

150132

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

KEYON LECEDRIC ROBERTSON,

Defendant-Appellee.

Court of Appeals

No. 315870

Circuit Court

No. 2012-242361-FH

APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

JESSICA R. COOPER
PROSECUTING ATTORNEY
COUNTY OF OAKLAND

THOMAS R. GRDEN
CHIEF, APPELLATE DIVISION

BY: JOSHUA J. MILLER (P75215)
Assistant Prosecuting Attorney
Oakland County Prosecutor's Office
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-5435



RECEIVED by Michigan Court of Appeals 5/31/2013 9:41:29 AM

TABLE OF CONTENTS

	<u>PAGE</u>
INDEX TO AUTHORITIES CITED.....	ii
JURISDICTIONAL STATEMENT	v
STATEMENT OF QUESTION PRESENTED.....	vi
STATEMENT OF FACTS	1
ARGUMENT	
I. THE TRIAL COURT REVERSIBLY ERRED BY SUPPRESSING THE PHYSICAL EVIDENCE DISCOVERED DURING THE SEARCH WHERE THE OFFICERS PROPERLY DETAINED DEFENDANT FOR INVESTIGATORY PURPOSES BASED ON THE TOTALITY OF THE CIRCUMSTANCES THAT THEY ENCOUNTERED AND WHERE THE OFFICERS SUBSEQUENTLY GAINED PROBABLE CAUSE TO ARREST DEFENDANT AND SEARCH HIM INCIDENT TO THAT ARREST BASED ON THE DRUG-SNIFFING DOG'S POSITIVE HIT ON DEFENDANT'S LUGGAGE.....	11
<i>Standard of Review & Issue Preservation</i>	11
<i>Discussion</i>	11
RELIEF	28

RECEIVED by Michigan Court of Appeals 5/31/2013 9:41:29 AM

INDEX TO AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<i>Adams v Williams</i> , 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972).....	18
<i>Allen v Los Angeles</i> , 66 F3d 1052 (CA 9, 1995)	16
<i>AT v State</i> , 941 So 2d 478 (Fla App, 2006)	26
<i>Chimel v California</i> , 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969).....	22
<i>Commonwealth v Jackson</i> , 464 Mass 758; 985 NE2d 853 (2013)	26
<i>Commonwealth v Washington</i> , 449 Mass 476; 869 NE2d 605 (2007).....	26
<i>Easley v State</i> , 166 Ind App 316; 335 NE2d 838 (1975).....	26
<i>Florida v Harris</i> , 568 US __; 133 S Ct 1050; 185 L Ed 2d 61 (2013).....	19, 20
<i>Florida v JL</i> , 529 US 266; 120 S Ct 1375; 146 L Ed 2d 254 (2000).....	13
<i>Florida v Royer</i> , 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983).....	20, 21
<i>Graham v Connor</i> , 490 US 386; 109 S Ct 1865; 104 L Ed 2d 443 (1989)	16, 17
<i>Illinois v Gates</i> , 462 US 213; 103 S Ct 2317; 76 L Ed 2d 527 (1983)	18, 21, 22, 27
<i>Illinois v Wardlow</i> , 528 US 119; 120 S Ct 673; 145 L Ed 2d 570 (2000).....	15
<i>Italiano v Commonwealth</i> , 214 Va 334; 200 SE2d 526, 528 (1973).....	26
<i>Joyce v Commonwealth</i> , 56 Va App 646; 696 SE2d 237 (2010)	26
<i>People v Anstey</i> , 476 Mich 436; 719 NW2d 579 (2006)	16
<i>People v Arterberry</i> , 431 Mich 381; 429 NW2d 574 (1988).....	18, 21, 24, 27
<i>People v Champion</i> , 452 Mich 92; 549 NW2d 849 (1996).....	18, 21, 22, 25, 27
<i>People v Clark</i> , 220 Mich App 240; 559 NW2d 78 (1996).....	21
<i>People v Coscarelli</i> , 196 Mich App 724; 493 NW2d 525 (1992)	14
<i>People v Davis</i> , 250 Mich App 357; 649 NW2d 94 (2002).....	11
<i>People v Dixon</i> , 392 Mich 691; 222 NW2d 749 (1974)	22
<i>People v Green</i> , 260 Mich App 392; 677 NW2d 363 (2004).....	16, 17
<i>People v Hawkins</i> , 468 Mich 488; 668 NW2d 202 (2003).....	22

RECEIVED by Michigan Court of Appeals 5/31/2013 9:41:29 AM

<i>People v Jones</i> , 279 Mich App 86; 755 NW2d 224 (2008).....	19
<i>People v Kazmierczak</i> , 461 Mich 411; 605 NW2d 667 (2000)	12
<i>People v Lewis</i> , 251 Mich App 58; 649 NW2d 792 (2002).....	12
<i>People v Lyon</i> , 227 Mich App 599; 577 NW2d 124 (1998).....	18
<i>People v Marland</i> , 135 Mich App 297; 355 NW2d 378 (1984).....	16
<i>People v Mullen</i> , 282 Mich App 14; 762 NW2d 170 (2008).....	11
<i>People v Mungo</i> , 288 Mich App 167; 792 NW2d 763 (2010).....	22
<i>People v Nelson</i> , 443 Mich 626; 505 NW2d 266 (1993).....	12, 13, 14, 15
<i>People v Oliver</i> , 464 Mich 184; 627 NW2d 297 (2001).....	15
<i>People v Randle</i> , 133 Mich App 335; 350 NW2d 253 (1984).....	16
<i>People v Rizzo</i> , 243 Mich App 151; 622 NW2d 319 (2000)	13, 14
<i>People v Sangster</i> , 123 Mich App 101; 333 NW2d 180 (1983).....	16
<i>People v Shankle</i> , 227 Mich App 690; 577 NW2d 471 (1998)	16
<i>People v Solomon (Amended Opinion)</i> , 220 Mich App 527; 560 NW2d 651 (1996)	26, 27
<i>People v Williams</i> , 472 Mich 308; 696 NW2d 636 (2005).....	11
<i>People v Zuccarini</i> , 172 Mich App 11; 431 NW2d 446 (1988)	16
<i>Peters v New York</i> , 392 US 40; 88 S Ct 1889; 20 L Ed 2d 917 (1968).....	25, 27
<i>Rawlings v Kentucky</i> , 448 US 98; 100 S Ct 2556; 65 L Ed 2d 633 (1980)	23, 24, 25, 27
<i>Scott v United States</i> , 436 US 128; 98 S Ct 1717; 56 L Ed 2d 168 (1978)	18, 21
<i>State v Ofori</i> , 170 Md App 211; 906 A2d 1089 (2006).....	20
<i>Terry v Ohio</i> , 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).....	passim
<i>United States v Cortez</i> , 449 US 411; 101 S Ct 690; 66 L Ed 2d 621 (1981).....	12
<i>United States v Crittendon</i> , 883 F2d 326 (CA 4, 1989).....	16
<i>United States v Esieke</i> , 940 F2d 29 (CA 2, 1991)	16
<i>United States v Hurst</i> , 228 F3d 751 (CA 6, 2000).....	16
<i>United States v Kapperman</i> , 764 F2d 786 (CA 11, 1985).....	16
<i>United States v Klinginsmith</i> , 25 F3d 1507 (CA 10, 1994)	20

United States v Knox, 839 F2d 285 (CA 6, 1988)20
United States v Laing, 889 F2d 281 (CA DC, 1989):16
United States v. Merkle, 988 F2d 1062 (CA 10, 1993).....16
United States v Navarrete-Barron, 192 F3d 786 (CA 8, 1999).....16
United States v Robinson, 414 US 218; 94 S Ct 467; 38 L Ed 2d 427 (1973)22
United States v Sanders, 994 F2d 200 (CA 5, 1993)16
United States v Smith, 3 F3d 1088 (CA 7, 1993).....16
Whitehead v Commonwealth, 278 Va 300; 683 SE2d 299 (2009)21
Ybarra v Illinois, 444 US 85; 100 S Ct 338; 62 L Ed 2d 238 (1979)14

CONSTITUTIONS AND STATUTES PAGE

US Const, Am IV12
 Const 1963, art 1, § 1112
 MCL 333.7401(2)(a)(iii).....v, 1
 MCL 333.740321
 MCL 600.308(1)v
 MCL 764.15(1)(d).....18
 MCL 770.12(1)(a).....v

RULES PAGE

MCR 2.613(C)11
 MCR 7.203(A)v
 MCR 7.204(A)(2)v

OTHER SOURCES PAGE

Wayne R. LaFave, 1 *Search and Seizure* § 2.2(g) (4th ed 2004)20

JURISDICTIONAL STATEMENT

Defendant was charged in this case with one count of Possession with Intent to Deliver 50 to 450 Grams of Heroin, contrary to MCL 333.7401(2)(a)(iii). Following a preliminary examination conducted before the Honorable Ronda M. Fowlkes Gross of the 50th District Court on July 31, 2012, Defendant was bound over as charged to the circuit court. On August 13, 2012, Defendant was arraigned before the Honorable Martha D. Anderson of the Circuit Court for the County of Oakland. Defendant subsequently filed a Motion to Suppress Evidence on November 16, 2012. The People filed a response on November 30, 2012, and an evidentiary hearing was held on December 20, 2012. Supplemental briefs were filed. In an Opinion and Order entered April 3, 2013, the circuit court granted Defendant's Motion to Suppress. An Order of Dismissal was entered on April 8, 2013.

On April 24, 2013, the People filed a timely Claim of Appeal from the Order of Dismissal. This Honorable Court has jurisdiction over this appeal by right pursuant to MCL 600.308(1); MCL 770.12(1)(a); MCR 7.203(A); and MCR 7.204(A)(2).

COUNTER-STATEMENT OF QUESTION PRESENTED

I. DID THE TRIAL COURT REVERSIBLY ERR BY SUPPRESSING THE PHYSICAL EVIDENCE DISCOVERED DURING THE SEARCH WHERE THE OFFICERS PROPERLY DETAINED DEFENDANT FOR INVESTIGATORY PURPOSES BASED ON THE TOTALITY OF THE CIRCUMSTANCES THAT THEY ENCOUNTERED AND WHERE THE OFFICERS SUBSEQUENTLY GAINED PROBABLE CAUSE TO ARREST DEFENDANT AND SEARCH HIM INCIDENT TO THAT ARREST BASED ON THE DRUG-SNIFFING DOG'S POSITIVE HIT ON DEFENDANT'S LUGGAGE?

