, while completely ignoring *LoCicero*, which applies on all fours with this case. In making use of *Nelson*, in particular, the Court of Appeals was persuaded by the investigating officer's theory that drug traffickers travel in pairs. Robertson asserts, however, that this testimony was nothing more than the articulation of a convenient hunch.<sup>20</sup>

Using the above legal framework, the Court of Appeals in the case at bar concluded that Robertson's travel, a perfectly legal activity, came under the requisite particularized articulable suspicion largely due to the identity of his companion, and his nervousness when asked for identification. The panel was favorably persuaded by the officer's testimony at Robertson's

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<sup>18</sup> *Id.*, at p. 502.

<sup>19</sup> *People v Jenkins*, 472 Mich 26 (2005).

<sup>20</sup> Of the subsequent Court of Appeals' panels to cite *Nelson* in cases involving tipsters in support of the various fact-specific holdings where a law enforcement officer's evidentiary seizure was based on reasonable suspicion, in contravention of suppressing such evidence, *People v Sanders*, unpublished per curiam opinion of the Michigan Court of Appeals, decided 09/27/2011 [docket no. 295429], is a very good example of the type of evidence giving rise to such reasonable suspicion. In that case, based on information obtained from an informant, the police were able to observe many drug-courier-consistent activities performed by the defendant immediately prior to his investigative detention and ultimate arrest.

evidentiary hearing relative to his motion to suppress that, “it is very common for individuals trafficking in narcotics to travel in pairs.” (Court of Appeals slip opinion, at p. 4). Likewise, the panel was further persuaded by the officer’s apparent inference that, since the search of the targeted individual did not yield drugs, the requisite particularized articulable suspicion was heightened as to Robertson being the individual in the pair of travelers who must have had the drugs. Defendant asserts, however, that these two circumstances, even when combined, do not give rise to the level of particularized articulable suspicion to justify a *Terry*-style stop-and-frisk of Mr. Robertson. At best, the officer’s observations in this regard amount to mere speculation based on generalized information. The officer’s only objective basis for suspecting criminal activity [the informant’s tip that was playing out in real time] applied to Mr. Leroy Jackson, not to Keyon Robertson. All the officer had relative to Robertson was a hunch. This Court has echoed the numerous post-*Terry* holdings that a mere hunch does not equate to reasonable suspicion.

A bus station, like nearly any public venue, is filled with people traveling in pairs. People traveling via public transportation, as in any public venue, tend to become nervous when accosted by police officers, even when they have nothing to fear or hide. These every-day common-place events do not require decades of law enforcement experience to deduce that, even when combined, they do not rise to the degree of suspicion sufficient to justify a *Terry* stop. Further, while this Court does afford deference to a veteran officer’s inference, drawn from his experience with similar criminal situations,<sup>21</sup> an officer’s bald assertion that a particular

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<sup>21</sup> *Nelson, supra*, at p. 636.

situation resembles criminal activity is not the equivalent of reasonable suspicion to justify a *Terry*-stop under the Fourth Amendment.<sup>22</sup>

In *People v Shabaz*,<sup>23</sup> this Court provided very specific guidance as to how to evaluate whether a particular set of facts constitutes the requisite degree of reasonable suspicion to justify a *Terry* stop. The *Shabaz* Court concluded that even a combination of defendant's presence in a high crime area at night, where recent weapon and drug arrests had been made, where defendant was observed stuffing something into his waistband, looking about furtively upon exiting the known house ill repute, and eventually running from police, were an insufficient set of circumstances to justify an investigative stop.<sup>24</sup> The *Shabaz* Court held:

Similarly, defendant's effort to conceal the paper bag in his vest, by itself, did not afford grounds for a stop. There was no evidence that the size or shape of the bag suggested that it contained a weapon. It may have contained money, liquor, food, jewelry, or any number of small items one might lawfully carry in a small bag and wish to conceal from view while walking down a darkened street in a high-crime area. It might, on the other hand, have contained unlawful contraband or an illegally concealed weapon. It is precisely because the officers could only speculate about the contents of the bag that they had no reasonable or articulable basis to conclude what its contents were.

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Because the police could only guess about what defendant was seeking to hide, their speculation did not provide a particularized suspicion of possessory wrongdoing, but only a generalized one.<sup>25</sup>

The case at bar is on all fours with this analysis. In fact, it is an even weaker case, particularly based on the analysis brought to bear by the Court of Appeals.

