

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant.,

VS.

KEYON LECEDRIC ROBERTSON.,
Defendant-Appellee.

supreme court no. _____
court of appeals no. 315870

Lower ct. no. 2012-242361-FH

APPELLEE'S BRIEF ON APPEAL

Date: 9-9-2014

BY: [Signature]

MR. Keyon L. Robertson (pro-se)

260997

Central Michigan Correctional facility
320 N. Hubbard
ST. Louis, Michigan
48880



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STATEMENT OF QUESTION PRESENTED

Whether the lower court properly suppressed 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 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

Your defendant say's that the Prosecutor appealed the opinion and order found in Attachment-1 to the Michigan court of appeals which reversed the trial court's opinion and order. See Attachment 2. Your defendant now appeals to this court to affirm the trial court's said opinion and order suppressing the drugs which are a fruit of a poisonous tree in violation of U.S Const. Amend-4. This court has Jurisdiction to hear this appeal under. MCR 7.302

COUNTER-STATEMENT OF FACTS

Appellee Defendant, Keyon Lecedric Robertson, was charged with one count of possession with intent to deliver 50-450 grams of heroin, in violation of MCL 333.7401(2)(a)(iii). Mr. Robertson was arrested on July 12, 2012, at the bus station in Pontiac, MI. He was bound over to the Oakland County Circuit Court after a preliminary exam was conducted at the 50th District Court on 07/31/2012, before the Honorable Ronda M. Fowlkes Gross.

At the Oakland County Circuit 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.

Defendant asserted that suppression of the evidence was the appropriate remedy given the unconstitutional taint surrounding how the evidence was obtained. Following an evidentiary hearing on Defendant's motion to suppress, Oakland County Circuit Court Judge Martha Anderson granted Mr. Robertson's motion. From the 04/03/2013 opinion and order granting the motion to suppress and dismissing the case, the People now bring this appeal of right.

On July 12, 2012, at approximately 11:00am, 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)¹ 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)

Upon arrival at the bus station, NET officers positively 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)

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)

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 the bags, indicating the possible presence of drugs; the bags were searched, but no drugs were found. (EH pp. 13-15, 18, 27)

¹ 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".

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 an offense. (PE pp. 18, 19; EH p. 39, 44)

Sgt. Jennings 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)

After Defendant was bound-over to the circuit court, he moved the trial court to suppress the evidence seized from his person during his arrest. This motion was granted in Judge Anderson's 04/03/2013 Opinion and Order from which the Oakland County Prosecutor now appeals of right.

In granting the Defendant's motion, Judge Anderson found that Sgt. Jennings's conduct went beyond an investigatory stop, also known as a *Terry*-style "pat-down"² search, and constituted a search for evidence. (Opinion & Order p. 4)

LEGAL ARGUMENT

The lower court properly suppressed 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 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.

A hybrid appellate review applies to this case. This 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.³ In this case, the record includes both the preliminary examination

² *Terry v Ohio*, 392 US 1 (1968).

³ *People v Burrell*, 417 Mich 439, 448 (1983)

and the evidentiary hearing conducted pursuant to Mr. Robertson's motion to suppress the narcotic evidence.

The lower court's ultimate decision whether to suppress the evidence -in this case granting Robertson's motion to suppress- is a question of law reviewed by this Court *de novo*.⁴ Similarly, the lower court's rulings on the constitutional issues involved in this case are reviewed *de novo*.⁵ Thus, this Court is guided, but not controlled, by the lower court's findings.⁶

Appellee agrees with the assertion by the prosecutor on appeal that this issue was properly preserved in the lower court.

Legal Analysis.