The People contend that the answer is, "yes."

Defendant will contend that the answer should be, "no."

RECEIVED by Michigan Court of Appeals 5/31/2013 9:41:29 AM

COUNTER-STATEMENT OF FACTS

Keyon Lecedric Robertson, hereinafter referred to as Defendant, was charged in this case with one count of Possession with Intent to Deliver 50 to 450 Grams of Heroin, contrary to MCL 333.7401(2)(a)(iii). Following a preliminary examination conducted before the Honorable Ronda M. Fowlkes Gross of the 50th District Court on July 31, 2012, Defendant was bound over as charged to the circuit court. On August 13, 2012, Defendant was arraigned before the Honorable Martha D. Anderson of the Circuit Court for the County of Oakland. Defendant subsequently filed a Motion to Suppress Evidence on November 16, 2012, stemming from the stop and subsequent search of his person that occurred on July 12, 2012. The People filed a response on November 30, 2012, and an evidentiary hearing was held on December 20, 2012. Supplemental briefs were filed. In an Opinion and Order entered April 3, 2013, the circuit court granted Defendant's Motion to Suppress. An Order of Dismissal was entered on April 8, 2013.¹

The People now appeal by right through a timely Claim of Appeal filed on April 24, 2013, seeking reversal of the suppression of evidence and dismissal of the charges and a remand for reinstatement of those charges.

The Charged Incident:

Sergeant Sean Jennings of the Oakland County Sheriff's Office was the sergeant in charge of the East Side Crew, a street-level narcotics crew that was part of the Narcotics Enforcement Team ("NET").² (E, 20-21.)³ Sergeant Jennings had been a sheriff's deputy for over twenty-one years and a sergeant for over six years. (E, 20.) He had worked with NET as a

¹ A copy of the April 3, 2013 Opinion and Order is attached as People's Appendix A, and a copy of the Order of Dismissal is attached as People's Appendix B.

² NET is a multi-jurisdictional law enforcement narcotics task force.

³ PE = Preliminary Examination Transcript, July 31, 2012; E = Evidentiary Hearing Transcript, Dec. 20, 2012; H = Hearing, Apr. 8, 2013.

detective from 2000 to 2006, and he had been reassigned to the team as a sergeant in September 2011. (E, 20–21.) All told, he was going on eight years as a narcotics officer.⁴ (E, 21.)

On July 12, 2012, Sergeant Jennings was working in his capacity as the sergeant in charge of the East Side Crew, and he had occasion to go to the Pontiac bus station. (E, 21–22.) He had received a Crime Stopper tip “stating that a subject would be there and would be traveling with an amount of [h]eroin.” (E, 22.) The name of the individual was Leroy Jackson. (E, 22–23.) The tip stated that Mr. Jackson would be there at “approximately noon of that day” and that he would be “[t]raveling up north via bus.” (E, 23.)

Prior to going to the bus station, Sergeant Jennings identified Mr. Jackson through the Law Enforcement Information Network, “brought up a picture of him through the Secretary of State database,” and so “had him positively identified.” (E, 23.) The sergeant and some other officers then set up surveillance at the bus station. (E, 23–24.)

At some point, Sergeant Jennings was alerted by Detective Curtis that Mr. Jackson was present at the bus station. (E, 24.) Mr. Jackson arrived at the bus station with another person: Defendant. (E, 24.) Mr. Jackson and Defendant arrived at the bus station at the approximate time that the tip indicated. (E, 24–25.) They came in the same vehicle. (PE, 7.) It was “very common” for individuals trafficking in narcotics to travel in pairs. (E, 32.) The tip had not mentioned another person, just Mr. Jackson. (E, 35.)

⁴ Sergeant Jennings had been qualified as an expert in the area of narcotics trafficking numerous times in the circuit court and various district courts in Oakland County. (E, 21.) He had received specialized training in that area through the Oakland Police Academy, in-service training with the Sheriff’s Office, the Detroit basic police narcotics school, the Michigan State advanced narcotics school, and “numerous drug enforcement narcotics schools.” (E, 21–22.) He had participated in “[h]undreds” of narcotics investigations. (E, 22.) At the evidentiary hearing in this case, Sergeant Jennings was qualified as an expert in the area of narcotics trafficking without objection. (E, 22.)

Sergeant Jennings learned that both men were on the north side of the building and made the call for the officers to approach. (E, 25.) Both men were standing outside, and the officers walked up to them (E, 25.) Sergeant Jennings yelled out “[H]ey Leroy,” and Mr. Jackson turned. (E, 25.) The sergeant then identified himself and asked Mr. Jackson for identification, which Mr. Jackson produced. (E, 25.) Mr. Jackson was placed under arrest, as he had a warrant out for his arrest. (E, 25.)

Mr. Jackson was searched incident to his arrest on the warrant. (E, 26–27.) Sergeant Jennings did not find any drugs on his person. (E, 27.) Both Mr. Jackson and Defendant indicated that they were “going up north” toward St. Ignace. (E, 33.)

After the officers took care of Mr. Jackson, their attention was drawn to Defendant. (E, 25.) Defendant produced an identification card bearing the name Kamone Dwayne Robertson and handed it to Sergeant Jennings. (E, 26.) At that time, the sergeant did not know who Defendant was. (E, 26.) The sergeant believed that the photograph on the card was Defendant after he looked at it. (E, 34.)

Sergeant Jennings “inquired to both subjects eventually if they had any luggage.” (E, 27.) The men “identified the two packages of luggage that were inside the terminal.” (E, 27.) He then alerted Deputy Curtis that the two bags were of interest. (E, 27.)

Deputy David Curtis of the Oakland County Sheriff’s Office was part of an undercover team. (E, 10–11.) He was also a member of the Oakland/Macomb Interdiction Team and served as a K-9 handler. (E, 11.) He had been a K-9 handler for thirteen years and had worked with his current dog Finn for eight of those years. (E, 11.) Deputy Curtis and Finn were certified “as a utility dog, which is narcotics, tracking, and aggressive work.” (E, 11.) The deputy maintained certification through weekly training, even though most departments only do such training

monthly. (E, 11–12.) Finn was trained to detect cocaine, crack, marijuana, heroin, and meth. (E, 12–13.) Finn was an “aggressive active” dog, meaning that “a canine scratches or bites at the odor that they’re trained to detect.” (E, 13.) He only responded to odors. (E, 15.)

Deputy Curtis was working as a narcotics officer on July 12, 2012. (E, 13.) On that date, he and Finn attempted to determine whether “[t]wo pieces of luggage” contained the odor of narcotics. (E, 13.) Both pieces of luggage were “inside the waiting room of the bus station.” (E, 14.) They were “side-by-side” when Deputy Curtis first observed them. (E, 14.) He separated the bags and retrieved Finn from outside. (E, 14.) He gave the command to sniff and circled around each bag “at a very quick pace.” (E, 14.) Finn alerted on both bags, which told Deputy Curtis “that the item either has narcotics inside or has the odor of narcotics on the outside or inside.” (E, 14–15.) The bags were closed, and Deputy Curtis never opened them. (E, 15.)

The earlier Crime Stoppers tip that led to the investigation involved the narcotic heroin. (E, 22.) The odor detected also could have been caused by the bags sitting in “a room full of [m]arijuana” or if anyone had been smoking marijuana around them. (E, 17–18.) Finn was trained to detect the odor of either drug. (E, 12–13.) Deputy Curtis could tell that whatever odor existed was strong because Finn “immediately head snapped and dug into these two bags for a strong odor,” but he could not tell when the bags were exposed to the odor. (E, 18.) His experience told him “that this was a fresh odor.” (E, 19.) No other sniffing was done. (E, 17.)

Defendant was outside the waiting area during the sniff. (E, 15–16.) Deputy Curtis always made sure that the person whose item(s) he was inspecting “is not standing behind me where they could get to me and I guess my own personal safety.” (E, 16.) He knew that both subjects were outside at the time, and his safety concerns had already been addressed. (E, 16–17.)

After Finn alerted on the bags, they were searched. (E, 27.) No narcotics were located in the bags themselves. (E, 27.) Defendant was already detained and handcuffed at this time. (E, 27–28.) Defendant had been placed in handcuffs earlier, just after he provided the ID card to Sergeant Jennings. (E, 28, 35.) The sergeant “just noticed him that – to appear to be real nervous, sweating, just – that – that feeling that an officer gets that, you know, something was wrong and he’s kind of a good-sized person so for my safety I decided to put him – to restrain him and put him in handcuffs.” (E, 28, 35.) In the sergeant’s experience, it was common for people to become nervous when he made contact with them. (E, 28–29.) On a scale of zero to ten, with zero being not nervous at all and ten being “the most nervous you’ve ever seen somebody,” Sergeant Jennings placed Defendant at “about a seven.” (E, 29.) When the sergeant noted that Defendant was sweating and asked why he was nervous, Defendant “just said it was hot outside.” (E, 29.)

Sergeant Jennings continued to talk to Defendant after placing him in handcuffs. (E, 36.) He also did “walk [Defendant] a short distance away” around a corner to “separate the parties.” (E, 37.) When the sergeant learned that no drugs were found in the bags, he asked Defendant why the dog may have alerted on his bag. (E, 29.) Defendant admitted smoking marijuana earlier in the day. (E, 29–30, 36.) Mr. Jackson had also stated that he and Defendant had smoked marijuana “a couple hours ago” after Sergeant Jennings “asked him about the contraband in his bags, if there was any, and he said, no.” (E, 30–31.)

The sergeant had probable cause to believe that Defendant might have drugs on his person. (E, 32–33.) This was “based . . . on everything that led up to where we were at based on the original tip that came [in]. Everything stemmed out pretty much perfectly from that where the time frame, the destination, the actual individual in that tip was there, the – the indication from

the K-9 officer. Just based on the whole entire circumstance leading up to that point.” (E, 33, 45.)

Everything the tipster had indicated was “[v]ery accurate.”⁵ (E, 33.)