In basing its legal conclusion, in part, on Mr. Robertson's nervousness and reversing the lower court's order to suppress evidence, the intermediate appellate court relied on this Court's

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<sup>22</sup> *LoCicero, supra*, at p. 506.

<sup>23</sup> 424 Mich 42 (1985).

<sup>24</sup> *Id.*, at pp. 60-64; recently cited in *People v Wright*, unpublished per curiam decision of the Michigan Court of Appeals, decided 06/11/2015 [docket no. 319724].

<sup>25</sup> *Id.*, at p. 61.

holdings in both the *Jenkins*<sup>26</sup> and the *Oliver* cases. From the analytical perspective of whether a particular set of facts are sufficient to constitute reasonable suspicion to justify an investigatory stop, both cases are distinguishable in light of this Court's holding in *Shabaz*.

The former case -*Jenkins*- involved the police investigation of a house party in Ann Arbor. The officer accosted defendant while he sat on the stoop outside the residence and, after hearing an irate resident of the home ask why defendant was present at her home, requested his identification. Defendant became visibly nervous after he provided his identification and heard the officer call his name into LEIN. He also displayed other features of a person that was guilty of some crime: he made furtive movements toward his pants pocket -from which a weapon eventually fell; and perhaps more significantly, he began to walk away despite the officer retaining his identification and despite the officer walking alongside him, encouraging him to await the results of the LEIN inquiry. Other residence in the housing complex called to the defendant by name, basically offering him a sanctuary from further interaction with the officer. When the defendant did not heed the officer's suggestion to wait at the scene, the officer placed his hand on defendant's shoulder to detain him at the scene.

In suppressing the evidence and dismissing the case, the trial court concluded that the above-summarized facts did not supply the arresting officer with reasonable suspicion to detain the defendant. The Court of Appeals affirmed the trial court dismissal, finding that defendant was seized at the moment the officer took the defendant's identification, and further concluding that such seizure was not supported by a reasonable suspicion because all the defendant was doing at that precise moment in time was sitting in a public place.

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<sup>26</sup> *Jenkins, supra*, at p. 34.

This Court, in reversing the Court of Appeals in *Jenkins*, concluded that the officer's seizure did not occur until the moment that the officer laid his hand on defendant's shoulder. Further, the *Jenkins* Court concluded that, by the time the officer seized the defendant by placing his hand on his shoulder, the officer did have reasonable suspicion that defendant committed a crime. The calculus of reasonable suspicion justifying the seizure was made-up of the following circumstances:

- the officer heard a woman who resided at the home challenge defendant's presence at the location;
- when the officer conveyed defendant's identification into LEIN, the defendant became visibly nervous and reached toward his pocket;
- the defendant was willing to walk away from the officer and the scene, content to leave his identification behind with the investigating officer; and
- during the officer's initial identification line of questioning, other nearby individuals began inviting the defendant into their residences to presumably shield him from further police contact.

Although the facts of the instant case are distinct from the above, Robertson asserts to this Court that the totality of the facts and circumstances in *Jenkins* were of a higher quality and quantity in the overall "reasonable suspicion" calculus. In the instant matter, at the precise moment of Robertson's seizure, he merely exhibited nervousness while traveling with a companion that was under suspicion. Robertson asserts that his mere presence accompanying Leroy Jackson was not sufficient to constitute reasonable suspicion to justify his detention, however brief. Further, Robertson asserts that his visible nervousness, even when combined with his mere presence, was

insufficient to supplement the totality of circumstances such that reasonable suspicion to justify a *Terry* stop was present in his case.

This Court's *Oliver* holding essentially focused on the combination of circumstances testified to by the investigating and arresting officer. The case involved a *Terry*-style stop of a vehicle occupied by four men suspected of committing a bank robbery. This Court afforded the usual deference to the officer's repeated testimony that he had reasonable suspicion, based on his considerable experience with bank robberies, that the two suspects that left the bank on foot, would need to hook-up with a getaway vehicle; so he was on the lookout for such a vehicle and, when a vehicle fit the bill, he obtained back-up and conducted a vehicle stop. The presence of four individuals in a vehicle, two of whom fit the basic description of the suspects seen leaving the bank on foot, was not sufficient by itself to supply the officer with reasonable suspicion.