As properly noted in the Prosecutor's brief as well as the opinion and order below, the Fourth Amendment to the U S Constitution, and the analogous provision of the Michigan Constitution, proscribe unreasonable searches and seizures. To be reasonable, a seizure, like the arrest of Mr. Robertson that occurred in the case at bar, must be supported by probable cause.⁷

The prosecutor argues that the investigatory stop law enforcement tool authorized by the United States Supreme Court in *Terry v Ohio* has been extended, "to incorporate stops in a variety of circumstances." (Prosecutor's brief, p. 12) Any investigatory stop, however, requires at least a "particularized suspicion". The prosecutor asserts that the reasonableness of any given stop is measured by what the police knew prior to the stop; an overly technical review of an

⁴ *People v Davis*, 250 Mich App 357, 362 (2002)

⁵ *People v Rizzo*, 253 Mich App 151, 156 (2000)

⁶ *People v Smith*, 19 Mich App 359, 367-68 (1969)

⁷ US Cons, Am IV; Const 1963, art 1 §11; *People v Kazmierczak*, 461 Mich 411 (2000).

officer's conduct is eschewed and, argues the prosecutor, "deference should be given to the police officer's experience and the known patterns of certain types of lawbreakers."⁸

The totality of the circumstances test, however, is not satisfied by every set of facts. A law enforcement officer may, "in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest."⁹ The Michigan Supreme Court has set forth the following definition for a reasonable suspicion:

Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch', but less than the level of suspicion required for probable cause. (Emphasis supplied)¹⁰

To pass constitutional muster, the investigatory stop by a peace officer must be justified at its inception and reasonably related in scope to the circumstances surrounding the officer's interference with the individual. 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.¹¹

In this case, Sgt. Jennings' testimony about a particularized suspicion was focused on Mr. Jackson to the extent that Jackson was the subject of an anonymous tip. His particularized suspicion relative to Robertson was nothing more than a hunch. 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, 28, 35)

⁸ Citing *Florida v JL*, 529 US 266, 271; 120 S Ct 1375; 146 L Ed 2d 254 (2000), and *People v Rizzo, supra*, 243 Mich App at 153.

⁹ *People v Grimmett*, 97 Mich 212, 215 (1980), quoting *Terry v Ohio, supra*.

¹⁰ *Rizzo, supra*, citing *People v Champion*, 452 Mich 92, 98 (1996). Also see *US v Sokolow*, 490 US 1; 109 S Ct 1581; 104 L Ed 2d 1 (1989).

¹¹ *Champion, supra*.

The Prosecutor also argues 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 incident to arrest.

Defendant, on the other hand, argues in this brief that none of the evidence compiled by the NET officers was specific as to Mr. Robertson; that he was seized, arrested and searched without supporting probable cause, solely because he accompanied Mr. Jackson to the Pontiac bus station. An arresting officer must reasonably believe, and not merely suspect, that the arrested person has committed the felony.¹²

- 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.

The Michigan Supreme Court and this Court 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.¹³

Similarly, in *People v Williams*, this Court 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

¹² *People v O'Neal*, 167 Mich App 274 (1988).

¹³ *Burrell, supra*, at p. 450.

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, this Court 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 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]¹⁴

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 4th Amendment.

The Prosecutor relies on this Court's overruled decision in *People v Green*¹⁵ 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

¹⁴ *People v Williams*, 63 Mich App 398, 403 (1975).

¹⁵ *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).

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 Williams and Burrell in the cases cited above. There was not sufficient particularized suspicion to justify the stop; 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. (Opinion and Order, 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 appealed from herein. 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.

The Prosecutor relies 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.¹⁶ The Prosecutor paints with such broad strokes because they are attempting to minimize the fact that Robertson was handcuffed and arrested 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

¹⁶ See, for example, the string of citations found at page 18 of the Prosecutor's brief. The cases need not be cited here.

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

The Prosecutor further asserts that by the objective standard of a reasonable peace officer, the actions taken were reasonable, and necessary for the officer's safety. On appeal, Defendant 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.

As for the Prosecutor's reliance on *US v Knox*¹⁷, 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, supplies this Court 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 such luggage, even after it turns out that the dogs "hit" was a false or mistaken hit, as occurred in this case.

¹⁷ *US v Knox*, 839 F2d 285, 294, n 4 (6th Cir 1988).

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 asserts 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 the Michigan Supreme Court decisions in *People v Anterberry*¹⁸ 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 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

¹⁸ *People v Anterberry*, 431 Mich 381 (1988).

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.