Sergeant Jennings then “[b]asically I said [to Defendant], I’m gonna [sic] search you and he kind of nodded and half-heartedly said, yes.” (E, 31, 42–43.) The sergeant said this as “pretty much a statement,” not a question. (E, 31.) However, in the sergeant’s mind he was asking Defendant. (E, 43.) Had Defendant said no, he would not have searched him and instead would have tried another means to continue the investigation. (E, 40, 43.)

Defendant was still in handcuffs. (E, 39.) Sergeant Jennings then preceded to lift Defendant’s long white T-shirt. (E, 31.) Defendant’s pants “were very low on a – real, real low where you could see a lot of the white boxer shorts that were underneath,” and the sergeant could see the fly of the boxer shorts as he lifted the shirt. (E, 31–32.) As Sergeant Jennings looked, “everything was compressed and it was kind of spread open,” and he “could see the – the – almost like the top or the tip of what looked to appear to be a clear sandwich bag.” (E, 32.) He had to lift Defendant’s shirt in order to see this. (E, 41.) Based on his experience, the sergeant believed that Defendant “was concealing what probably was narcotics in his crotch area.” (E, 32.) The sandwich bag the sergeant found contained 67.9 grams of a brown substance that field tested positive for heroin. (PE, 12–13; *see* Footnote 5, *infra*.) Defendant was arrested. (E, 41.) He was then transported to the Oakland County Jail by Deputy Thomas. (E, 7, 34–35.)

Deputy Kevin Thomas was also present at the Pontiac bus station that day. (E, 5.) At some point, he came into possession of a Michigan identification card bearing the name Kamone Dwayne Robertson and a date of birth of August 8, 1979. (E, 5–6, 9.) Deputy Morton gave him the card. (E, 6.) Deputy Morton had run the card through the LEIN system in their car, but he

⁵ Sergeant Jennings noted at the evidentiary hearing that in his mind there was a difference between probable cause to search and probable cause to arrest. (E, 45.)

could not find any information on it. (E, 6.) Deputy Thomas saw the results, or lack thereof, on Deputy Morton's computer screen. (E, 8.) Deputy Morton gave the card to Deputy Thomas to see if he could find out any information. (E, 6.) When Deputy Thomas ran the card through the computer system in his vehicle, the card came back as having no record in LEIN. (E, 6, 8.) This meant that the number on the card was not valid. (E, 6-7.) The LEIN system was functioning properly, and Deputy Thomas had no problems accessing it from the computer in his car. (E, 9.) Deputy Thomas informed one of the NET officers of his findings. (E, 8-9.)

Several hours later, Sergeant Jennings learned that Defendant's true identity was discovered at the jail. (E, 35.) Defendant had a valid parole warrant outstanding. (E, 35.) At the time Defendant was arrested, the sergeant did not know that Defendant's name was not Kamone and did not know about the outstanding warrant. (E, 41.) Sergeant Jennings did know that the uniformed patrol officers had checked the LEIN system for Kamone Robertson, and he did have the results of that check at the time he had Defendant in custody, after he was handcuffed. (E, 42.) This was after he searched Defendant, though. (E, 43.)

Procedural Matters:

A preliminary examination was held in this matter before the Honorable Ronda M. Fowlkes Gross of the 50th District Court in Pontiac on July 31, 2012. (PE, 3.) Detective Jennings testified at the preliminary examination.⁶ (PE, 5-20.) Detective Mark Ferguson also testified at

⁶ Sergeant Jennings' testimony at the preliminary examination was consistent with his testimony at the later evidentiary hearing described above. The only additional testimony of note from the preliminary examination that was not covered at the evidentiary hearing pertained to what was recovered from Defendant. At the preliminary examination, Sergeant Jennings noted that when he retrieved a plastic baggie from inside Defendant's boxer shorts, the baggie was found to contain a brown substance that field tested positive for heroin. (PE, 12-13.) The defense stipulated that the substance weighed 67.9 grams. (PE, 13.) This information was addressed in the initial motion to suppress and People's response filed with the circuit court prior to the December 20, 2012 evidentiary hearing.

the preliminary examination. (PE, 22–26.) Detective Ferguson took the Crime Stopper complaint in the case around 10:00 A.M. on the morning of July 12, 2012 and presented the warrant. (PE, 24–25.) At the conclusion of Detective Ferguson’s testimony, the People moved to bind Defendant over as charged. (PE, 27.) Defense counsel noted that his argument was on the search. (PE, 28.) The district court stated, “Question of fact and I will bind the Defendant over as charged.” (PE, 28.)

On August 13, 2012, Defendant was arraigned before Judge Anderson. Defendant subsequently filed a Motion to Suppress Evidence on November 16, 2012. The People filed a response on November 30, 2012, and the evidentiary hearing was held on December 20, 2012.

At the conclusion of Sergeant Jennings’ testimony, the People rested. (E, 45.) The defense offered no witnesses. (E, 45.) The assistant prosecutor then offered oral argument, describing several theories under which the search of Defendant was valid. (E, 45–55.) She noted two cases, including one United States Supreme Court case, that stated that the positive hit of a drug detection dog provides probable cause to arrest and conduct a search incident to that arrest. (E, 46–49.) She also argued that the information in the tip had been confirmed and that, when coupled with Defendant’s behavior, the dog’s hit on the bags, and the searches of the bags and Mr. Jackson, this increased Sergeant Jennings’ belief that the drugs must be on Defendant’s person. (E, 49–50.) She noted that the probable cause standard to arrest was different from the standard to search. (E, 50–51.) Finally, she argued that Defendant’s admission to smoking marijuana earlier in the day provided probable cause for an arrest, as did Defendant providing a false ID. (E, 51–55.)

Defense counsel argued that “carrying this argument to its logical conclusion, we end up with a situation that the [F]ourth [A]mendment is designed to protect,” and that the protections of

the amendment were stretched “just way too thin to say, well, if we go ahead and hold a person or we arrest a person, even though we might not have enough to do so or we might be arresting on one thing and then not know about another, it goes at it backwards In other words, if we hold everyone long enough, eventually we’ll find something is where that ultimately goes.” (E, 55–56.) He also contended that the invalidity of the ID had nothing to do with Sergeant Jennings’ actions with regard to Defendant. (E, 57.) Likewise, he noted that the sergeant had testified that he “probably wouldn’t have arrested” Defendant for smoking marijuana. (E, 57.) Ultimately, he argued that there was no probable cause to believe that any offense had taken place until Defendant was searched and that the search was improper. (E, 57–58.)

In response, the assistant prosecutor noted that under existing case law, the subjective motivations of the officer were irrelevant when there was an objective reason to conduct a stop and conduct an arrest. (E, 58–59.)

The court asked that the parties provided further briefs on the issue, “only because the Court is unfamiliar with a number of these cases.” (E, 59.) A briefing schedule was set, and the court did not decide whether it would hold further arguments on the matter. (E, 59–60.)

The People subsequently filed a memorandum of law on January 11, 2013, and the defense filed a reply brief on February 21, 2013. No further oral arguments were held.

On April 3, 2013, the court entered an Opinion and Order suppressing the physical evidence in this case. [Appendix A.] In the Opinion and Order, the court rejected each of the arguments against suppression advanced by the People, primarily relying on the fact that Defendant was not the initial person of interest in the anonymous Crime Stoppers tip. [See Appendix A, at 5–6.] The court also concluded that the arrest and search could not be justified based on the information regarding smoking marijuana, as it was learned after what the court

found to be an “improper detention.” [Appendix A, at 6–7.] The court applied similar reasoning to the false ID. [Appendix A, at 7–8.] The court also rejected the People’s argument that even if probable cause was lacking, the evidence obtained from the search was not fruit of the poisonous tree because the taint was purged by the subsequent discovery of a valid warrant for Defendant’s arrest. [Appendix A, at 8–10.] The court stated that “the evidence was acquired during the illegality and no knowledge of the warrant was gained until Defendant was booked at the jail. This Court is unable to place the discovery of the warrant back in time to dispel the illegal taint of the evidence.” [Appendix A, at 9.] Accordingly, the court granted Defendant’s motion to suppress. [Appendix A at 1, 10.]

At a subsequent April 8, 2013 hearing, the defense moved for dismissal based on the court’s April 3 Opinion and Order. (H, 3.) The assistant prosecutor noted that she would not be able to proceed with the case even if it was set for trial and left the motion to the court’s discretion. (H, 3.) The case was dismissed. (H, 4.) An Order of Dismissal was entered the same day. [Appendix B.]

The People now appeal by right from the Order of Dismissal. Additional pertinent facts may be discussed in the body of this brief’s Argument section, *infra*, to the extent necessary to fully advise this Honorable Court as to the arguments raised by the People on appeal.

ARGUMENT

1. THE TRIAL COURT REVERSIBLY ERRED BY SUPPRESSING THE PHYSICAL EVIDENCE DISCOVERED DURING THE SEARCH WHERE THE OFFICERS PROPERLY DETAINED DEFENDANT FOR INVESTIGATORY PURPOSES BASED ON THE TOTALITY OF THE CIRCUMSTANCES THAT THEY ENCOUNTERED AND WHERE THE OFFICERS SUBSEQUENTLY GAINED PROBABLE CAUSE TO ARREST DEFENDANT AND SEARCH HIM INCIDENT TO THAT ARREST BASED ON THE DRUG-SNIFFING DOG'S POSITIVE HIT ON DEFENDANT'S LUGGAGE.

Standard of Review & Issue Preservation:

This Court reviews *de novo* a trial court's ultimate ruling on a motion to suppress evidence. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). A court's factual findings in ruling on a motion to suppress are reviewed for clear error. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005); MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008) (citations and quotation marks omitted).

This issue was preserved for appellate review when the People filed pleadings and argued in opposition to Defendant's Motion to Suppress.

Discussion:

On appeal, the People argue that the trial court reversibly erred by suppressing the physical evidence gathered from the search of Defendant's person at the Pontiac bus station on July 12, 2012. The trial court erred in that much of its reasoning was based on the conclusion that Defendant's detention was improper and therefore any actions the officers took thereafter were also improper. However, Defendant's detention was a proper investigative stop based on the totality of the circumstances presented to the officers, and their decision to place Defendant in handcuffs for safety purposes did not automatically convert the investigative stop to an arrest.