Several additional factors compiled by the officer in his reasonable suspicion calculus were persuasive to this Court: the location of the vehicle in a secluded apartment complex supported the officer's suspicion as well as the atypical behavior of all of the individuals in the car, i.e. none of the vehicle occupants would look at the officer as it pulled away from the complex, along with the particularly circuitous route the vehicle traveled in order to avoid passing by the scene of the crime. Again, while Appellant recognizes that every case of reasonable suspicion depends on its particular set of facts, the instant case lacks these type of additional factors that provide a reasonable basis for a law enforcement officer to conclude that criminal activity is afoot. Here, unlike *Jenkins* and *Oliver*, Robertson's mere presence alongside a surveillance target [Jackson] and his nervousness when being questioned by the officer were the only factors observed by the officer prior to conducting a seizure. A defendant's "[m]ere presence, even with knowledge that an offense is about to be committed or is being committed, is

insufficient to establish that a defendant aided or assisted in the commission of the crime.”<sup>27</sup> In drug possession cases such as the one at bar, a defendant's mere presence at a place “where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown.”<sup>28</sup> Mere presence “implies not only an absence of criminal intent but also passivity and nonparticipation in the actual commission of [the] crime.”<sup>29</sup>

Where, as here, an officer’s stop of an individual, however brief, is not supported by reasonable suspicion, the evidence obtained from the improper seizure -the heroin in this case- was properly suppressed by the trial court in accord with applicable doctrine known as “fruit of the poisonous tree”.<sup>30</sup>

Therefore, Robertson asserts that the Court of Appeals’ analysis involving probable cause to arrest the Defendant based on the positive “alert” provided by the drug-sniffing dog, or whether the police were justified in handcuffing Robertson, is moot because the investigative stop was never justified in the first place. A constitutionally valid stop is necessary prior to the implication of law enforcement interests in subduing a suspect with restraints, as the officer did in this case at the outset of his interaction with Appellant. Robertson concedes that, once a proper detention has occurred, law enforcement officers have an interest in their own protection and, in suspected drug cases, may handcuff an individual they suspect is transporting drugs. But this is not the situation in the case at bar where, prior to the canine alert, based only on

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<sup>27</sup> *People v Norris*, 236 Mich App 411, 419-420 (1999).

<sup>28</sup> *People v Echavarria*, 233 Mich App 356, 370 (1999).

<sup>29</sup> *People v Moldenhauer*, 210 Mich App 158, 160 (1995).

<sup>30</sup> *Wong Sun v United States*, 371 U.S. 471; 83 S.Ct. 407; 9 L.Ed.2d 441 (1963), and *Shabaz*, *supra*, at p. 66.

Robertson's physical presence to the target of a police investigation, and based on his nervousness once the police began to question him, Robertson was detained via handcuffs. At that point his person was seized, Appellant argues unconstitutionally, and any evidence obtained thereafter, including from the canine unit, was properly suppressed as proverbial "fruit-of-the-poisonous-tree".

The Court of Appeals relies on *People v Zuccarini* for the proposition that, during the heat of a narcotics investigation, officers may lawfully detain suspects by briefly deploying handcuffs to ensure their own safety and the safety of others, and that such detention does not constitute an arrest.<sup>31</sup> Appellant asserts that the same analysis brought to bear on the initial determination of whether reasonable suspicion supported a warrantless arrest applies to the Court of Appeals' application of *Zuccarini*. In that case, the officers were executing a search warrant against the defendant's home; he was the first of several occupants to arrive at his home just as officers were securing the premises to execute the warrant. This is a factually distinct context for a handcuffing and "non-arrest" to occur. In the instant matter, by contrast, Robertson was simply traveling with the target of a police investigation; he was merely present. No warrant was being executed at his home and, as emphasized above, the anonymous tipster's information, upon which the police investigation was based, did not involve Robertson.

Also, similarly, a constitutionally valid stop is the prerequisite to the proper deployment of drug-sniffing dogs. The Prosecutor's assertions to the intermediate appellate court that the Sheriff did, in fact, have a particularized suspicion as to Mr. Robertson to justify detaining and even arresting him; that the Sheriff had probable cause to arrest Robertson based on the positive K-9 hit of Defendant's luggage at the bus station; and that the Sheriff conducted a valid search

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<sup>31</sup> 172 Mich App 11, 13 (1988).

incident to that arrest. The arguments below were asserted in the Court of Appeals and bear repeating in this supplemental brief following the additional constitutional analysis set forth above, although some of these arguments and the case law on which they are based were not addressed in the Court of Appeals' decision.