Conclusion and Relief Requested.

WHEREFORE, your Appellee respectfully requests that this Honorable Court affirm the lower Court's 04/03/2013 Opinion and Order.

BY:  9-9-14

Mr. Keyon L. Robertson (Pro-se)

Central Michigan Correctional Facility

320 N. Hubbard

St. Louis, Michigan

48880

In the opinion of the court of Appeals the court of appeals held on pg-5 "In this Case a trained canine sniffed and 'Alerted on' defendant's bag. At that point, the positive alert could have resulted in his justifiable arrest on probable cause" citing Florida v. Royer, 460 U.S. 492, 506 (1983); and U.S. v. Williams, 726 F. 2d 661, 663 (ca 10, 1984). Now, your Defendant objects on the Record and argues sixth circuit Precedence which mandates: A canine alert to a travelers bag does not constitute probable cause to search bag or arrest traveler, in a completely random setting, such as an airport [bus station] because of its questionable accuracy. See U.S. v. Galloway, 316 F. 3d 624, 631 (6th cir. 2003), U.S. v. Fernandez, 772 F. 2d 495, 498 n.2 (9th cir. 1985).

On pg-1 and 2 of the court of appeals opinion, the court and prosecutor stated that they received an anonymous tip that an individual named Leroy Jackson would be at a bus station, etc. but did not mention your Defendant. Your Defendant objects and now says this is hearsay because he was denied the right to confront this Informant/Witness in violation of U.S. v. Const. Amend 6, 14 and Crawford v. Washington, 1245 Ct. 1354, 1359-1374 (2004); People v. Kevin Harrington, 472 Mich. 854, 855-856 (2005).

"Anonymous call to 911 inadmissible hearsay" See U.S. v. Nelson, 725 F. 3d 615, 618 (6th cir. 2013). "The defendant's consent to the opening of his luggage was tainted by his illegal detention". See Florida v. Royer, 103 Sct. 1319 (1983). "An unlawful search can never be justified by its fruits" See Parkhurst v. Trapp, 77 F. 3d 707 (3rd cir. 1996). "Unique, significantly heightened, protection is afforded against search of one's person". See Wyoming v. Houghton, 119 Sct. 1297, 1302-1303 (1999); also See Maryland v. Dyson 119 Sct. 2013 (1999). "State searches must conform to Federal

Constitution requirements, whether or not they are Federal in character". See U.S. v. Dozal, 173 F. 3d 787, 793 (10th cir. 1999). "Federal Constitution's Fourth Amendment held violated by highway checkpoint program under which police, without individualized suspicion, stopped vehicles for primary purpose of discovering and interdicting illegal narcotic". See City of Indianapolis v. Edmond, 121 Sct. 447 (2000). "Absent exigent circumstances, police officers may not undertake warrantless search". Peyton v. New York, 100 Sct. 1371 (1980). "For purposes of determining reasonableness of search a strip searches an invasion of personal rights of the first magnitude". See Price v. Kramer, 207 F. 3d 1202 (9th cir. 2000), also See U.S. v. Hatcher, 275 F. 3d 689 (8th cir. 2001).

The prosecutor said in their appeal on page - 12 during the investigative search, the officer's gained probable cause to arrest Defendant b based solely on the dog sniffing positive hit. So the prosecutor cannot argue anything else and has defaulted any other moot position and their use of U.S. v. Knox, 839 F. 2d 285, 294 n. 4 (6th cir. 1988) is misplaced where they used fraud on the lower court of appeals using this Case. In Knox, supra the court held that Knox and ware abandoned the travel bags, and that they would not address the arguement of consent and the court used Royer which dealt with consent by defendant's and based on consent, any evidence found could be admitted into evidence. And under Royer due to consent a positive hit by the K-9 allowed a search and arrest of Defendants. See Knox, supra 839 F. 2d 294 n. 4, Royer, supra and Knox, supra only dealt with the consent of the K-9 search of Defendant's. Your Defendant Robertson did say in Royer and Knox evidence in their Travel Bags were found, and that he, Mr.