Furthermore, during this proper investigative stop, the officers gained probable cause to arrest Defendant based solely on the drug-sniffing dog's positive hit on Defendant's luggage. The subsequent search was a proper search incident to arrest, even though it preceded Defendant's arrest. Accordingly, the trial court erred by granting Defendant's Motion to Suppress, and this Court should reverse and remand for reinstatement of the charges.

A. The Police Properly Detained Defendant for Investigative Purposes Based on the Totality of the Circumstances Presented and Their Use of Handcuffs for Safety Purposes Did Not Automatically Convert the Investigative Stop into an Arrest.

Both the United States and Michigan Constitutions guarantee the right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). In general, a search and seizure conducted without probable cause is unreasonable. *People v Lewis*, 251 Mich App 58, 69; 649 NW2d 792 (2002). However, this rule is not absolute.

In *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court carved out an exception to the general rule that a search or seizure conducted without probable cause is unreasonable. It determined that the Fourth Amendment permits the police to stop and briefly detain a person based on "reasonable suspicion that criminal activity may be afoot." *Terry, supra* at 30–31. The *Terry* exception has been extended to incorporate investigative stops under a variety of circumstances for specific law enforcement needs. *People v Nelson*, 443 Mich 626, 631; 505 NW2d 266 (1993). The appropriate test for the validity of an investigative stop under this doctrine is as follows:

In order for law enforcement officers to make a constitutionally proper investigative stop, they must satisfy the two-part test set forth in *United States v Cortez*, 449 US 411; 101 S Ct 690; 66 L Ed 2d 621 (1981). The totality of the circumstances as understood and interpreted by law enforcement officers, not legal scholars, must yield a particular suspicion that the individual being

investigated has been, is, or is about to be engaged in criminal activity. That suspicion must be reasonable and articulable, and the authority and limitations associated with investigative stops apply to vehicles as well as people. [*Nelson, supra* at 632 (internal citations omitted).]

Thus, reasonable suspicion, not probable cause, was required to effectuate a valid investigatory stop of Defendant. *Id.*

The reasonableness of official suspicion must be measured by what the police knew before the stop. *Florida v JL*, 529 US 266, 271; 120 S Ct 1375; 146 L Ed 2d 254 (2000). Overly technical reviews of the police officer's assessment are unwarranted, and “[d]eference should be given to the police officer's experience and the known patterns of certain types of lawbreakers.” *People v Rizzo*, 243 Mich App 151, 156; 622 NW2d 319 (2000).

In the present case, the information known to Sergeant Jennings at the time he detained Defendant for investigative purposes was more than sufficient to support a finding that the stop was based on a “reasonable suspicion that criminal activity [was] afoot.” *Terry, supra* at 30–31. First, Sergeant Jennings had the Crime Stoppers tip regarding Mr. Jackson. The tip stated that Mr. Jackson would be arriving at the Pontiac bus station around noon on July 12, 2012 and that he would be traveling “up north via bus” with an amount of heroin. (E, 21–23.) The sergeant gathered information on Mr. Jackson before traveling to the bus station with several other officers. (E, 23–24.) Mr. Jackson had outstanding warrants for his arrest. (E, 25; PE, 8, 15.) At some point after the police set up surveillance, Sergeant Jennings was alerted that Mr. Jackson was present at the bus station. (E, 24.) However, Mr. Jackson was not alone; he had arrived at the station with Defendant, in the same car. (E, 24; PE, 7.) The two men arrived at the approximate time that the tip indicated. (E, 24–25.)

If this was the only information known to Sergeant Jennings at the time he detained Defendant and Mr. Jackson, then an investigative stop of Defendant likely *may* have been

improper. See *People v Coscarelli*, 196 Mich App 724, 726; 493 NW2d 525 (1992), citing *Ybarra v Illinois*, 444 US 85, 91; 100 S Ct 338; 62 L Ed 2d 238 (1979) (noting that an individual's proximity to others independently suspected of criminal activity, without more, does not give rise to probable cause to search the individual). However, in the present case, more was known to Sergeant Jenkins than Defendant's mere proximity to Mr. Jackson.

In addition to the information from the tip itself regarding Mr. Jackson, Defendant and Mr. Jackson arrived in the same vehicle, showing that Defendant's presence was not merely a chance encounter with Mr. Jackson. (E, 24; PE, 7.) Sergeant Jennings had been a sheriff's deputy for over twenty-one years and a narcotics officer for eight of those years. (E, 20–21.) Even though the tip had only mentioned Mr. Jackson, the sergeant knew that it was "very common" for individuals trafficking in narcotics to travel in pairs. (E, 32, 35.) No drugs were found on Mr. Jackson, though. (E, 27.) It was also established at the preliminary examination that narcotics traffickers use bus stops to travel for delivery and pick up purposes. (PE, 23.) Both Defendant and Mr. Jackson indicated that they were "going up north" toward St. Ignace. (E, 33.) They indicated that their luggage was inside the bus station. (E, 27.) This was additional information that Sergeant Jennings could consider in determining whether or not there was a reason to detain Defendant in addition to Mr. Jackson. *Nelson, supra* at 632; *Rizzo, supra* at 156.

Finally, before Sergeant Jennings actually detained Defendant, the sergeant had asked Defendant for identification and Defendant provided an ID card. (E, 26.) Defendant had not been handcuffed at this time. (E, 28, 35.) During the initial conversation with Defendant when he was *not* handcuffed, Defendant appeared "to be real nervous, sweating." (E, 28, 35.) When the sergeant noted that Defendant was sweating and asked him why he was nervous, Defendant "just said it was hot outside." (E, 29.) On a scale of zero to ten, with zero being not nervous at all and

ten being “the most nervous you’ve ever seen somebody,” Sergeant Jennings placed Defendant at “about a seven.” (E, 29.) At the preliminary examination, the sergeant characterized Defendant as “real nervous” and “real jittery” as they talked. (PE, 9.) Our Supreme Court has held, in accordance with United States Supreme Court precedent, that “nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.” *People v Oliver*, 464 Mich 184, 197; 627 NW2d 297 (2001), quoting *Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d 570 (2000). Sergeant Jennings noted at the evidentiary hearing that, in addition to Defendant’s nervous behavior, Defendant was a “good-sized person,” and based on his own feeling that “something was wrong,” he placed Defendant in handcuffs for safety purposes. (E, 28, 35.)

Based on the totality of the circumstances presented to the officers, it was entirely proper for Sergeant Jennings to detain Defendant by placing him in handcuffs while the investigation continued. *Terry, supra* at 30–31; *Nelson, supra* at 632. The trial court acknowledged in its April 3 Opinion and Order that only reasonable suspicion was required to make a valid investigatory stop of Defendant. [Appendix A, at 3–5.] Yet, the trial court then immediately moved into analyzing whether there was *probable cause* to search Defendant, wholly ignoring whether the investigative stop was properly based on reasonable suspicion and repeatedly characterizing Defendant’s detention as “improper.”⁷ [Appendix A, at 5–8, 10.]

As clearly shown *supra*, Defendant’s detention was not improper and was based at the very least on reasonable suspicion that criminal activity by Defendant was afoot. *Terry, supra* at 30–31. The fact that Sergeant Jennings chose to utilize handcuffs is of no consequence. It is true

⁷ See Appendix A, at 7 (“[T]he People cannot now legitimize the improper detention in this case based on this information which was received after the fact.”); *id.* (“[T]he false identification was not discovered until after officers illegally detained Defendant and subsequent to his arrest.”); *id.* at 7–8 (“In this case however, there was not probable cause for the detention, search or questioning of Defendant, nor was the same done pursuant to a warrant.”); *id.* at 10 (“There was no valid basis to detain and arrest Defendant at the time of the search . . .”).

that an individual is not free to leave when handcuffs are used, *i.e.*, s/he is seized. *See People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). However, there is no bright line rule of when an investigative stop becomes an arrest, as an officer's use of force must be judged objectively from the perspective of a reasonable officer. *Graham v Connor*, 490 US 386, 395–396; 109 S Ct 1865; 104 L Ed 2d 443 (1989). This Court has held that a brief but complete restriction of a person's liberty through the use of handcuffs, if not excessive under the circumstances, is permissible during a *Terry* stop and does not necessarily convert the stop into an arrest. *People v Green*, 260 Mich App 392, 397–398; 677 NW2d 363 (2004), overruled in part on other grounds by *People v Anstey*, 476 Mich 436, 447; 719 NW2d 579 (2006) (finding that the use of handcuffs for safety purposes does not automatically convert an investigative stop into an arrest); *People v Zuccarini*, 172 Mich App 11, 14; 431 NW2d 446 (1988) (same).⁸ In fact, this Court has even held that an officer's use of his or her weapon does not automatically transform a stop into an arrest, *People v Randle*, 133 Mich App 335, 339; 350 NW2d 253 (1984); *People v Sangster*, 123 Mich App 101, 103; 333 NW2d 180 (1983), nor does placing an individual into a police car. *People v Marland*, 135 Mich App 297, 302–303; 355 NW2d 378 (1984).

⁸ Ten federal courts of Appeals, including the Sixth Circuit, have also determined that the use of handcuffs does not necessarily turn a lawful *Terry* stop into an arrest under the Fourth Amendment. *See United States v Laing*, 889 F2d 281, 285 (CA DC, 1989) *cert den* 494 US 1069; 110 S Ct 1790; 108 L Ed 2d 792 (1990) (use of handcuffs); *United States v Esieke*, 940 F2d 29, 36 (CA 2, 1991), *cert den*, 502 US 992; 112 S Ct 610; 116 L Ed 2d 632 (1991) (handcuffs and leg irons); *United States v Crittendon*, 883 F2d 326, 329 (CA 4, 1989) (handcuffs); *United States v Sanders*, 994 F2d 200, 205–208 (CA 5, 1993), *cert den* 510 US 955; 114 S Ct 408; 126 L Ed 2d 355 (1993) (stopping defendant at gun point, ordering him to lie on the ground, and handcuffing him); *United States v Hurst*, 228 F3d 751 (CA 6, 2000) (use of handcuffs); *United States v Smith*, 3 F3d 1088, 1094–1095 (CA 7, 1993), *cert den* 510 US 1061; 114 S Ct 733; 126 L Ed 2d 696 (1994) (handcuffs); *United States v Navarrete-Barron*, 192 F3d 786 (CA 8, 1999) (suspect handcuffed and placed in a police car); *Allen v Los Angeles*, 66 F3d 1052 (CA 9, 1995) (pointing a weapon at a suspect, ordering him to lie on the ground, handcuffing him, and placing him in a patrol car for questioning); *United States v. Merkley*, 988 F2d 1062, 1064 (CA 10, 1993) (display of firearms and use of handcuffs); *United States v Kapperman*, 764 F2d 786, 790 n 4 (CA 11, 1985) (placing suspects in police car in handcuffs).