- A. The sheriff conducted a warrantless search of Defendant that went beyond the scope of a proper investigatory stop permitted by the *Terry v Ohio* case as the premature use of handcuffs effectively placed Defendant under arrest and no probable cause existed to arrest defendant thus, the evidence seized in this fashion constituted fruit of the poisonous tree.

This Court and the Court of Appeals have invalidated investigative stops on facts more compelling than those presented in this case. For example, in *People v Burrell*, an observation by an officer that two black men driving through a predominantly white residential area where armed robberies recently had occurred did not provide a particularized reasonable suspicion to justify an investigative stop.<sup>32</sup>

Similarly, in *People v Williams*, the Court of Appeals invalidated a stop where the officers had been called to a hotel by the manager because there was a suspicious man sitting alone in the hotel parking lot. The man was asked to produce identification; he stated he had no identification; an officer, using his flashlight, could see what appeared to be the top of a standard driver's license. The man's wallet was immediately seized and the officers discovered that the license belonged to another individual which the suspect could not explain. Credit cards belonging to several other people were seized. In reversing the lower court denial of defendant's motion to suppress, the Court of Appeals stated:

This case highlights the difficult situation confronting a police officer when his investigation has failed to resolve suspicions concerning an individual who has been temporarily detained. Even though there is no probable cause to believe an individual has committed a crime, a police officer may, under circumstances

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<sup>32</sup> *Burrell, supra*, at p. 450.

warranting a reasonable suspicion, approach an individual in an appropriate manner for the purpose of investigating possible criminal behavior. Thereafter, the officer's course of action depends entirely on what is reasonable in the circumstances. The officer must bear in mind, however, that at this stage in the investigation a search—except for a protective frisk or a search with the individual's voluntary consent—must be based on probable cause to believe an offense has been committed. [footnotes and citations omitted]<sup>33</sup>

Like *Williams*, the case at bar highlights the sheriff's difficulty when a temporary detention fails to resolve suspicions. In this case, Sgt. Jennings' solution was to separate Robertson from Jackson and, prior to conducting any type of *Terry*-style "stop-and-frisk", handcuff Robertson, effectively arresting him on-the-spot. Even with hind-sight, this was not reasonable under the circumstances. To allow this type of search and seizure under the pretext of the "totality of the circumstances" test is to trample upon the meaning of the 4<sup>th</sup> Amendment.

At the Court of Appeals, the Prosecutor relied on an overruled decision in *People v Green*<sup>34</sup> for the proposition that a "brief but complete" restriction of a person's liberty through the use of handcuffs does not constitute an arrest. The *Green* case is distinguishable to the extent that in that case, the police were responding to information provided by Ford Motor Company security guards about a possible drunk driver that posed an immediate safety threat. The investigating police officers observed first-hand the driver's belligerent conduct and his aggressive accosting of a female officer. In the case now before this Court, there was no such immediate threat; there was no specific circumstances that would justify a handcuffing as there were in the now-overruled *Green* case.

Mr. Robertson was in a position similar to that of the defendants in *Williams* and *Burrell* in the cases cited above. There was not sufficient particularized suspicion to justify the stop;

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<sup>33</sup> *People v Williams*, 63 Mich App 398, 403 (1975).

<sup>34</sup> *People v Green*, 260 Mich App 392, 397-398 (2004), overruled in part on other grounds by *People v Anstey*, 476 Mich 436, 447 (2006).

there certainly was not probable cause to affect the arrest. As noted by the trial court, Robertson was handcuffed simply for being in Jackson's presence. The anonymous tip received by the sheriff concerned only Mr. Jackson; not Mr. Robertson, as expressly noted by the trial court in its analysis. (See Exhibit B, trial court's opinion and order, at pp. 6, 7) These findings of fact are uncontested and instructive; they are not clearly erroneous thus, they must inform and guide this Court in the review of Judge Anderson's legal conclusion set forth in the opinion and order that Robertson asserts was reversed by the Court of Appeals in error. The trial court concluded correctly that Defendant's motion to suppress should be granted and this conclusion should not be reversed on appeal.

- B. The police K-9's positive hit for drugs on Defendant's luggage did not subsequently justify the sheriff's already-flawed investigative stop, especially where no drugs were found inside Defendant's luggage, and similarly did not provide probable cause for Defendant's arrest based on the *Florida v Royer* case thus, the lower court properly granted Defendant's motion to suppress the narcotics evidence and the Court of Appeals erred by relying on the distinguishable *People v Nguyen* case.