Robertson, did not consent to a K-9 search of his alleged bags, and no drugs were found in these bags, and did not give the police consent to search his person. Knox, supra 839 F. 2d at 291, 294 n. 5, the defendant's consent so the prosecutor's argument must fail, and the trial court's suppression order must be affirmed and the court of appeals order reversed under Galloway, 316 F. 3d at 631.

This court is bound to protect me under Mich. Const. Of 1963, Art 1 § 1 & U.S. Const Amend-14; County of Sacramento V Lewis, 523 U.S. 833, 845 (1998). Failure to grant the above relief and refusing to affirm the trial court's opinion & order will violate the Fourth Amendment, to the U.S. Constitution. And violate his procedural & substantive due process right's to liberty & not to be unlawfully searched. See Pittsley V Warrish, 27 F.2d 3, 6-9 (1st cir. 1991) And deny him the equal protection of the law as a class of one. See Village of Willow Brook V Olach, 528 U.S. 562, 564 (2000). "Court's of justice at any stage should not remain silent spectators of infringements of true principles of law, which they are appointed to administer". See Deeg V City of Detroit, 345 Mich. 371, 373, 382 (1956).

Wherefore without further relief your defendant says the above says the above is true & correct upon the penalty of perjury Under 28 U.S.C 1746.

Date 9-9-2014

By 
MR. Keyon Robertson

Oakland County 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.

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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.

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Attachment-1

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

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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 (1968).

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;

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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 1310; 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

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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 698 (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.

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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

Martha D Anderson
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
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STATE OF MICHIGAN
COURT OF APPEALS

DEFENDANTS COPY

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
August 21, 2014

v

KEYON LECEDRIC ROBERTSON,
Defendant-Appellee.

No. 315870
Oakland Circuit Court
LC No. 2012-242361-FH

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

The prosecution appeals by right the April 3, 2013 dismissal of one count of possession with intent to deliver more than 50 grams, but less than 450 grams, of heroin, MCL 333.7401(2)(a)(iii). The trial court granted defendant's motion to suppress the physical evidence seized from his person and subsequently dismissed the charge. We reverse and remand for reinstatement of the charge against defendant.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On July 12, 2012, Sergeant Sean Jennings of the Oakland County Sheriff's Office Narcotics Enforcement Team (NET) received an anonymous tip that an individual named Leroy Jackson would be at the bus station in Pontiac at approximately noon that day, that Jackson would be travelling "up north," and that he would be carrying heroin. Jennings used the Law Enforcement Information Network (LEIN) and the Secretary of State database to obtain a photograph and basic information about Jackson. He then arranged for a team of officers to conduct surveillance on the bus station.

At approximately noon, one of the officers on the surveillance team identified Jackson arriving at the bus station. Although the anonymous tip did not mention that Jackson would be travelling with another person, Jackson arrived at the bus station with defendant. Several officers, including Jennings, approached Jackson and defendant. Jennings confirmed Jackson's identity and asked the men where they were going; they responded "up north." Jennings then placed Jackson under arrest because there was an outstanding warrant for Jackson's arrest. Jackson was searched, but the officers did not find any drugs on Jackson.

After Jackson was arrested, the officers requested identification from defendant. Defendant gave one of the officers a Michigan identification card that identified him as "Kamone

Dwayne Robertson.” A subsequent search of LEIN performed by two of the officers at the scene indicated that the information on the card was not valid.

While two officers were checking the information on the identification card provided by defendant, Jennings continued to talk to defendant. At the evidentiary hearing on defendant’s motion to suppress, Jennings testified that as he talked to defendant:

I just noticed [defendant] 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.

When Jennings asked defendant why he was nervous and sweating, defendant “just said it was hot outside.” Jennings testified that on a scale of zero to ten, with zero representing someone who is not at all nervous and ten representing someone who is “the most nervous you’ve ever seen somebody,” he would have ranked defendant at “about a seven.” Jennings testified at the evidentiary hearing that the reason that he placed handcuffs on defendant at this time was that defendant’s demeanor caused Jennings to be concerned for his own safety.