Here, Sergeant Jennings' use of handcuffs during the course of the valid investigatory stop based on reasonable suspicion was entirely reasonable. *Graham, supra* at 395–396. The sergeant and his fellow officers were investigating alleged narcotics trafficking at a location known to be used for that purpose. (PE, 24.) While they expected based on the Crime Stoppers tip to encounter only one individual, Mr. Jackson, they instead encountered two. Mr. Jackson was known to have outstanding warrants for his arrest. Furthermore, Defendant and Mr. Jackson had not just met each other at the bus station by chance, but instead arrived together in the same vehicle. Both men were planning to travel up north, and their luggage was together inside the bus station. Finally, Defendant began to act nervous and jittery when Sergeant Jennings began speaking with him. While the sergeant later testified that people often become nervous when he approached them, in this case Defendant became so nervous that it caused the sergeant to fear for his safety. The use of handcuffs was prudent. *Id.*

Thus, based on the circumstances Sergeant Jennings encountered, restraining Defendant in handcuffs while the investigation continued was a reasonable course of action. The use of handcuffs did not convert the lawful *Terry* stop into an arrest. *Green, supra* at 397–398. Accordingly, the trial court erred when it acknowledged the reasonable suspicion standard of *Terry* but then failed to apply it to the facts of this case, instead repeatedly characterizing the detention as improper and proceeding immediately to a probable cause analysis on the search itself. This Court should reverse the decision of the trial court that found that the investigative stop of Defendant was improper.

B. The Drug-Sniffing Dog's Positive Hit on Defendant's Luggage While He Was Lawfully Detained for a *Terry* Investigative Stop Provided Probable Cause for Defendant's Arrest.

An officer may make an arrest when he or she has reasonable cause to believe that a felony has been committed and reasonable cause to believe that the person has committed it. MCL 764.15(1)(d). Probable cause to arrest depends upon whether the facts and circumstances within the arresting officers' knowledge were sufficient to warrant a prudent man in believing the suspect had committed an offense. *Adams v Williams*, 407 US 143, 147; 92 S Ct 1921; 32 L Ed 2d 612 (1972); *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." *Illinois v Gates*, 462 US 213, 237; 103 S Ct 2317; 76 L Ed 2d 527 (1983). Probable cause is not a standard of absolute certainty but mere probability. *Id.* at 231–232. In other words, probable cause only requires a probability or substantial chance of criminal activity, not an actual showing of criminal activity. *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). Probable cause is traditionally determined on the basis of the totality of the circumstances. *Gates, supra* at 238.

When assessing whether an officer had probable cause for his or her action, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, *viewed objectively*, justify that action." *Scott v United States*, 436 US 128, 138; 98 S Ct 1717; 56 L Ed 2d 168 (1978) (emphasis added); *People v Arterberry*, 431 Mich 381, 384; 429 NW2d 574 (1988), quoting *Scott, supra* at 138.

Here, viewed objectively, the circumstances presented to the officers were more than sufficient to provide probable cause for Defendant's arrest after he was lawfully detained for an investigative *Terry* stop and handcuffed for safety purposes based on the officer's training,

experience, and personal observations of Defendant's size and behavior. In addition to all of the information already discussed *supra*, a dog sniff of Defendant's luggage also occurred. Deputy David Curtis had been a K-9 handler for thirteen years, and he had worked with his current dog Finn for eight years. (E, 11.) Deputy Curtis and Finn were certified and trained weekly.⁹ (E, 11–12.) Finn was trained to detect a number of drugs, including cocaine, crack, marijuana, heroin, and meth. (E, 12–13.) As an “aggressive active” dog, Finn would scratch or bite at any odor he was trained to detect. (E, 13.)

On July 12, 2012, Deputy Curtis used Finn to attempt to determine whether “[t]wo pieces of luggage” in the Pontiac bus station contained the odor of narcotics. (E, 13.) The two pieces of luggage were inside the station's waiting room, sitting side-by-side. (E, 14.) Deputy Curtis separated the bags, retrieved Finn, and then had him sniff the bags. (E, 14.) When Deputy Curtis gave Finn the command to sniff and began walking him around the bags at a quick pace, the dog alerted on both bags. (E, 14–15.) This told the deputy that the bags either had narcotics inside or had the odor of narcotics on the outside or inside. (E, 14–15.) He could tell that the odor was strong because Finn “immediately head snapped and dug into these two bags for strong odor,” and his experience told him “that this was a fresh odor.” (E, 18–19.)

Finn's positive alert on Defendant's luggage alone provided probable cause to arrest Defendant.¹⁰ In both oral argument following the evidentiary hearing and in briefing the issues, the People noted that the United States Supreme Court stated long ago that a positive alert from a

⁹ Finn's reliability was not challenged by the defense, and there was no reason for the deputies or the trial court to doubt the reliability of the sniff in this case. *See Florida v Harris*, 568 US __; 133 S Ct 1050, 1059; 185 L Ed 2d 61 (2013). Here, there is no dispute that Finn was lawfully present in the public bus station waiting room when the sniff occurred.

¹⁰ It should also be noted that this Court has held that “a canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at its vantage point when its sense is aroused.” *People v Jones*, 279 Mich App 86, 93; 755 NW2d 224 (2008).

drug-sniffing dog on an individual's luggage provided probable cause to arrest that individual. *Florida v Royer*, 460 US 491, 505–506; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (stating in regard to a hypothetical dog sniff of Royer's bag that “[a] negative result would have freed Royer in short order; *a positive result would have resulted in his justifiable arrest on probable cause.*”) (emphasis added). The Sixth Circuit Court of Appeals has taken note of this language in *Royer*, stating that “[w]e would point out that, under *Royer*, the positive reaction of the Narcotics Unit dog alone would have established probable cause to not only search defendants' luggage, *but to arrest them immediately.*” *United States v Knox*, 839 F2d 285, 294 n 4 (CA 6, 1988). Finally, other states' appellate courts have offered similar assessments of dog sniffs and probable cause to arrest. *See, e.g., State v Ofori*, 170 Md App 211, 221; 906 A2d 1089 (2006) (discussing a drug sniffing dog's alert to the probable presence of contraband drugs in a vehicle and noting that “[t]o the extent to which it might be material, [the officers] also had unquestionable probable cause for the warrantless arrest of the appellee as the driver of the Cadillac (not to mention the arrest of his passenger.)”); *United States v Klingensmith*, 25 F3d 1507, 1510 (CA 10, 1994) (noting that dog alert on rented car provided probable cause to arrest both the driver and passenger and search the car). *See also generally* Wayne R. LaFave, 1 *Search and Seizure* § 2.2(g), 526–527 (4th ed 2004) (“In light of the careful training which [drug-detection dogs] receive, an *alert by a dog is deemed to constitute probable cause for an arrest* or search if a sufficient showing is made as to the reliability of the particular dog used in detecting the presence of a particular type of contraband.”) (footnotes omitted; emphasis added).¹¹

¹¹ The Supreme Court has also articulated that a positive alert by a drug sniffing dog is sufficient for a showing of probable cause in the context of a warrantless search. *See Harris, supra* at 1058 (holding that in a probable cause hearing focusing on a dog's alert that probable cause should be found if the state produces evidence of the dog's reliability and the defense does not contest the

The positive alert gave the police probable cause to believe that Defendant had committed, at the very least, a crime involving the possession of a controlled substance. MCL 333.7403. When asked why the dog would alert on his bag, Defendant admitted only to smoking marijuana earlier in the day. (E, 29–30, 36.) Yet, the earlier Crime Stoppers tip that led to the investigation involved heroin. (E, 22.) That drug had not been found on Mr. Jackson’s person or in either piece of luggage, including Defendant’s. (E, 27, 29.) While it was certainly possible that Finn alerted on Defendant’s bag due to the odor of marijuana, which he was also trained to detect, it is also possible that he alerted on the odor of another narcotic like heroin. Based on the circumstances and Finn’s positive alert on *Defendant’s* luggage, Sergeant Jennings could plausibly conclude by process of elimination that drugs might be found on Defendant’s person. *See Whitehead v Commonwealth*, 278 Va 300; 683 SE2d 299 (2009) (vacating the defendant’s conviction after determining that the officer improperly concluded by process of elimination that the defendant was carrying contraband when a drug-sniffing dog alerted *only* on the car in which he was a passenger and *not* on any particular item tied to Whitehead himself).

Ultimately, though, regardless of the exact odor Finn alerted on, that alert alone provided probable cause to arrest Defendant on the spot. *Royer, supra* at 505–506. While Sergeant Jennings apparently did not believe that he possessed probable cause to arrest Defendant at the time of the search (E, 37–39), his subjective belief on that point is ultimately irrelevant. *Scott, supra* at 138; *Arterberry, supra* at 384. Viewed objectively, the totality of the circumstances shows that the sergeant unquestionably had probable cause to arrest Defendant as soon as Finn positively hit on Defendant’s bag. *Gates, supra* at 238; *Champion, supra* at 115. Probable cause

showing). This Court has held the same. *See, e.g., People v Clark*, 220 Mich App 240, 242–244; 559 NW2d 78 (1996).

to arrest Defendant thus existed *well before* his person was searched and the baggie of heroin was located.¹²

C. Because the Sergeant Developed Probable Cause to Arrest Defendant While Defendant was Lawfully Detained for a *Terry* Stop, He was Lawfully Allowed to Conduct a Search Incident to Arrest, Which May Precede a Formal Arrest if Probable Cause to Arrest Already Exists at the Time of the Search.