The Court of Appeals was not persuaded that the fruitless search of Robertson's bag subsequent to the canine Finn's "alert" dissipated any reasonable suspicion that may have attached to Robertson during his encounter with the sheriff at the bus station. In so concluding, the Court of Appeals relied on its recent decision in *People v Nguyen, supra*. The defendant in *Nguyen*, however, unlike in the case at bar, was the person of interest to the police based on information received from a confidential informant that had agreed to work with the local police in order to set up a purchase of narcotics, with Mr. Nguyen as the seller. In *Nguyen*, the case involved a traffic stop where neither the initial pat-down of Nguyen's person, nor a consent search of the vehicle, yielded the drugs believed to be within Nguyen's possession based on the information obtained from the informant. The case is distinguishable to the extent that the informant in *Nguyen* was a confidential informant known to the Troy Police Department that had

been deployed in that case specifically to set up a drug purchase with Mr. Nguyen. In the instant case, on the other hand, the sheriff had no knowledge whether the information received from an anonymous source was reliable as to their target –LeRoy Jackson- let alone Robertson who was merely present along with Jackson. While this Court has held that an officer may rely on a tip when making a warrantless arrest, the justification of the arrest lies in the quality of the information provided by the tipster and whether that information was independently corroborated by the officer when making the warrantless arrest.<sup>35</sup> This simply was not the case with Robertson, as properly noted by the trial court. Here, the tip was from an unproven anonymous source and concerned someone other than the Appellant. Accordingly, the trial court could properly conclude that any reasonable suspicion to continue to detain Robertson, or any probable cause to arrest Robertson, was dissipated when a search of his bag did not yield narcotics.

Further, in persuading the Court of Appeals to reverse the trial court, the Prosecutor relied on United States Supreme Court and Michigan Supreme Court cases for the vague and general proposition that the concept of probable cause, in situations like the one at bar, are imprecise, not technical, and “as the very name implies”, dealing in probabilities.<sup>36</sup> The Prosecutor painted with such broad strokes because they are attempting to minimize the fact that Robertson was handcuffed and arrested very early in his exchange with Officer Jenkins solely because he was in the presence of Jackson. The sheriff moved too quickly and thus unreasonably, in handcuffing Robertson almost immediately, and by going beyond the scope of a simple pat-down, and searching his underclothes for evidence of crime without a warrant. This section of the prosecutor’s brief is therefore devoted to constructing an argument to make it seem

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<sup>35</sup> *People v Levine*, 461 Mich 172, 183 (1999).

<sup>36</sup> See, for example, the string of citations found at page 18 of the Prosecutor’s merits brief submitted to the Court of Appeals. The cases need not be cited here.

like there was specific evidence pointing directly to Robertson that he committed a felony, i.e. narcotic trafficking.

The Prosecutor further asserted that by the objective standard of a reasonable peace officer, the actions taken were reasonable, and necessary for the officer's safety. On the further appeal to this Court, Defendant again asserts, on the other hand, that the lower court properly ruled that the sheriff's conduct was not objectively reasonable as it went beyond what was called for under the circumstances from a safety perspective, and constituted a warrantless search for evidence of crime. In addition, Defendant asserts, as noted by the lower court, that Defendant's reliance on *Florida v Royer* is misplaced to the extent that this case is distinguishable. Unlike the case at bar, the defendant in the *Royer* case was the subject of the peace officer's investigation; here, Defendant was not the person upon whom the interest of law enforcement was focused; in *Royer*, there was no anonymous tip that involved another separate and distinct individual, as here. Neither did *Royer* involve a K-9 search, as in the instant matter; *Royer*, in dicta, addressed a hypothetical dog-search. Therefore, the Court of Appeals' reliance on *Royer* was misplaced, as discussed above. The dog sniff evidence arising from the positive alert for drugs did not remove the taint of the officer's improper detention of Robertson.

As for the Prosecutor's reliance on *US v Knox*<sup>37</sup>, Defendant asserts that while the positive K-9 hit on the luggage certainly did provide the sheriff with probable cause to search the bag, Defendant cannot agree that *Knox*, in fn #4, supplied the Court of Appeals with the authority to determine that positive K-9 hits on luggage supplies a peace officer with probable cause to not only search the suspect luggage, but also to arrest the individuals believed to be the owners of

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<sup>37</sup> *US v Knox*, 839 F2d 285, 294, n 4 (6<sup>th</sup> Cir 1988).

such luggage, even after it turns out that the dogs “hit” was a false or mistaken hit, as occurred in this case.