Jennings inquired if defendant and Jackson had luggage, and defendant indicated that they each had one bag, and that the bags were already inside the terminal. Jennings then requested that Deputy David Curtis, a canine handler with the Oakland County Sheriff’s Office, and his canine, Finn, examine the two bags. Curtis and Finn were part of the surveillance team originally assigned to watch the bus station, so they were already present at the location. Curtis was certified as a master canine handler, and Finn was trained to detect cocaine, crack cocaine, marijuana, heroin, and methamphetamine. Curtis separated the two pieces of luggage and brought the dog to each piece of luggage. Finn “alerted on both bags,” meaning that the dog indicated that both pieces of luggage either had narcotics inside of them, or had the odor of narcotics on the inside or outside of them. In addition, Curtis opined that based on Finn’s immediate, sharp reaction to the luggage, the odor of the narcotics was strong and fresh. After Finn detected the odor of narcotics on the luggage, both bags were searched; no narcotics were found in either of the bags.

Jennings then asked defendant why Finn would have “alerted” on his bag, and defendant responded that he and Jackson had smoked marijuana earlier in the day. Jennings testified that “[b]asically, I said, I’m gonna search you[,] and he kind of nodded and half heartedly said, yes.” Jennings confirmed that he “pretty much” made “a statement” that he was going to search defendant, as opposed to asking defendant’s permission to search him, and that defendant was not free to leave at that point. However, Jennings also testified that if defendant had told him not to search at that point, he would not have conducted the search of defendant’s person. Jennings lifted defendant’s shirt and observed that defendant’s pants were “real, real low where you could see a lot of the white boxer shorts that were underneath,” including “the fly of the boxer shorts.” Jennings observed what appeared to be the top of a clear plastic bag protruding from defendant’s boxer shorts, and he believed that defendant was concealing narcotics in his boxer shorts. Jennings removed the bag from defendant’s boxer shorts; the substance inside field-tested as heroin.

Defendant was arrested and transported to the Oakland County Jail. It was not until defendant was at the jail that Sergeant Jennings learned that the identification that defendant had provided to the officers was false. In addition, once defendant arrived at the jail, the officers discovered that there was an outstanding warrant for defendant's arrest.

Defendant was charged with one count of possession with intent to deliver more than 50 grams but less than 450 grams of heroin, MCL 333.7401(2)(a)(iii). After defendant was bound over to the circuit court, he moved to suppress certain statements that he made to Sergeant Jennings and to suppress the physical evidence seized from him. The prosecution stipulated to the suppression of the challenged statements. However, the prosecution opposed defendant's motion to suppress the heroin that was seized when defendant was searched.

On December 20, 2012, an evidentiary hearing was held on defendant's motion to suppress. The trial court declined to rule on the motion at that time, and ordered further briefing from the parties. Both the prosecution and defendant provided additional briefing as requested. On April 3, 2013, the trial court issued an opinion and order granting defendant's motion to suppress the physical evidence seized from him. The trial court first recognized that police can make a valid investigatory stop if an officer has a reasonable suspicion that crime is afoot. The trial court also recognized that during such an investigatory stop, the police may conduct "a constitutionally sound *Terry*¹ pat-down." However, the trial court noted that "[t]he People agree Detective Jennings' conduct went beyond a pat-down and was indeed a search." Therefore, the trial court's analysis focused on whether Sergeant Jennings had probable cause to search defendant. First, the trial court found that the information in the anonymous tip did not include information about defendant, so the anonymous tip did not provide Jennings with probable cause to search defendant. Second, the trial court found that because defendant "was not the initial person of interest upon observation," Finn's "alert" on defendant's luggage did not provide Jennings with probable cause to search defendant. Third, the trial court found that although defendant's admission that he smoked marijuana earlier in the day "provides an independent basis for arrest," it did not provide Jennings with probable cause to search defendant because "the People cannot now legitimize the improper detention in this case based on this information which was received after the fact." Fourth, the trial court found that although the fact that defendant provided false identification to the officers "is a misdemeanor which may have independently subjected Defendant to arrest," it did not provide Jennings with probable cause to search defendant because "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 trial court concluded that "there was not probable cause for the detention, search[,] or questioning of Defendant, nor was same done pursuant to a warrant." Therefore, the trial court granted defendant's motion to suppress the physical evidence seized from him.