Moreover, because Sergeant Jennings clearly had probable cause to arrest Defendant, he likewise had the ability to search Defendant incident to arrest. The search incident to arrest exception to the warrant requirement “derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.” *People v Mungo*, 288 Mich App 167, 172; 792 NW2d 763 (2010), vacated on other grounds 490 Mich 870 (2011); *Chimel v California*, 395 US 752, 762–763; 89 S Ct 2034; 23 L Ed 2d 685 (1969) (search incident to arrest exception is based on the belief that it is reasonable for a police officer to expect an arrestee to use any weapons he may have or to attempt to destroy incriminating evidence). For searches incident to arrest, the police may search the arrestee and the area within his immediate control as well as containers seized from the arrestee. *Chimel, supra*; *United States v Robinson*, 414 US 218; 94 S Ct 467; 38 L Ed 2d 427 (1973). A search of a person incident to an arrest requires no additional justification. *Champion, supra* at 115.

¹² Viewed objectively, the police also arguably had probable cause to arrest Defendant for presenting a false identification, as the People also argued below. Sergeant Jennings was not aware at the time he searched Defendant that the identification card Defendant presented was invalid, and he admitted so at the evidentiary hearing. (E, 41–43.) However, both Deputy Morton and Deputy Thomas had run the identification through the LEIN computer system in their patrol vehicles, and the card came back as having no record in LEIN. (E, 5–9.) This meant that the number on the card was not valid. (E, 6–7.) Thus, Deputies Morton and Thomas had probable cause to believe that the card may be false. *Gates, supra* at 237–238; *Champion, supra* at 115. Our Supreme Court has approved the “police team” approach of combining officers’ collective perceptions to support an arrest. *See People v Dixon*, 392 Mich 691, 696–698; 222 NW2d 749 (1974), abrogated in part on other grounds by *People v Hawkins*, 468 Mich 488; 668 NW2d 202 (2003).

Importantly, the United States Supreme Court has held that a search incident to arrest need not necessarily follow the arrest, so long as probable cause to arrest existed prior to the search. In *Rawlings v Kentucky*, 448 US 98; 100 S Ct 2556; 65 L Ed 2d 633 (1980), the defendant moved before the trial court to suppress certain evidence seized by law enforcement, including money that the arresting officer located on his person after he claimed ownership of some controlled substances but before he was formally arrested. *Id.* at 100–102. The trial court denied the motion, finding that “the search that revealed the money and the knife was permissible ‘under the exigencies of the situation.’” *Id.* at 102. Defendant was convicted. *Id.* at 102. The Kentucky Court of Appeals affirmed, and in doing so held that the detention of the five individuals in the house and the subsequent searches were legitimate “because the police had probable cause to arrest all five people in the house when they smelled the marihuana smoke and saw the marihuana seeds.” *Id.* at 103. The Supreme Court of Kentucky also affirmed, but under a different rationale. *Id.* That court held that “the search uncovering the money in [Rawlings’] pocket, which search followed [his] admission that he owned the drugs in Cox’s purse, was justifiable as incident to a lawful arrest based on probable cause.” *Id.*

The United States Supreme Court granted certiorari and affirmed. *Id.* at 100. Rawlings argued that he had a reasonable expectation of privacy in another individual’s purse in order to challenge the legality of the search of that purse; that his admission of ownership of the drugs was the fruit of an illegal detention; and that the search that uncovered the money and the knife was illegal itself. *Id.* at 103. As to the third issue, the *Rawlings* Court dismissed the challenge out of hand, stating that:

Petitioner also contends that the search of his person that uncovered the money and the knife was illegal. Like the Supreme Court of Kentucky, we have no difficulty upholding this search as incident to petitioner’s formal arrest. Once petitioner admitted ownership of the sizable quantity of drugs found in Cox’s

purse, the police clearly had probable cause to place petitioner under arrest. *Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.* [*Id.* at 110–111 (citations omitted).]

In a footnote, the Court also observed that “[t]he fruits of the search of petitioner’s person were, of course, not necessary to support probable cause to arrest petitioner.” *Id.* at 111, n 6.

Our Supreme Court has at least twice held that a search without a warrant of an individual whom the police had probable cause to arrest was proper even where the person searched had not been formally arrested. In *Arterberry, supra*, the Detroit Police Department, acting with an informant, purchased heroin at a suspected drug distribution site and observed seven people make short visits to the site on the same day in a thirty-minute period. *Id.* at 382. A warrant was issued the following day to search the residence and the man who sold the heroin. *Id.* When the officers knocked on the door and announced their presence, they heard someone running away and forced the door open. *Id.* at 382–383. Seven people were found inside, and all of them were subjected to a weapons pat-down. *Id.* at 383. The police searched the site and discovered a locked toolbox, which they forced open. *Id.* Inside, they discovered “a quantity of controlled substances.” *Id.* The occupants were searched for the key to the box, and it was discovered in Arterberry’s possession. *Id.* The six other individuals “were apparently released.” *Id.* Arterberry was charged with possession with intent to deliver controlled substances, but the district judge dismissed the charges at his preliminary examination. *Id.* The district judge found that the search of Arterberry’s person exceeded the scope of the warrant. *Id.*

Both the Detroit Recorder’s Court and this Court affirmed. *Id.* A unanimous Supreme Court reversed, finding that the officers acted within the scope of the warrant when they opened the toolbox and thus gained probable cause to arrest all seven occupants “for loitering in a place of illegal occupation or business. The police could have reasonably believed that the seven

occupants of this private residence knew that the residence was being operated as a site for the distribution of controlled substances.” *Id.* The Court noted that the officers did *not* assert “and may not have had in mind the offense of loitering in a place of illegal occupation or business” when they searched the occupants, but that the state of mind of the officers was irrelevant. *Id.* at 384. Ultimately, the Court held that:

Since the officers had probable cause to arrest Arterberry and the other occupants, the search was proper: had the occupants been arrested, they could have then been searched incident to arrest. The validity of the search is not negated by the failure of the officers to arrest the occupants. Where the officers have probable cause to arrest a group of persons and, instead of arresting them all, search them and then arrest only some of the group, they act properly. Those searched could have been arrested and then searched incident to the arrest. [*Id.*]

The *Arterberry* Court also quoted approvingly, *id.* at 384–385, from the second Justice Harlan’s concurring opinion in *Peters v New York*, 392 US 40, 77; 88 S Ct 1889; 20 L Ed 2d 917 (1968) (Harlan, J, concurring), which states that:

If the prosecution shows probable cause to arrest prior to a search of a man’s person, it has met its total burden. There is *no* case in which a defendant may validly say, “Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards.” [Emphasis original.]

Likewise, in *Champion, supra*, our Supreme Court cited *Rawlings* and its own opinion in *Arterberry* for the proposition that a search conducted immediately prior to arrest may be justified as incident to arrest if the police already have probable cause to arrest the suspect *before* conducting the search. *Champion, supra* at 115–116. The search in *Champion* involved a pill bottle found in Champion’s sweatpants that was opened after the police already had probable cause to arrest him. *Id.* at 117. The *Champion* Court noted only that “a search . . . cannot be justified as being incident to an arrest *if probable cause for the contemporaneous arrest was provided by the fruits of the search.*” *Id.* at 116–117 (emphasis added).

This Court has also held that a search incident to arrest need not occur prior to the arrest if probable cause to arrest existed prior to the search. *See, e.g., People v Solomon (Amended Opinion)*, 220 Mich App 527, 530; 560 NW2d 651 (1996) (noting that the search incident to arrest exception applies when there is probable cause to arrest, “even if an arrest is not made at the time the search is actually conducted). A number of other states’ appellate courts have offered similar holdings. *See, e.g., AT v State*, 941 So 2d 478, 479 (Fla App, 2006) (“A search incident to an arrest may precede the formal arrest as long as probable cause existed prior to the search.”); *Easley v State*, 166 Ind App 316, 319; 335 NE2d 838 (1975) (“[A] search incident to an arrest is not rendered invalid merely because it precedes a formal arrest or notice of arrest where probable cause for the arrest exists prior to the search.”); *Commonwealth v Jackson*, 464 Mass 758, 761; 985 NE2d 853 (2013) (“The legality of the search [incident to arrest] depends on the legality of the arrest, although ‘the search may precede the formal arrest so long as probable cause [to arrest] exists independent of the results of the search,’ and the arrest and search are ‘roughly contemporaneous.’”), quoting *Commonwealth v Washington*, 449 Mass 476, 481; 869 NE2d 605 (2007); *Joyce v Commonwealth*, 56 Va App 646, 657–658; 696 SE2d 237 (2010) (“A constitutionally permissible search incident to arrest ‘may be conducted by an officer *either before or after* the arrest.’ It does not matter whether the search occurs ‘at the moment the arresting officer takes the suspect into custody or when he announces that the suspect is under arrest’” if probable cause exists independently of what the search produces), quoting *Italiano v Commonwealth*, 214 Va 334, 336; 200 SE2d 526, 528 (1973) (internal citations omitted).

In this case, when viewed objectively, the totality of the circumstances shows that the police developed probable cause to arrest Defendant while he was lawfully detained for a *Terry* stop when the drug-sniffing dog, Finn, positively hit on Defendant’s luggage. *See* Parts I.A and

I.B, *supra*. Defendant even admitted to smoking marijuana earlier in the day. (E, 29–30, 36.) It is clear that there was probable cause to arrest Defendant at the instant that the dog hit on *Defendant's* luggage, and Defendant's admission only further strengthened that probable cause when viewing the total circumstances presented. *Gates, supra* at 238; *Champion, supra* at 115. Under the substantial and longstanding case law of the United States Supreme Court, the Michigan Supreme Court, and this Court, the subsequent search of Defendant's person that revealed a baggie containing 67.9 grams of heroin was justified as a search incident to arrest because Sergeant Jennings already had probable cause to arrest Defendant. *Rawlings, supra* at 110–111; *Peters, supra* at 77 (Harlan, J, concurring); *Champion, supra* at 115–116; *Arterberry, supra* at 384–385; *Solomon, supra* at 530.

The trial court reversibly erred when it concluded that the search of Defendant was improper. This error clearly stemmed from the trial court's mistaken characterization of the initial detention as improper when it was, as noted *supra*, a proper and valid *Terry* stop. During the subsequent investigation, Sergeant Jennings then developed probable cause to arrest Defendant. The subsequent search, although preceding Defendant's formal arrest, was therefore proper as a search incident to arrest. Sergeant Jennings' subjective beliefs as to whether he had probable cause to arrest and/or search Defendant are irrelevant because, when viewed objectively and considering the totality of the circumstances, his actions were reasonable. *Gates, supra* at 238; *Arterberry, supra* at 384. Accordingly, the trial court reversibly erred when it suppressed the physical evidence and subsequently dismissed the case. This Court should reverse and remand for reinstatement of the charges.

RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Joshua J. Miller, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court reverse the circuit court's order suppressing the evidence found on Defendant's person and remand for reinstatement of the charges.

Respectfully Submitted,

JESSICA R. COOPER
PROSECUTING ATTORNEY
COUNTY OF OAKLAND

THOMAS R. GRDEN
CHIEF, APPELLATE DIVISION

By: /s/ Joshua J. Miller
(P75215)
Assistant Prosecuting Attorney
Oakland County Prosecutor's Office
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-5435

DATED: May 31, 2013

RECEIVED by Michigan Court of Appeals 5/31/2013 9:41:29 AM

PEOPLE'S APPENDIX A

12-242361-FH
JUDGE MARTHA D. ANDERSON
PEOPLE v ROBERTSON,KEY

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

12-242361-FH

Hon. Martha D. Anderson

v

KEYON L. ROBERTSON,

Defendant.

JESSICA R. COOPER (P23242)
OAKLAND COUNTY PROSECUTOR
By: Beth M. Hand (P47057)
1200 N. Telegraph Road
Pontiac, MI 48341
248.858.0656

JOHN H. HOLMES (P25446)
Attorney for Defendant
P.O. Box 7011
Bloomfield Hills, MI 48302
248.424.9394

RECEIVED FOR FILING
MICHIGAN COURT CLERK
2013 APR -3 PM 1:23
DEPUTY CLERK

OPINION AND ORDER

This matter is before the Court on Defendant's Motion to Suppress Physical Evidence.¹ On December 20, 2012, an evidentiary hearing was held; at the conclusion of the hearing, the Court ordered further briefing from the parties. The Court has had the opportunity to review the evidence as well as the parties' supplemental briefs; for reasons discussed fully *infra*, Defendant's Motion is **GRANTED**.

¹ Defendant also requested suppression of statements made to law enforcement. The People conceded the arguments concerning Defendant's statements were correct and consented to suppression.

RECEIVED by Michigan Court of Appeals 5/31/2013 9:41:29 AM

Background

In case no. 12-242359-FH, Defendant is charged with Count 1: Controlled Substance/Manufacturing – Less than 50 Grams; Count II: Controlled Substance – 2nd or Subsequent Offense Notice – Double Penalty – High Misdemeanor. In case no. 12-242361-FH, Defendant is charged with Count I: Controlled Substance – Delivery/Manufacturing Narcotics 50-449 Grams. It is the latter offense in case no. 242361 that is before the Court.

This matter arises out of an incident that occurred on July 12, 2012 in the City of Pontiac. Following a preliminary examination on July 31, 2012 before Judge Ronda Gross in the 50th District Court, Defendant was bound over for further proceedings in this Court.

Officers responded to an anonymous tip about an individual named Leroy Jackson. The tipster indicated Jackson would be at a bus station in Pontiac and would also be carrying cocaine and/or heroin. NET officers began surveillance at the station at which time Detective/Sergeant Jennings was advised that a person matching Jackson's description arrived at the station with another black male – Defendant. Jackson had active warrants and was placed under arrest. No drugs were found on Jackson. Deputy Curtis is a certified K-9 handler. He testified his K-9 partner investigated duffel bags belonging to Defendant at the station. The K-9 gave a positive alert, indicating the presence of narcotics. According to Detective Jennings, Defendant appeared to be quite nervous and when asked why the K-9 would hit on his bag, Defendant responded he did not know. While Defendant admitted to smoking marijuana earlier in the day, he told Detective Jennings he had no contraband on his person. Detective Jennings then told

RECEIVED by Michigan Court of Appeals 5/31/2013 9:41:29 AM

Defendant he was going to search his person and Defendant replied "okay." Detective Jennings lifted Defendant's shirt and observed Defendant's pants hanging low, with exposed boxer shorts. Detective Jennings observed a baggy in the fly area of Defendant's boxer shorts. Based on Detective Jennings' experience, he believed drugs were contained in the baggy. At the time Detective Jennings began questioning Defendant, his bags had already been searched and nothing was found.

According to Detective Jennings, all information received from the tipster was accurate. At some point Defendant provided an identification card to Detective Jennings which was later determined to be false. However, at the time he searched Defendant's person, he did not know Defendant gave a false I.D. Although it was also subsequently determined that Defendant had a valid parole absconder warrant, this information was also unknown to Detective Jennings at the time of the stop and subsequent search. It was not until Defendant was booked at the jail that (1) his true identity was revealed and (2) the absconder warrant was discovered.

Defendant argues that at the time of questioning, Detective Jennings had no evidence Defendant committed a crime, nor was he aware of any existing warrants for Defendant's arrest. Thus, according to Defendant, Detective Jennings lacked probable cause to believe Defendant committed any offense.

ANALYSIS

The Fourth Amendment of the US Constitution and the analogous provision in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures. US Cons, Am IV; Const 1963, art 1 § 11; *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Kazmierczak*, 41 Mich

411, 417; 605 NW2d 667 (2000). In order to effectuate a lawful arrest without a warrant, a police officer must "possess information demonstrating probable cause to believe that an offense has occurred and that defendant committed it." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996)

Defendant presents two issues: (1) whether it was constitutional for Detective Jennings to conduct the pat down; and (2) assuming the pat down was legal, whether the search extended beyond the scope permitted in a constitutionally-sound *Terry*² pat-down. The People agree Detective Jennings' conduct went beyond a pat-down and was indeed a search. Thus, the Court must determine whether Detective Jennings' had probable cause to search Defendant or alternatively, if probable cause was lacking, whether the evidence obtained is fruit of the poisonous tree. The People contend grounds other than those leading to the stop and subsequent search dispel the taint of the illegal arrest. Unique to the instant case is the fact Defendant was *not* the subject of the anonymous tip received by law enforcement and the information concerning the false identification and Defendant's warrant status was not received until after the search.

Police may make a valid investigatory stop, a *Terry* type of detention, if an officer has reasonable suspicion that crime is afoot. *People v Champion, supra* at 98. "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.* citing *US v Sokolow*, 490 US 1; 109 S Ct 1581; 104 L Ed 2d 1 (1989).

A valid investigatory stop must be justified at its inception and reasonably related in scope to the circumstances that justified police interference with a person's security.

² *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1988).

Champion, supra. Justification must be based on an objective manifestation that the person stopped was or was about to be engaged in criminal activity as understood by law enforcement, not legal scholars, when viewed under the totality of the circumstances. *Id.* "The detaining officer must have had a particularized and objective basis for the suspicion of criminal activity." *Id.* at 98-99.

Here, the People claim several factors gave Detective Jennings probable cause to search Defendant's person; even if probable cause was lacking,

I. Probable Cause – Anonymous Tip.

The People argue Detective Jennings had probable cause to search Defendant's person because the anonymous tip containing specific information was corroborated by the officers' investigation in this case. However, the information contained in the tip did not involve Defendant, but rather Leroy Jackson. Put another way, officers had absolutely no information from the tip that Mr. Jackson would be travelling with a companion, Defendant in this instance, nor was there any information about Defendant whatsoever. In the cases cited by the People, the defendants therein were the subject of the anonymous tips or the reliability of the informants/tipsters was in question. Because neither of these factors are present in this case, the authorities cited are distinguishable.

For example, in *Alabama v White*, 496 US 325; 110 S Ct 2412; 110 L Ed 2d 301 (1990), the anonymous tip implicated the defendant. In addition, the reliability of the tipster was in question. Similarly, in *People v Faucett*, 442 Mich 153; 499 NW2d 764 (1993) and *People v Levine*, 461 Mich 172; 499 NW2d 764 (1993), the tips involved the actual defendants as well as issues of reliability. Also, in *People v Keller*, 479 Mich 467;

739 NW2d 505 (2007) cited by the People, the issue was the sufficiency of a search warrant affidavit based on an anonymous tip and subsequent trash pull at the defendant's home. The case at bar does not involve a warrant of any kind or independent evidence to support the issuance of a warrant as in *Keller*.

Again, the reliability of the Informant or the propriety of acting on an informant's tip is not at issue in this case. Simply, the information provided by the tipster did not involve Defendant or place him at the scene. For these reasons, the anonymous tip in this case did not provide probable cause Defendant was involved in any criminal activity.

II. Probable Cause – K-9 Alert.

The People also contend the search was proper because of the positive K-9 alert of Defendant's bag. The People rely on *Florida v Royer*, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983). *Royer* again is distinguishable. Similar to the cases discussed above, the actual defendant in *Royer* was the target of law enforcement. Specifically, undercover detectives spotted the defendant at an airport and believed he fit the profile of a drug courier. He was stopped and subsequently taken to a small room at the airport where his luggage was searched. *Royer* did not involve a K-9 search; the Court was discussing less intrusive means of conducting a search under the circumstances. In particular, the Court hypothesized that the use of a K-9 in that case would have either produced a less intrusive detention or no detention at all. Again, hypothetically speaking, the Court theorized under the facts and circumstances of the case that "a negative result would have freed Royer in short order; a positive result would have resulted in his justifiable arrest on probable cause." *Id.* at 506. However, unlike the

defendant in *Royer*, the instant Defendant was not the initial person of interest upon observation.

III. Probable Cause – Ingestion of Marijuana; False Identification.

The People argue Defendant's arrest was justifiable under the circumstances due to his admission he smoked marijuana earlier in the day, which provides an independent basis for arrest. See MCL 333.7501. Upon arrest, Defendant would have been searched and the drugs found. However, the People cannot now legitimize the improper detention in this case based on this information which was received after the fact. Although not dispositive to the Court's inquiry in this instance, Detective Jennings also testified he would not have sought a warrant based solely on the admission Defendant smoked marijuana earlier that day.

As it relates to the false identification provided to the officers – that too is a misdemeanor which may have independently subjected Defendant to arrest. However, just as with Defendant's admission to smoking marijuana, the false identification was not discovered until after officers illegally detained Defendant and subsequent to his arrest. The People rely on *People v Arterberry*, 431 Mich 381; 429 NW2d 574 (1988). However, *Arterberry* involved the execution of a search warrant at a home with several occupants. While executing the warrant, officers found a locked tool box and forced it open, which led to the discovery of controlled substances. The occupants were then searched and officers found the defendant in possession of a key to the box. The Court found sufficient probable cause existed to arrest the defendant and explained that the search was proper. In this case however, there was not probable cause for the

detention, search or questioning of Defendant, nor was same done pursuant to a warrant.