In the case at bar, the K-9 dog had a positive “hit” or indication as to two bags positioned next to each other in a bus terminal: Jackson brought two pieces of luggage into the bus terminal; there is no evidence in the record as to which piece of luggage triggered the dog’s so-called “hit”; there is no evidence in the record regarding whether the NET task force officers were able to tell which bag belonged to Jackson and which one, if either, belonged to Robertson; it was undisputed at the preliminary exam and at the evidentiary hearing that the NET officers’ search of the bags did not turn-up any evidence of crime whatsoever.

Under such circumstances, it was wrongful for the sheriff to continue to detain Mr. Robertson after no drugs were located in the luggage believed to be his; it was wrongful to tell him that he was going to be searched; and, it was wrongful to subject Robertson to an evidentiary search of his person without first securing a warrant. The lower court was not confused about the timing of Robertson’s handcuff detention and preemptive arrest, neither should this Court. The lower court was not confused about the initial positive K-9 hit on Jackson’s and Robertson’s luggage which ultimately turned out to be an evidentiary dead end, so neither should this Court. The lower court’s findings and legal conclusion should be affirmed on appeal.

- C. The sheriff did not have probable cause to arrest the Defendant pursuant to a Terry investigative stop under the circumstances presented in this case thus, there was no constitutional search-incident-to-arrest and the evidence of narcotics uncovered by the illegal search must be suppressed.

In this bootstrap-style argument, the Prosecutor again asserted to the Court of Appeals that, because the Sheriff “clearly had probable cause to arrest Defendant”, the subsequent search incident to his arrest was valid. As argued throughout this brief, and as concluded by Judge Anderson below, it was anything but clear that the Sheriff had a reasonable suspicion to conduct

an investigative stop, let alone probable cause to conduct a search, or to make an arrest. Also, the fact that circumstances would eventually turn-out to provide probable cause for an arrest, i.e. a parole warrant, does not cure the initially defective and unconstitutional search of Robertson's person. While the undersigned counsel recognizes the principle of allowing a search incident to arrest on the basis of officer safety, in the instant matter, there was no valid arrest in the first place thus, there could be no constitutional search on this basis.

The Prosecutor seems to assert that the Sheriff was empowered, on the basis of an anonymous tip directed at someone else, to accost Defendant and request identification and, after receiving Defendant's identification, handcuff the individual, also in the name of safety, and then conduct a thorough search for evidence on the Defendant's person without a warrant on the basis that Defendant said, "okay" when told by the Sheriff that he would be searched. In all of the case law cited by the Prosecutor, the common theme in this prong of the Prosecutor's argument is that probable cause to make the arrest existed in the first place. In the case at bar, Defendant has argued in subsections A and B of this appellate brief, that no such probable cause existed and, that an articulable suspicion to even conduct a *Terry* investigative stop likewise did not exist.

The Prosecutor's reliance on this Court's decisions in *People v Anterberry*<sup>38</sup> and *People v Champion, supra*, for the proposition that a search just prior to a valid arrest, is misplaced as these cases are distinguishable on their plain facts. In *Anterberry*, the Detroit Police entered defendant's home armed with a valid search warrant. The DPD's subsequent search of a locked tool box within the home was found to be within the scope of the search warrant thus, the evidence seized pursuant to the execution of a valid search was deemed admissible against any

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<sup>38</sup> *People v Anterberry*, 431 Mich 381 (1988).

of the seven persons present in the home; this is cut from a completely different whole cloth than the facts presented in the instant case. Robertson arrived with Jackson at a public place. Without any particularized suspicion toward Robertson, he was handcuffed and, Defendant asserts, immediately arrested without probable cause; detained while the Sheriff completed his investigation.

While the Prosecutor attempts to suggest at several points in their brief that the bus station in Pontiac is an area known for narcotics trafficking, Defendant asserts that such vague and conclusory observations about a large public area, without more, do not supply the Sheriff with a particularized suspicion as to Robertson. Thus, the search of Robertson's person, while handcuffed pursuant to an invalid arrest [as argued in this brief, *infra*] was not consistent with the "search-incident-to-arrest" exception to the 4<sup>th</sup> Amendment's probable cause warrant requirement. As such, the narcotics seized are fruits of the poisonous tree and were properly suppressed by the lower court.