On April 8, 2013, the trial court held a pretrial hearing. At that time, defendant made an oral motion to dismiss the case, and the prosecution stated that based on the trial court's recent

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

opinion and order, it “would not be able to proceed” with the case. Therefore, the trial court entered an order dismissing the case without prejudice. The prosecution appeals as of right.

II. STANDARD OF REVIEW

To the extent a trial court’s decision on a motion to suppress evidence is based on an interpretation of the law, appellate review is de novo. *People v Antwine*, 293 Mich App 192, 194; 809 NW2d 439 (2011). However, findings of fact are reviewed for clear error. *Id.* “A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made.” *Id.* (citation omitted).

III. ANALYSIS

Both the United States and Michigan Constitutions prohibit unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. See also *Antwine*, 293 Mich App at 194. “The Michigan constitutional provision is generally construed to afford the same protections as the Fourth Amendment.” *Id.* at 194-195. Generally, a search or seizure conducted without a warrant is unreasonable under these constitutional provisions unless the search or seizure falls within a “specifically established and well-delineated” exception to the warrant requirement. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996).

A police officer is permitted to “seize,” or detain, an individual, without a warrant, to conduct an investigation into potential criminal activity. An investigatory stop is appropriate when “a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot.” *Terry v Ohio*, 392 US 1, 30; 88 S Ct 1868; 20 L Ed 889 (1968). In order for law enforcement officers to make a constitutionally proper investigative stop, “[t]he 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,” and “[t]hat suspicion must be reasonable and articulable.” *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). Further, when determining whether a reasonable suspicion exists to justify an investigative stop, “deference should be given” to experienced law enforcement officers, and “law enforcement officers are permitted, if not required, to consider ‘the modes or patterns of operation of certain kinds of lawbreakers.’” *Id.* at 635-636.

In this case, the record supports the finding that the initial detention of defendant was a valid investigatory stop. Defendant arrived at the bus stop with an individual suspected to be transporting heroin. Jennings, the officer who detained defendant (and who was qualified as an expert in narcotics trafficking) testified that it is very common for individuals trafficking in narcotics to travel in pairs. At the time Jennings initially detained defendant, heroin had not been found on defendant’s traveling companion, which led him to believe that defendant was transporting the heroin. Further, after he asked defendant for identification, defendant appeared to be very nervous. Defendant’s nervousness upon questioning and a request for identification supports a finding that defendant was involved in criminal activity. *People v Jenkins*, 472 Mich 26, 34; 691 NW2d 759 (2005). See also *People v Oliver*, 464 Mich 184, 197; 627 NW2d 297 (2001) (citation omitted) (holding that “nervous, evasive behavior is a pertinent factor in determining reasonable suspicion”). Giving deference to Jennings’s 21 years of experience as a

police officer and expertise in narcotics trafficking, which permitted him to draw inferences and make deductions that might well elude an untrained person, we find that at the time he initially approached defendant, spoke with him, and asked him for identification, he had a reasonable suspicion, based on the totality of the circumstances, that defendant had been, was, or was about to be engaged in criminal activity. *Jenkins*, 472 Mich at 33; *Nelson*, 443 Mich 632, 635-636.

Moreover, police officers are permitted to minimize risk of harm to both the police and the occupants of the surrounding area by utilizing handcuffs during an investigatory stop. *People v Zuccarini*, 172 Mich App 11, 14; 431 NW2d 446 (1988). Because an investigation regarding, and the search for, narcotics “is the kind of transaction which may give rise to sudden violence,” such an investigation may warrant the use of handcuffs on a detained individual. *Id.* The present case involved an investigation regarding, and a search for, narcotics, and the officer testified that defendant’s nervous behavior made the officer concerned for his personal safety. Therefore, it was reasonable for Jennings to detain defendant by placing him in handcuffs during the investigatory stop, and the use of handcuffs did not convert the investigative stop into an arrest. *Id.* at 14-15. See also *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 (2006).