IV. Fruit of the Poisonous Tree.

It is the position of the People that even if probable cause is lacking, the evidence obtained therefrom is not fruit of the poisonous tree. The Court disagrees.

Evidence obtained as a result of an illegal search may be subject to the exclusionary rule as fruit of the poisonous tree. See *Wong Sun v United States*, 371 US 471, 487-488; 83 S Ct 407; 9 L Ed 2d 441 (1963). The People rely on *People v Lambert*, 174 Mich App 610; 436 NW2d 699 (1989) and *People v Reese*, 281 Mich App 290; 761 NW2d 405 (2008). These cases are distinguishable.

In *Lambert*, the Court explained that evidence obtained from an individual subject to a lawful arrest on grounds other than the illegal stop is admissible. *Id.* at 618. In *Lambert*, the deputies admitted they had no probable cause to stop the vehicle the defendant was driving. However, when they approached the vehicle, one of the deputies recognized the defendant and was aware *at that time* the defendant had active warrants for his arrest. He was then arrested. The defendant in *Lambert* subsequently made statements about a breaking and entering in the area; the vehicle was then searched incident to arrest and from that search evidence of the breaking and entering was procured. In this case however, Detective Jennings had no information about Defendant's warrant status at the outset of his interaction with him.

In *Reese*, certain evidence was found after the defendant was arrested for loitering and a misdemeanor warrant was discovered. Although the officers did not have probable cause to arrest the defendant for loitering, the Court reasoned that the

misdemeanor arrest, which permitted the inventory search of his vehicle where cocaine was found, was an intervening cause that "dissipates the taint from the initial illegal arrest." *Id.* at 297. The Court articulated three factors in reaching their decision: (1) the time elapsed between the illegality and acquisition of the evidence; (2) the presence of the intervening circumstance; and (3) the purpose of the flagrancy of the official misconduct. *Id.* at 299, see also *Brown v Illinois*, 422 US 590, 603-604; 95 S Ct 2254; 45 L Ed 416 (1975). In the instant case, the evidence was acquired during the illegality and no knowledge of the warrant was gained until Defendant was booked at the jail. This Court is unable to place the discovery of the warrant back in time to dispel the illegal taint of the evidence.

Upon arrival at the bus station, Defendant was merely present with Mr. Jackson – no other evidence of criminal activity on Defendant's part was observable at that time. In fact, Detective Jennings was clear in his testimony (1) there was no evidence Defendant committed any crime; (2) no information to reveal the existence of a warrant; and (3) no probable cause to believe Defendant committed an offense.

(This space intentionally left blank).

As the Court in *Lambert* explained:

When a defendant claims that physical evidence should be suppressed as a result of an unlawful seizure of his person, the appropriate inquiry is whether that evidence was procured by an exploitation of the illegality or, instead by means sufficiently distinguishable to be purged of the primary taint. *Id.* at 616-617.

There was no valid basis to detain and arrest Defendant at the time of the search and thus the drugs found on his person were the result of an exploitation of the primary illegality.

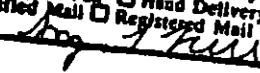
CONCLUSION

Based on the foregoing, the Court will **GRANT** Defendant's Motion and suppress all physical evidence.

IT IS SO ORDERED.

DATED: APR 03 2013


Hon. Martha D. Anderson-Circuit Judge

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties and/or attorneys of record to the above cause at their respective addresses disclosed on the pleadings on 4-3-13 by:
 U.S. Mail Fax Hand Delivery
 Certified Mail Registered Mail


RECEIVED by Michigan Court of Appeals 5/31/2013 9:41:29 AM

RECEIVED by Michigan Court of Appeals 5/31/2013 9:41:29 AM

PEOPLE'S APPENDIX B

STATE OF MICHIGAN
6th JUDICIAL CIRCUIT
COUNTY OF OAKLAND

ORDER OF
DISMISSAL

OAKLAND COUNTY 12-242361-FH
JUDGE MARTHA D. ANDERSON
PEOPLE v ROBERTSONKEY
COURT TELEPHONE: 248-858-7954

ORI: MI-630015J Court Address: 1200 N. Telegraph Rd. Pontiac, MI 48341
Police Report No.

THE PEOPLE OF THE STATE OF
MICHIGAN

V

Defendant's name, address, and telephone no.
ROBERTSON, KEYON, LECEDRIC,
1167 NEAFIE
PONTIAC MI 48342
CTN/TCN SID DOB
63-12-094620-01 1844501K 11/29/1977

Prosecuting Attorney Name Bar No.
JESSICA R. COOPER P23242

Defendant Attorney Name Bar No.
JOHN H. HOLMES P25446

Count	Crime	CHARGE CODE(S) MCL citation/PACC Code	
1	C/S-DEL/MANF (NARC) 50-449 GRM	333.74012A3	DISMISSED
2	SENT ENH/MENT/4TH OR SUB OFF	769.13(4TH)	ENHANCED

IT IS ORDERED:

- 1. The Case is dismissed on the motion of the Court with without prejudice.
- 2. Defendant's/Juvenile's motion for dismissal is granted with without prejudice and the case is dismissed.
- 3. Defendant's/Juvenile's motion for dismissal is granted in part with without prejudice and the following charge(s) is/are dismissed: _____
- 4. Defendant/Juvenile is acquitted on all charge(s) in this case after trial by judge jury.
- 5. Defendant/Juvenile is acquitted after trial by judge jury only on the following charge(s): _____
- 6. Defendant/Juvenile shall be immediately discharged from confinement in this case.
- 7. Bond is canceled and shall be returned after costs are deducted.
- 8. Bond/bail is continued on the remaining charge(s).
- 9. The case is remanded to the _____ district court for further proceedings for the following reasons: _____
- 10. If item 1, 2, or 4 is checked, the arresting agency shall destroy the fingerprints and arrest card according to law.

Other:

DATED: 04/08/2013

Martha D. Anderson
HON. MARTHA D. ANDERSON P27910

If item 1, 2, or 4 is checked, the clerk of the court shall advise the Michigan State Police Criminal Justice Information Center of the disposition as required under MCL 769.16a.

TO THE DEFENDANT: By law, your fingerprints and arrest card will be destroyed by the Michigan State Police within 60 days of the date of this order.

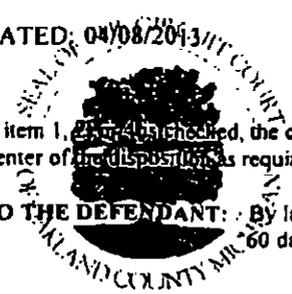
MCL 769.16a, MCR 6.419, MCR 7.101(M)

MC 262 (3/06) ORDER OF ACQUITTAL/DISMISSAL OR REMAND

Page 1
COURT FILE

RECEIVED by Michigan Court of Appeals 3/5/2013 9:41:29 AM

RECEIVED FOR FILED
OAKLAND COUNTY CLERK
APR - 8 P 3:58



STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

KEYON LECEDRIC ROBERTSON,

Defendant-Appellant.

Supreme Court
No. 150132

Court of Appeals
No. 315870

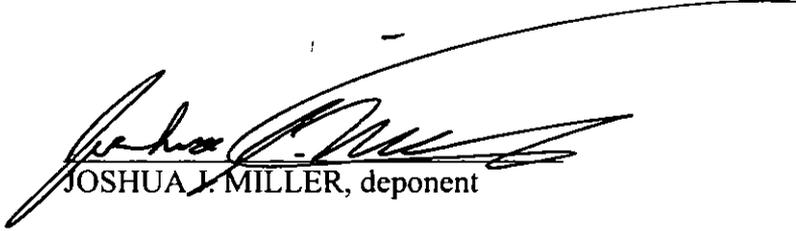
Circuit Court
No. 2012-242361-FH

STATE OF MICHIGAN)
SS)
COUNTY OF OAKLAND)

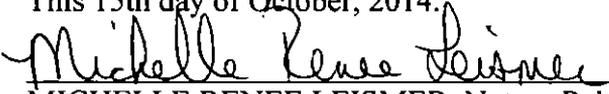
PROOF OF SERVICE

Joshua J. Miller, being duly sworn, deposes and says that on the 15th day of October, 2014, he served a copy of the People's cover letter and Court of Appeals brief in response to Defendant Robertson's Application for Leave to Appeal before the Supreme Court upon Keyon Lecedric Robertson, #260997, Defendant acting *in propria persona*, at 320 N. Hubbard, St. Louis, MI 48880, by depositing same in an envelope with the Oakland County mailing pick-up service.

Further deponent saith not.


JOSHUA J. MILLER, deponent

Subscribed and sworn before me,
This 15th day of October, 2014.


MICHELLE RENEE LEISMER, Notary Public
Oakland County, Michigan
Acting in the County of Oakland
My Commission Expires: 03/29/2017

Office of the Prosecuting Attorney
County of Oakland



JESSICA R. COOPER
Prosecutor

Paul T. Walton
Chief Assistant Prosecutor

October 15, 2014

Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 West Ottawa Street
Lansing, MI 48913

Re: *People v. Keyon Lecedric Robertson*
Supreme Court No. 150132
Court of Appeals No. 315870
Circuit Court No. 2012-242361-FH

Dear Clerk:

Enclosed for filing please find an original and seven (7) copies of this letter and eight (8) copies of the People's Court of Appeals brief, in response to Defendant's application in this case. An appeal was taken to the Court of Appeals by the People after the Circuit Court suppressed the evidence and dismissed the charge. The People ultimately prevailed in the Court of Appeals, and Defendant now seeks leave to appeal in the Supreme Court.

Defendant's application is noticed for hearing on October 21, 2014. The People intend to rely on the arguments in this brief in response to Defendant's application. Should the Court require any additional pleadings or arguments, or any further information, I would be glad to provide them.

Please contact me with any questions at (248) 858-5435 or at millerjo@oakgov.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Joshua J. Miller".

Joshua J. Miller, Esq.
(P75215)
Assistant Prosecuting Attorney
Oakland County Prosecutor's Office
Appellate Division



/enclosures