Similarly, in the *Champion* case, the facts were distinct from the case at bar. Two police veterans were patrolling a high-crime area of Saginaw when they observed an individual, Champion, known to have a prison record. Upon seeing the officers, Champion fled; when the officers finally caught up with Champion, they conducted a Terry-style pat down search; during the pat down, one of the officers felt a pill bottle in Champion's sweat suit pocket. The case is cited for the proposition that such evidence is within the "plain feel" exception to the warrant requirement created by the United States Supreme Court in *Minnesota v Dickerson*.<sup>39</sup> Thus, unlike the "mere presence" of Mr. Robertson at the Pontiac bus station, Champion, an ex-convict

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<sup>39</sup> *Minnesota v Dickerson*, 508 US 366; 113 S Ct 2130; 124 L Ed 2d 334 (1993).

known to the officers, immediately fled upon sight of the officers. When he was subdued, the officers had the right to conduct a *Terry*-style pat down search of Champion's person.

In the instant case, Sgt. Jennings: a) handcuffed Robertson almost immediately; b) told him he was going to conduct a search of his person; c) did not conduct a *Terry*-style pat down search for weapons, but rather, d) lifted Robertson's shirt and conducted a search for evidence of crime. The drugs seized were not in plain view, nor were they located as a result of a *Dickerson* "plain feel" pursuant to an investigative pat down. Pursuant to such uncontested facts, it was proper for the lower court in the instant case to grant Defendant's motion to suppress the evidence and to dismiss the case against Robertson.

- D. The Court of Appeals erred by including within its assessment of the totality of the circumstances Appellant's statement to police that he smoked marijuana earlier on the day of his arrest where the prosecutor stipulated that the statement was properly suppressed, and even without such a stipulation, the statement was made while Appellant was detained with handcuffs and thus not free to leave, but had not been advised of his *Miranda* rights.

The Court of Appeals erred in reversing the trial court's suppression of the physical evidence based on Defendant's admission he smoked marijuana earlier in the day because at the time that Robertson made that statement, he was under custodial interrogation. First, and perhaps most significant, the lower court record reflects, in the trial court's opinion and order at footnote #1 on page 1. Despite this stipulation, when the prosecutor submitted a brief on the merits to the Michigan Court of Appeals, it raised the issue of Appellant's marijuana statement as a component of the factual basis on which the arresting officers claimed to have based their reasonable suspicion about Robertson's possible involvement in heroin trafficking. Therefore, Appellant elects to brief this issue as though no stipulation was placed on the record with the trial court.

In the seminal case of *Miranda v Arizona*,<sup>40</sup> the United States Supreme Court long-ago held that the prosecutor may not introduce the statements of an accused that were obtained during custodial interrogation, unless it can be demonstrated that the procedural safeguards –the so-called Miranda warnings- were given to the accused prior to the questioning. In the instant case, the record indicates that after Robertson was handcuffed, he was questioned by the sheriff about various aspects of the potential drug trafficking they were attempting to unravel. The Michigan Court of Appeals cites the marijuana misdemeanor statute, MCLA 333.7403(2)(d), to support its conclusion that Defendant’s statement could also be used by the investigating officers to supply the requisite “reasonable suspicion” to detain Robertson. Here, the trial court properly assessed this straight-forward factual scenario. Robertson’s statement about marijuana could not be used to develop “reasonable suspicion” that he was involved in the drug trade because it was obtained while he underwent custodial interrogation –to the extent he was being questioned while handcuffed- and without the requisite *Miranda* warnings. While the sheriff testified that he sought to handcuff Robertson for his own protection, once he had the cuffs on his suspect, he began a purposeful attempt to obtain evidence of a crime: he conducted a pat-down search that went beyond the scope of Terry and constituted a search for evidence; and he questioned Robertson about the presence of drugs. Under such circumstances, a warrant was required to conduct a proper lawful search, and Miranda warnings should have been given prior to questioning Robertson.

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<sup>40</sup> *Miranda v Arizona*, 384 US 436, 474 (1966).

Conclusion and Relief Requested.

WHEREFORE, your Appellant respectfully requests that this Honorable Court reverse and vacate the opinion of the Court of Appeals and affirm and reinstate the lower Court's 04/03/2013 Opinion and Order and subsequent dismissal of this case against Mr. Robertson.

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