During this investigatory stop, officers diligently pursued a means of investigation that was likely to quickly confirm or dispel their suspicions that defendant was transporting heroin. *People v Chambers*, 195 Mich App 118, 123; 489 NW2d 168 (1992). In this case, a trained canine sniffed and “alerted on” defendant’s bag. At that point, the positive alert could have “resulted in his justifiable arrest on probable cause.” See *Florida v Royer*, 460 US 491, 506; 103 S Ct 1319; 75 L Ed 229 (1983); see also *United States v Williams*, 726 F2d 661, 663 (CA 10, 1984), cert den 467 US 1245 (1984), quoting *United States v Waltzer*, 682 F2d 370, 372 (CA 2, 1982), cert den 463 US 1210 (1983) (“[A] drug sniffing dog’s detection of contraband in luggage ‘itself establish[es] probable cause, enough for the arrest, more than enough for the stop.’”). Therefore, once Finn alerted on defendant’s bag, Jennings had probable cause to arrest defendant,² and the subsequent search of defendant was a valid search incident to arrest.

² The fact that no drugs were found in defendant’s luggage did not dissipate probable cause to arrest under the facts of this case. In *People v Nguyen*, ___ Mich App ___; ___ NW2d ___ (2014), slip op at 8, this Court examined a similar factual scenario involving information from an informant, probable cause to arrest, and a fruitless initial search, and stated:

Although the district court viewed the failure to find the cocaine during the initial pat-down for weapons and vehicle search as facts supporting the dissipation of probable cause, the circuit court held that these facts demonstrated it was more probable that the cocaine was on defendant's person. The evidence supports the circuit court's conclusion that probable cause did not dissipate. The ICE agents and police received information that defendant possessed a substantial amount of cocaine from a reliable and credible informant. Defendant failed to stop his vehicle as ordered by Officer Piltz, and while he continued to drive, defendant made evasive movements indicating he was moving or hiding something. The fact that cocaine was not found either during the pat-down search, which was

Champion, 452 Mich at 116; *Green*, 260 Mich App at 398.³ The trial court clearly erred in concluding to the contrary, based on the fact that defendant was not the “initial person of interest.”

Further, after defendant’s bag was searched, and while defendant was still validly detained pursuant to an investigatory stop, the officer asked defendant why the dog alerted on defendant’s bag. Defendant replied that he had smoked marijuana earlier that day. At this time, the officer also had probable cause to arrest defendant for possession of marijuana. See MCL 333.7403(2)(d) and MCL 764.15(1)(d). “Probable cause to arrest exists where the facts and circumstances within an officer’s knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *Champion*, 452 Mich at 115. Defendant’s admission to smoking marijuana, as well as Finn’s alert on an item belonging to defendant, provided Jennings with probable cause to believe that defendant was in possession of marijuana. See *People v Cohen*, 294 Mich App 70, 74; 816 NW2d 474 (2011); see also *United States v Taylor*, 471 Fed Appx 499, 511-512 (CA 6, 2012). Further, the fact that Jennings may have subjectively anticipated that his search would reveal marijuana, as opposed to heroin, does not

geared toward searching for weapons, or the search of defendant’s vehicle, did not lead to the dissipation of probable cause. Rather, given the credible and corroborated information from the CI that defendant possessed cocaine, that cocaine was not recovered during the pat-down search for weapons or the search of the vehicle, and that defendant may have disregarded the order to stop his vehicle to take time to hide the cocaine in his pocket, the circuit court did not err in finding that probable cause for the arrest continued to exist during the second search of defendant.

Here, the police had received an anonymous tip that had been corroborated with regard to Jenkins’s location and direction of travel. Additionally, although no drugs had been located on Jenkins’s person or in either bags possessed by the duo, defendant acted extremely nervous and a drug-sniffing dog had alerted on the bags. Further, defendant essentially immediately admitted to smoking marijuana, as described above. We conclude, as this Court did in *Nguyen*, that probable cause to arrest did not dissipate following the fruitless search of the bags.

³ In *Champion*, 452 Mich at 116, our Supreme Court explained that a warrantless search of a person whom the police have probable cause to arrest is proper, even though the person has not yet been formally arrested. “A search conducted immediately *before* an arrest may be justified as incident to arrest if the police have probable cause to arrest the suspect before conducting the search.” *Id.* (emphasis added), citing *Rawlings v Kentucky*, 448 US 98, 111; 100 S Ct 2556; 65 L Ed 2d 633 (1980) (holding that when “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”). See also *People v Arterberry*, 431 Mich 381, 384; 429 NW2d 574 (1988) (holding that because the officers had probable cause to arrest the defendant and the other occupants of the house, the search of all of these individuals was proper, and quoting with approval a Michigan Supreme Court holding that “[i]f the prosecution shows probable cause to arrest prior to a search of a man’s person, it has met its total burden” (citation omitted)).

change the validity of the search because a police officer's "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v United States*, 517 US 806, 813; 116 S Ct. 1769; 135 L Ed 2d 89 (1996). Since defendant was properly detained at the time of his admission regarding smoking marijuana, the trial court clearly erred in concluding that the admission occurred "after the fact" and at a time in which defendant was "illegally detained."

We emphasize that both of the above findings of probable cause are made in the totality of the circumstances in the instant case. Jennings testified that at the time he searched defendant, "the whole entire circumstance leading up to that point" led him to believe that there was probable cause to believe defendant possessed illegal narcotics. He testified that in his experience as an expert in narcotics trafficking, it is very common for individuals trafficking in narcotics to travel in pairs. The information from the anonymous tipster had proven accurate; Jackson indeed appeared at the bus station around noon and indicated that he was travelling "up north." Defendant acted extremely nervous in his interactions with Jennings, and admitted to smoking marijuana that day. Further, the fact that Finn strongly alerted to both defendant's and Jackson's luggage led him to believe that one of the two individuals possessed the drugs indicated by the anonymous tipster, but no drugs had been found on Jackson or in either of the bags. The totality of these circumstances leads to our finding of probable cause in the instant case. In fact, even absent the alert from a drug-sniffing dog *and* defendant's admission to smoking marijuana, sufficient probable cause may have existed, not to arrest defendant, but to perform a search of his person. See *People v Levine*, 461 Mich 172, 185; 600 NW2d 622 (1999) (holding that an anonymous tip, when corroborated by additional information, can provide probable cause to support a warrantless search).

We hold that, examining the totality of the circumstances, the trial court clearly erred when it suppressed the heroin found in defendant's possession, as both the drug-sniffing dog alert on defendant's luggage and defendant's admission to smoking marijuana, when viewed in the totality of the circumstances, provided probable cause to arrest defendant, and thus, the search performed of his person was a valid search incident to arrest.

In light of this holding, we decline to address the prosecution's remaining arguments concerning whether defendant's provision to the police of identification later revealed to be false, or the fact that defendant was the subject of an outstanding arrest warrant for parole violation, established probable cause to arrest defendant.

We reverse the order of dismissal, as well as the order of suppression, and remand for reinstatement of the charge in this case and further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra

From | Mr. Keyon L. Robertson # 260997

Central Michigan Correctional Facility

320 N. Hubbard

Date: 9-19-14

St. Louis, Michigan-48880

To | Court clerk

Michigan Supreme Court

925 W. Ottawa, P.O. Box 30052

Lansing, Michigan-48909

RE | New case

Dear, court clerk How are you?

I am Filing my criminal appeal via a Delayed application

For leave to appeal, enclosed is one original & two copies which is sufficient. Because I am a Prisoner, IF anything is needed please contact me at the above address thank you.

Respectfully yours

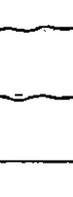
BY: 

Mr. Keyon L. Robertson

Affidavit - Proof of Service

I Keyon L. Robertson, says on September, 22, 2014 he mailed a copy of this Brief to the Oakland County Prosecutor, under the penalty of Perjury. See 28 U.S.C. 1746

Date: 9-19-14

BY: 

Mr. Keyon L. Robertson